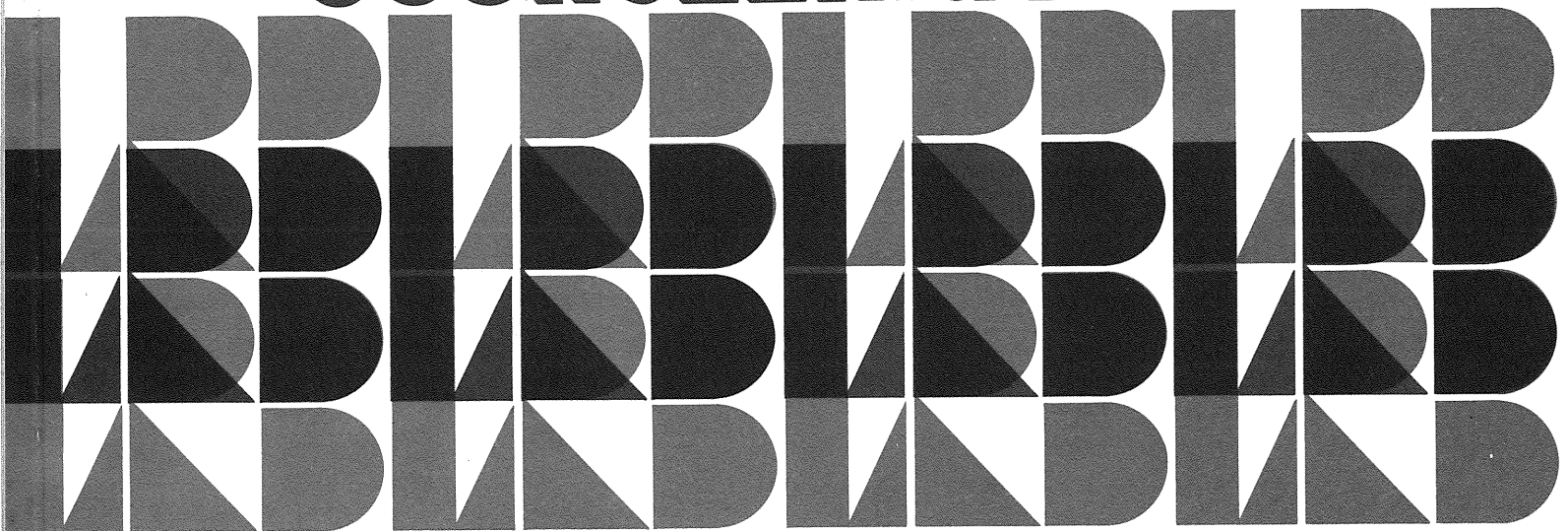
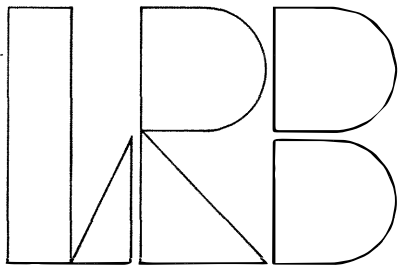


# **PRIVILEGED COMMUNICATION AND COUNSELING IN HAWAII**



LEGISLATIVE REFERENCE BUREAU/STATE OF HAWAII



## THE OFFICE OF THE LEGISLATIVE REFERENCE BUREAU

The present Office of the Legislative Reference Bureau resulted from Act 171, Session Laws of 1972, which transferred, as of July 1, 1972, the former Legislative Reference Bureau out of the jurisdiction of the executive branch of government to the legislative branch of government. In addition, the Office of the Revisor of Statutes, formerly under the Judiciary, was placed within the Bureau for administrative purposes only. The end result of this legislation is to centralize under the Legislature the functions of bill drafting and bill publication as well as research and reference services supportive of the Legislature. The new Bureau is one of three legislative support agencies directly under the Legislature.

As a governmental institution, however, the Legislative Reference Bureau has its origins in Act 91, Session Laws of 1943, when the Territorial Legislature established the organization as an integral part of the University of Hawaii.

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3. Providing service to legislative committees, including interim committees.
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12. Responding to requests for information made to the Bureau.
13. Serving as state information agency under the Uniform Reciprocal Enforcement of Support Act.

# **PRIVILEGED COMMUNICATION AND COUNSELING IN HAWAII**

*"A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the mores of the time."*

Cardozo

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Report No. 1, 1976

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Honolulu, Hawaii 96813

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## FOREWORD

This study on privileged communication and counseling in Hawaii was requested by S.C.R. 55 and S.R. 263 adopted by the respective houses in the 1974 Regular Session. The text of the Senate Concurrent Resolution, identical in substance to the Senate Resolution, is set forth in the Appendix.

The facts and practices, or the lack thereof, uncovered and reported in the study indicate that there is much that can be done by the counseling practitioners by way of self-help to remedy the problems they face in performing their functions.

Without the full and frank cooperation of all of the persons interviewed and surveyed, ascertainment of the conditions and problems that appear to exist would not have been possible. To all of these individuals, the Bureau extends its sincerest appreciation. The contribution of Letitia Uyehara, former Bureau researcher, to this report also should not be overlooked.

Samuel B. K. Chang  
Director

February 1976



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# Chapter I

## INTRODUCTION

In this study on privilege and the counseling function, although the term "counseling professions" is used throughout the report, it should be noted that only three of the four counseling groups, school counselors, public health nurses, and social workers, may be termed "professions". The fourth group, outreach counselors, is not a profession as such but elsewhere, and particularly in Hawaii, is a function or program.<sup>1</sup>

For the purposes of this study also, the term "counseling" relates to advice and guidance given by persons who are by training and/or experience competent to furnish the same to assist the person counseled in coping with, or resolving, problems of a social nature. Moreover, in the performance of this counseling function, the counselors will, if need be, assume an advocacy role in behalf of their clients. While several of the counseling groups in a broader sense of the term "counseling", may give advice and guidance, for example, as to academic direction, i.e. what courses one should take to best attain that person's future career objectives, health precautions or nutritional needs, those areas are excluded from our use of the term "counseling".

An additional point to keep in mind is that the approach of the report is to state, insofar as is possible, general practices, procedures and understandings of the groups. The Bureau recognizes that many variations from what we perceive to be the general way things are done, exist. Indeed, it is the multiplicity of the variations that has constituted the single most difficult element to deal with in this study and in arriving at definite conclusions after analysis. If a single point is to be made in this study, it is that before consideration of extending privilege by statute becomes viable, much more uniformity in practice and understanding of the rights and responsibilities applicable to each of the persons a counselor comes into contact with, by the professions involved must be achieved.

The study logically breaks down into two parts. Chapters II through V discuss the theoretical basis for a grant of privilege, outlines how generally the four counseling groups perform their functions, and makes observations on the positions of the affected groups and others with whom they interact with respect to a grant of privilege. Chapters VI and VII discuss the problems of the counseling professions with

## PRIVILEGED COMMUNICATION AND COUNSELING

suggestions and recommendations as to solutions of the problems which apparently exist and a recommendation as to whether or not privilege status should be granted.

The study concludes with appendices consisting of texts of surveys, responses of pertinent agencies and a list of resource persons contacted.

## Chapter II

### AN OVERVIEW OF PRIVILEGED COMMUNICATIONS

Privileged communications may be defined by breaking up its component parts. A privilege is a right with no consequent duty. A communication is any passage or conveyance of information, from person to person, by word of mouth or in writing. Under the law of evidence, statutes and court rules govern what testimony or evidence may be admitted in court. A part of this law is that providing a privilege to certain communications. In application, these laws and rules grant or recognize the absolute or qualified privilege of one party to prevent another from testifying, or from testifying on specific subjects of communication. For example, a parishioner can prevent a clergyman from being called to testify and from testifying to what the parishioner said in a confessional or consultative situation.

The grant of privilege to certain communications does more than prevent testimony in court. It restricts the person from revealing the communication or the communicator to any person from the time of the communication, unless the communicator waives the privilege. That is, a grant of privilege places a complete blanket of silence on the privileged communication, unless waived.

Rules of evidence, such as those concerning privileged communications, are designed to exclude evidence for reasons not related to the quality of the evidence or the credibility of the witness. These rules are based on judicial and legislative policy adopted to protect certain social interests and relationships. For example, it is generally the policy of legislative bodies to preserve and enhance marriages and family life. To protect this relationship, Hawaii law provides that a defendant may prevent his spouse from testifying to any communication occurring during the marriage. This provides every spouse with the peace of mind arising from the knowledge that nothing one spouse says to the other during marriage can be used against the speaker.

This chapter will examine four evidentiary privileges recognized in Hawaii: that of spouses, that of attorney and client, physician and patient, and clergyman and penitent.

## PRIVILEGED COMMUNICATION AND COUNSELING

### The Spousal Privilege

In the history of the common law there were two spousal privileges and a testimonial disqualification as incompetent to testify which must be distinguished. These may be stated, in their historical order of appearance as the spousal adverse facts privilege, the spousal disqualification, and spousal privilege communication.

Prior to and throughout the nineteenth century courts commonly merged or appeared to confuse these three rules of privilege and disqualification. It was not until the pleading reform acts beginning in the last century that distinctions were made. Great variance persists among the states in the forms their reformations took. Virtually all jurisdictions have eliminated the spousal disqualification. However, all or part of the spousal adverse facts privilege remains in many jurisdictions through statute and/or court rule. The spousal privilege of communication is universal.

As most commonly enacted the spousal privilege of communications is:

1. Applicable only to the communications made during the marriage, not before, and not after the marriage is terminated;
2. Not applicable to communications between lovers, or bigamous or separated spouses;
3. Applicable to confidential communications, or to those presumed to have been intended to be confidential;
4. Not applicable to an eavesdropper who overhears the private communications of spouses.

Hawaii's treatment of these privileges and the marital disqualification has paralleled that of other common law jurisdictions. The first statutory enactment on this subject occurred with the passage of the *Civil Code of 1859*. The married woman was defined as civilly dead and merged in her husband. The article on evidence provided that the party to a suit, or the real party in interest, shall not be allowed to testify in his own behalf. Read together, these sections resulted in preventing a party and his spouse from testifying in his own behalf in a civil suit.<sup>1</sup>

In 1876 the Hawaii Legislature passed a comprehensive evidence act which rewrote the spousal privilege in modern terms.<sup>2</sup> It may now be found with little change since 1876 in section 621-19, *Hawaii Revised Statutes*.



## AN OVERVIEW

On occasions from the time of the Kingdom to the present when the subject arose on appeal, the Hawaii Supreme Court has generally paralleled the affirmation of this privilege by the appellate courts in other states.<sup>3</sup>

### The Attorney-Client Privilege

The common law privilege concerning communications between an attorney and his actual or potential client is stated:

*Where legal advice of any kind is sought,  
from an attorney in his capacity as such, any  
communication made, in confidence, by the  
client, is protected at his election, from  
disclosure by himself or by the legal adviser,  
unless waived by the client.*

Each part of this statement is an essential element. The objective is the protection of the legal rights of the client. Since the privilege is the client's, the term "attorney" includes any person the client reasonably believes to be an attorney regardless of the fact. The term "communication" includes every topic and matter of discussion.

It was realized at an early date that the citizen had to be provided a freedom from fear of compulsory disclosure by having his attorney testify. If a citizen entertained such a fear, he would never consult counsel, would wait until too late, or when consulting, would feel it necessary to withhold information.

In addition, English and American jurists and political officers have reasoned that if any group of litigants were repeatedly to find that they were given short shrift by a judicial system, the disquietude generated would constitute a threat to the government, its courts, and the existing society. Thus, the state would fail in its overall objective of providing a method of resolution for disputes and of the common peace.

In the United States today some thirty-four states provide for the attorney-client privilege by statute. The remaining states observe the common law and in some instances add court rules re-enforcing this privilege. Hawaii has no statutory provision for the attorney-client privilege, but instead has relied on the common law supplemented by rules adopted by the Hawaii Supreme Court.<sup>4</sup>

## PRIVILEGED COMMUNICATION AND COUNSELING

From the time of the Kingdom to the present, there appear to be no Hawaii court cases in which either party seriously questioned the existence or the generally accepted outlines of this privilege. Those cases involving some aspect of the attorney-client privilege have followed the privilege.<sup>5</sup>

### The Physician-Patient Privilege

Generally, the physician's privilege is actually that of the patient, as in the case of the client of an attorney, and arises only in the physician-patient relationship devoted to the diagnosis and treatment of illness or injury. Any discussion or information extended to a physician for any other purpose is not privileged.

The decision of the New York State Commissioners on the Revision of Statutes to codify the physician-patient privilege in 1828 was a milestone in the development of this privilege. The Commissioners reasoned:

*The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare the defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.<sup>6</sup>*

More than two-thirds of the other states followed New York to make this the majority rule in the United States.

In some states without statutory recognition of this privilege, protection has been given by the courts. The Kingdom of Hawaii enacted the privilege in the Evidence Act of 1876.<sup>7</sup>

## AN OVERVIEW

The physician-patient privilege in Hawaii established since 1876 was last revised in 1972 and is codified as section 621-20.5, *Hawaii Revised Statutes*.

The privilege applies to civil suits. The section is sufficiently broad to include information not communicated by the patient but learned by the physician from tests, x-rays, observation and relatives, but is restricted to information required by the physician to act or prescribe for the patient.

Apparently only one case has been in the Supreme Court of Hawaii containing any issue related to the physician-patient privilege. In *Nishi v. Hartwell*<sup>8</sup> neither the patient nor his wife was informed of a possible side effect to the diagnostic heart surgery proposed. The Court outlined the physician's obligations to the patient and to his family:

*We are of the opinion that defendants owed no duty of disclosure to Mrs. Nishi under the law. The duty of a physician to make full disclosure is one that arises from physician-patient relationship. It is owed to the patient himself and not his spouse or any other member of his family.*<sup>9</sup>

### The Clerical-Penitent Privilege

The clerical privilege concerns communications between a clerical person of a religious sect and a person seeking the cleric's penitential, confessional, pastoral or moral advice, consultation, instruction, or other ecclesiastically prescribed intervention.

The origin of this privilege is buried in antiquity and has evolved in a number of ways. This privilege has the objective of protecting the relationship between the clerical practitioner and the penitent in order to permit the free and open advice and confession.

Currently, some forty-one states and the federal courts provide for clerical privilege.<sup>10</sup>

The first statute in the United States granting a privilege of communications to clergyman was passed by the New York State Assembly in 1828. Prior to that time the common law provided this privilege through court decisions. The first Hawaii statute was passed as part of the second evidence act in the reign of King Kalakaua in 1876.<sup>11</sup> The current Hawaii statute, last revised in 1972, is contained in section 621-20, *Hawaii Revised Statutes*.

## PRIVILEGED COMMUNICATION AND COUNSELING

There appear to be no Hawaii Supreme Court cases in which the clerical privilege was at issue.<sup>12</sup>

### Summary

The four privileges discussed in this chapter have several elements in common. All of them developed through court decisions in common law. In Hawaii, except for the attorney-client privilege which is contained in rules of court, they were codified as statute before Hawaii became a territory. Since codification the privileges have, for the most part, remained unchanged.

All privileges treat the communication as privileged at its inception and do not allow the person to whom the communication was made to reveal the communication without the permission of the communicator. With the exception of the spousal privilege, such permission is required at any time after the communication is made including testimony in court.

## Chapter III

### SOME ASPECTS OF SOCIAL COUNSELING IN HAWAII

The functions which will be examined, social work, public health nursing, outreach and school counseling have common factors relevant to the focus of the study. The following discussion categorizes these factors and attempts to explain what deviations, if any, exist among the different professions. The common factors considered are: who is considered the client, how confidentiality is treated by each profession, and what occurs in the "classical confrontation"<sup>1</sup> situation. Preceding this treatment is a generalized discussion of the qualifications, functions, and organization of each group.

#### Social Work Counselors

*Social Work in General*. A comprehensive description of the social work profession would be a monumental, if not impossible, task. The dictionary defines social work as:

*any of various professional services, activities or methods concretely concerned with the investigation, treatment, and material aid of the economically underprivileged and socially mal-adjusted.*

The broadness and ambiguity of "social work" and "social welfare" are admitted to by the *Encyclopedia of Social Work*:

*the field of social work and social welfare is concerned with many aspects of living, none of which are easily treated in systematic fashion.*<sup>2</sup>

Some of the "social conditions" which encompass social work are:

*...social relationships, groups and cultural changes; individual behaviors; deviant behavior; economic, psychological, emotional, and social dependencies; the suitability of the urban environment for human development; the effect of economic, social, and political conditions on behavior; and the effect of behavior on economic and political affairs. The boundaries of these subjects are ill defined and difficult to measure.*<sup>3</sup>

## PRIVILEGED COMMUNICATION AND COUNSELING

Also complicating the matter is that disciplines, which until recently, have been contiguous but separate from social work, now overlap.

*...horizons and activities of related professions have been significantly extended so that the boundaries are no longer clear among medicine, economics, urban planning, and social welfare, to name a few.*

*In the health field concern has moved from the physical treatment of prevention of disease to consideration of motivation in human behavior, to human ecology and the physical environment, to the economics of health care, to the problems of service structuring, delivery, and manpower. City planning, originally concerned with the urban environment through land use and spatial organization, is now concerned with the behavior of individuals as they utilize planned space and the differential desires of population subgroups. Even economic planning has recognized that race, behavior, and social considerations influence the functioning of individuals within the previously rigidly defined economic system.*

*This recognition of social relationships by other disciplines has clearly affected the activities of social workers and the organizations that have had to deal with the failures of the basic economic, medical, and social systems in the United States for a long time. Social workers have been drawn into the activities of these other systems of activity at the same time practitioners of the other arts and sciences are moving into social welfare. Communications across professional lines has increased as the society has sought to deal with persistent poverty, as psychiatry has moved out of the hospital, and as the delivery of health care has moved into the community.<sup>4</sup>*

Further complicating any attempts of a rigid distinction are the financial assistance aspects of social work. The term "public assistance" connotes and is used as a term for financial assistance. "Public assistance is an American governmental program for aid or assistance to needy individuals."<sup>5</sup>

The *Encyclopedia of Social Work* draws a distinction between "social work" and "social welfare".

## SOME ASPECTS OF SOCIAL COUNSELING

...the term "social work" was defined as the programs and services performed by social workers and by agencies under the direction of professional social workers. The term "social welfare" was considered applicable to a broad range of socially useful programs and services which may be performed by a variety of administrative and professional personnel, usually but not necessarily including social workers among the staff members.<sup>6</sup>

Yet social workers are employed in many diverse fields. Some of the areas in which "social work" and "social welfare" services are offered are: in the treatment of familial conflicts; employment-oriented counseling and training; child and adult protective services; mental health counseling; counseling of alcohol and drug abusers/addicts; juvenile delinquency; probation and parole; adoption; therapy and counseling for the physically disabled; alternative institutional care for children and the elderly; vocational rehabilitation, employment training, and family planning.

The term "social worker" is equally broad and ambiguous. The preface to the *Encyclopedia of Social Work* provides the following definition of a social worker.

...the term "social worker" was defined as the professional person whose education, preparation, and practice qualify him for membership in the National Association of Social Workers, ...<sup>7</sup>

At the inception of the National Association of Social Workers (NASW) in 1955, the minimum educational requirement was a Masters of Social Work (MSW). At that time, seven per cent of the membership did not possess an MSW. Most of the non-MSWs had some college training and were "grandfathered" into the NASW.<sup>8</sup>

Recently, a new criteria was established to admit three categories of persons previously excluded:

...(1) persons employed in a social work position who have completed a CSWE-approved undergraduate program in social work, (2) students in accredited graduate schools of social work, and (3) persons with doctoral degrees in fields related to social work (primarily the social and behavioral sciences) and affiliated with graduate schools of social work or social agencies.<sup>9</sup>

Still another category was established:

## PRIVILEGED COMMUNICATION AND COUNSELING

*Also established was a category of associate membership open to persons employed in a social work capacity and holding baccalaureate degrees with majors in any field, with provisions for their advancement after two years in the associate category and the completion of certain (as yet unspecified) academic but not degree-earning studies. The details of these changes in eligibility for formal membership and their full implementation are yet to be worked out.<sup>10</sup>*

The emphasis for classification as a "social worker" appears to have shifted from purely educational qualifications to considerations of functions. The corollary questions, what is social work and what is a social worker, are recognized by the profession itself:

*Differentiation of the professional social worker from the larger force of social workers who constituted all the service-providers constituted a central issue for the development of the social work profession and even today represents a boundary problem to which continuing attention is given.<sup>11</sup>*

*General Discussion of Social Work in Hawaii.* The Public Welfare Division of the Department of Social Services and Housing (DSSH) is divided into two primary functional operations, the Income Maintenance Section and the Social Services Section. Financial assistance and eligibility to receive welfare benefits are handled by the Income Maintenance Section. This section generally does not provide social services in the classical sense. Such social services are provided by the Social Services Section.<sup>12</sup>

Personnel of the Income Maintenance Section are not considered to be professional social workers. Minimum educational requirements for a position as an income maintenance worker is a high school education,<sup>13</sup> the assigned function of which is to assist economically deficient families with their finances. Generally, little interaction is developed between the income maintenance worker and the recipient in a counseling sense, and such interaction is not considered to be at the level of a professional-client relationship.<sup>14</sup>

The Social Services Section is further differentiated on the basis of two broad target groups: one handling eligible families with children, and the second dealing exclusively with adult clients. On Oahu, the former is further divided into eight units. The following specifies the units and their general functions:



## SOME ASPECTS OF SOCIAL COUNSELING

### Social Service Intake Unit

Receives, processes and disposes of applications for social services except for the following: foster boarding homes for children; adoptive homes for children; adult boarding homes; Veteran's benefits and services; child abuse and neglect; and the Work Incentive program.

With respect to applications, assesses need for services, determine eligibility for services, and disposes of applications by assigning to other functional units, or by referral to other social agencies, or by helping applicants to use resources within themselves.

### Child Protective Service Unit

Provides immediate child protective services on a 24-hour basis, seven days a week to children who are subject to abuse and/or neglect.

Service includes receiving complaints of child abuse and neglect from the community. Investigation of such complaints, evaluates care, provides emergency social welfare services, takes immediate steps to protect children from further abuse or neglect, develops realistic service plans, stabilizes care solution and refers to other units in the Oahu Branch or to other social agencies for ongoing treatment services.

### North and South Foster Care Unit

Provides foster care (pre-placement, placement, and post placement services); adoption services and general child welfare services to non-recipient families.

General child welfare services which services to children in days of abuse or neglect, who are physically deprived or who are without supervision and guidance to develop patterns acceptable to community standards, and who are ill or in general poor physical condition, or who are having severe educational, emotional or acting out/pre-delinquent problems, and to teenage unmarried mothers.

## PRIVILEGED COMMUNICATION AND COUNSELING

### North and South Family and Children Services Unit

*Provides social services to active recipient families with children including family counseling, family planning, services in child/parent problems, child caring problems, childhood adjustment problems, and emergency child placement services.*

*Provides protective, rehabilitation and placement services to the active cases of elderly, blind, disabled and other adult recipients to enable them to reach maximum self-care and self-support utilizing various health, rehabilitative resources, home-maker, housekeeper services, adult boarding homes, etc.*

### Homefinding Unit

*Recruits, studies, licenses/approves agency foster homes for children requiring foster placement.*

*Foster homes include emergency shelter homes, foster boarding homes, adoptive homes, free homes, work homes, wage homes.*

*Provides information in approved/discontinued foster homes to other social agencies. Supervises, trains and coordinates use of Emergency Shelter Homes by units and community agencies by maintaining emergency shelter home registry.*

### Student Training Unit

*Provides field training to students of the School of Social Work, University of Hawaii within the framework of services rendered by the Public Welfare Division.<sup>15</sup>*

Personnel servicing the first target group includes paraprofessionals who assist professionally trained social workers. Considered an "environmental manipulator", the paraprofessional primarily provides assistance in everyday living or recommends referrals to needed professional services. Another important function is to act as "sounding board". A para-professional listens to, and empathizes with his client and in times of impending stress, sustains the client through periods of crisis. A para-professional generally does not, however, offer counseling or therapy service because of lack

## SOME ASPECTS OF SOCIAL COUNSELING

of proper training and theoretically no true professional-client relationship is developed.<sup>16</sup>

The professionally trained social worker is an "inter-psychic manipulator". Personnel qualifications have recently been revised and a masters degree in social work is no longer a requirement except for the positions of administrator, supervisor, or child protective service unit worker. Qualified by education to meet the human, emotional, and psychological needs of the troubled clients, with free exchange and manipulation of the socio-psychic needs of the troubled clients being necessary for adequate treatment, the professional social worker does appear to establish a professional-client relationship.<sup>17</sup>

Relationships between line workers and supervisors are generally at a professional level. Line workers in each unit are considered to be responsible independent practitioners. Professional discussions between line worker and supervisor are for consultative purposes and for verifying diagnoses.

The second target group differentiated social worker category is divided into seven units on Oahu. The units and their general functions are:

### Self Support Unit

*Provides supportive services to recipients other than those enrolled in WIN who are interested in reemployment with potentials in becoming financially independent in whole or in part or who are employed or in training.*

*Supportive services include evaluation of client's interests, readiness and potentials for self support, counseling in family planning, child care, child/parent relationships, marital problems, and provision of child care, housekeeper service, transportation and employment training expense.*

### WIN Unit

*Jointly appraises with team members from Department of Labor the suitability of WIN registrants for enrollment with the WIN program and determines their need for specific types of supportive social services which are certified by Department of Labor.*

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*Provides supportive social services to WIN enrollees which include child care, family planning, obtaining medical examination and care, homemaker services, housing location, transportation, counseling regarding family problems.*

### Child Support Unit

*Locates absent parents who have responsibilities for the support of dependent minors, determines their ability to support, develops agreements for support, enforces such agreements or court support orders through direct contacts and/or referral to enforcement agencies, and monitors support payment records of parents.*

*Also conducts investigations relating to fraud and serves as liaison between the prosecuting attorney, the courts and other government agencies in processing fraud referrals. Also serves legal processes in relation to support as well as other cases requested by social work staff.*

### North and South Adult Services Unit

*Provides services to the aged, blind and disabled in boarding, care and nursing homes to include counseling, assessment of placement, replacement when indicated and utilization of appropriate community resources for the client's health or rehabilitative purposes.*

*Recruits, studies, and approves boarding homes; plans and conducts boarding home training sessions; evaluates annually approved boarding homes.*

### Homemaker Services Unit

*Provides in-home services such as household chores, care of children, personal care of disabled adults to enable needy individuals or families to overcome a temporary breakdown in the normal functioning of the home, or to permit disabled adults to remain in their own homes.*

*Provides in-home weekly or bi-weekly services to recipient and non-recipient families with mentally*

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*retarded children or adults to enable parent to get some relief from the continued care of the retarded person.*

### Day Care Licensing Unit

*Licenses and re-licenses group day care centers and family day care homes. Provides supervision/consultation after licensing to upgrade quality of care, program and standards. Provides placement information to social workers.*

### Veteran Services Unit

*Provides information, referral and other appropriate services to veterans and their dependents to help them adjust effectively to civilian life and to assure them of their entitled benefits. Services include legal change of name, assistance in obtaining state grants, preparation of affidavit of support to sponsor aliens entering U.S., recordation and forms assistance.<sup>18</sup>*

Similar to the first described social work group, the latter group utilizes para-professionals as well as professional social workers with similar qualifications for personnel. However, workers in the Homemaking Unit are solely for the purpose of assisting clients with the mechanics of home life. Educational qualification for a homemaker position is a high school degree.<sup>19</sup>

Social workers in this adult-oriented category are generally involved in two types of social services; work-oriented social services and the placement of disabled, handicapped, and elderly in boarding or nursing homes.<sup>20</sup>

Work-oriented social services are generally provided in the WIN and Self-Support Units which encompass vocational rehabilitation, providing supportive services when parents are inconvenienced by jobs, i.e., arrangements for babysitting or transportation, counseling to reconcile a reluctant jobholder with a less than enjoyable job, counseling to support a client dismissed from a job, and introducing and conveying to the client the importance of employment. The philosophy behind this type of counseling is to get, and keep clients off welfare and in doing so, reduce the welfare payroll.<sup>21</sup>

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In the placement of the disabled, blind, or aged in boarding or nursing homes, financial assistance is provided and, if necessary, nonindependent individuals are placed into proper institutions to suit their needs and to better maintain their welfare. The social worker in placement situations must deal with the individual and his family. When an individual is reluctant in being placed, the social worker must use "common sense" in handling this type of situation.<sup>22</sup>

As yet, there are no adult protective statutes that parallel or are similar to the child protective statutes.<sup>23</sup> The unit, however, is engaged in some adult protection services. Very few cases, though, are in the adult protective category.<sup>24</sup>

The Child Support Unit, Homemaker Service Unit, Day Care Licensing Care Unit and Veteran Service Unit do not engage in what is considered to be professional social work. They provide investigatory, referral, or regulatory services. Most of the workers in this field are not professionally educated in social work. They are not expected to provide any in-depth social services. If a situation becomes too intense or complex, the client is referred to other better qualified sections or agencies to handle the problem.

Another important distinction between social workers performing the social services function versus income maintenance is the greater emphasis on the monitoring of welfare fraud of the latter. Apparently, there is no official policy requiring all personnel in the Department of Social Services and Housing to monitor cases of welfare fraud.

Both of the private social service agencies contacted by the Bureau indicated that they deal with family/children problems.<sup>25</sup> Policies of these agencies require that social workers in a professional position possess a masters degree in social work.<sup>26</sup>

### **Public Health Nursing**

Public Health Nursing in General. The functions of the public health nurse (PHN) are numerous and varied. Underlying public health nursing is the philosophy of assisting and maintaining the general physical health of all people desiring help. In theory, the public health nurse should not be involved with the social problems of their clients, but it is recognized that health ills and social problems are interrelated. This interrelation and the reality of the speed of the DSSH application process sometimes necessitate the nurse's involvement into their client's social problems.

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It has been said:

*Public health nurses, including school nurses and those in other specialties in public health nursing, work as members of a health team to further community health. They provide nursing care and treatment, health counseling, and organize families and community groups for health purposes. Their activities include work in the home, clinic, office, school, or health center. In all phases of the work emphasis is placed on the prevention of diseases, the promotion of health, and rehabilitative measures.*<sup>27</sup>

The phrase "to further community health" distinguishes the "specialty" of public health nursing from general nursing. Public health nursing, thus, seems to be identified by its outreach function and, in practice, has been transformed to one that is not limited solely to health matters, in a medical sense, but also extends to areas formerly the province of social work professionals.

Ideal qualifications for a PHN position as expressed by the American Nurses' Association are a "...license to practice professional nursing in the state in which employed"<sup>28</sup> and the:

*...completion of a baccalaureate degree program approved by the National League for Nursing for public health nursing preparation or post baccalaureate study which includes content approved by the National League for Nursing for public health nursing association.*<sup>29</sup>

However, as of January 1, 1968, 32 per cent of the national work force in public health nursing possessed both a baccalaureate or higher degree in nursing and some public health preparation.<sup>30</sup>

Data indicate that a designation of PHN is accorded by function and not educational requirements. Although in view of the State's qualifications and requirements for a public health nursing position, which will be discussed later, the above may not be representative of the State of Hawaii.

General Discussion of Public Health Nursing in Hawaii.  
The public health nursing branch of the Department of Health is divided into nine units throughout the State.<sup>31</sup> One unit is assigned to each of the outer island counties. Oahu is divided geographically into six districts with one unit accommodating each district.<sup>32</sup>

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All public health nurses must be registered nurses. Public health training is also required in the form of a public health certificate or work experience in that area.

The following are the qualifications of the different levels of the public health nurse derived from the respective position descriptions:

### RPN II

- A. Graduation from an accredited college or university school of nursing with a bachelor's degree which required completion of course work in public health nursing in its curriculum.
- B. Graduation with a diploma from an accredited three-year nursing program supplemented by completion of an accredited university curriculum in public health nursing for which a certificate was awarded.
- C. Must possess a license or be eligible for a license to practice as a professional nurse in the State of Hawaii.<sup>33</sup>

### RPN III

- A. Graduation from an accredited college or university school of nursing with a bachelor's degree which required completion of course work in public health nursing in its curriculum, or
- B. Graduation with a diploma from an accredited three-year nursing program supplemented by completion of an accredited university curriculum in public health nursing for which a certificate was awarded.
- C. In addition to meeting the appropriate educational requirement, applicants must have had one year of professional nursing experience of which a minimum of 6 months was in public health nursing.
- D. Must possess a license to practice as a professional nurse in the State of Hawaii.<sup>34</sup>



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### RPN IV

*In addition to the educational and experience requirements for RPN III, she must have had one additional year of professional public health nursing experience comparable to Level III.*

*She must possess a license to practice as a professional nurse in the State of Hawaii.<sup>35</sup>*

### RPN V

*Must possess the educational and experience requirements for RPN IV, and in addition, one year of professional public health experience at the RPN IV level.<sup>36</sup>*

### RPN VI

*Must possess the educational and experience requirements for RPN V, and in addition, one year of professional public health nursing experience at the RPN V level.<sup>37</sup>*

Paraprofessionals are also employed in the public health nursing branch. The following are the qualifications of the Para-Medical Assistant I and Para-Medical Assistant II:

### PMA I

*Graduation from high school. One year of experience in a hospital, clinic or other medically oriented institution where care is for maximum physical, mental and/or emotional health of the patient. Duties require observation and reporting of physical or mental symptoms and conditions, understanding of socio-culture factors as they generally influence health and health care, and the implementation of care and/or treatment.<sup>38</sup>*

### PMA II

*Graduation from high school. One year of experience in a hospital, clinic or other medically oriented institution where care is for maximum physical, mental and/or emotional health of the patient, and one year's experience at the PMA I level. Duties require observation and reporting of physical or*

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*mental symptoms and conditions, understanding of socio-culture factors as they generally influence health and health care, and the implementation of care and/or treatment.*<sup>39</sup>

The public health nursing branch also utilizes practical nurses. These practical nurses, placed administratively under the State, are funded by federal monies.<sup>40</sup>

The positions classified numerically above and inclusive of the RPN IV are considered "journeyman".<sup>41</sup> These are nurses who are authorized to act independently with minimum supervision. Those positions below the RPN IV level, the para-medical assistant and the practical nurse are closely supervised and are not expected to provide in-depth social services. When a situation requiring intense social services is encountered, the problem is handled by an RPN IV. If the problem is too intense, the PHN may refer the client to a more qualified, specialized professional.

The PHN provides the support for the programs of the DOH.<sup>42</sup> Some of the areas in which they are engaged in are general family health, child rearing techniques and assistance, vaccinations and immunization of communities where communicable diseases or epidemics are apparent, motor-development training, tuberculosis treatment and subsequent investigations, visitations and assistance at nursing homes, maternal care, assistance for the physically and mentally handicapped, and community clinics and seminars.

The PHN assumes a social service function also. Health and health needs are the primary concern of the PHN. They recognize, however, that to maintain and promote the health of the clients, some social service counseling is involved. They also recognize that the total needs of the client must be taken care of before an approach can be made to the health needs of the client.

*Consideration of both the human and medical factors influencing illness are indispensable to planning and carrying out effective nursing care. Productive nurse-patient relationships require recognition of the psycho-social factors that may encourage or inhibit progress toward health.*<sup>43</sup>

The melding of the "...human and medical factors...", for example, might include the following situations. Families with physically and mentally handicapped children are taught to adjust as well as care for the child. Mothers, themselves deprived of love and affection as youths, are taught to

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express these dormant emotions to their child. The line distinguishing health services from social services is impossible to discern.

Counseling becomes very important when the PHN tries to help the parents express their love to their child. To the nurses, the mechanics of child care cannot be effective unless an innate love exists which can be nurtured and produced.

A pragmatic approach to the problem is illustrated by the following. The client, a mother of five children was in the process of obtaining a divorce. Two of her children were diagnosed to be progressing abnormally slow. The immediate problems of the mother overrode the therapeutic needs of her children so treatment could not be effectively applied. The nurse had to first assist the mother in solving her immediate problems before unified therapy for the children could be considered. Assistance took the form of counseling and obtaining financial aid through the public welfare agency. The nurse found that only after solving the immediate concerns of the mother, could effective long-term therapy be commenced.<sup>44</sup>

Counseling again is important in child "beating" cases where malicious abuse is not the intent. Parents who beat their child may do so out of sudden emotional fury. Although loving their child, they cannot restrain themselves when confronted with an adverse stress situation. Otherwise, the child is well-kept and happy. This has been observed particularly in certain cultures where "beatings" are considered a necessary form of punishment. The nurse views her responsibility as one of conveying to the parents that it is contrary to acceptable societal behavior and very dangerous in the short-term physical sense and the long-term psychological sense to continue such a practice.

Further complicating the distinction between health and social services is the looking to the PHN for social service type assistance due to the inability of obtaining a social worker because a family may not qualify financially to receive DSSH assistance or may not meet the standards of the individual private agencies. The connotation of deprivation and shame may also attach to relations with a social worker which adds to the reluctance of some people. Also, the application process to receive DSSH social services is said to be rather slow and cumbersome. Welfare recipients, though qualified, must submit another application for social services, and the trouble and nuisance in arranging baby-sitting, transportation, etc., which may seem trivial, but to the disadvantaged can be enormous.

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There is also observed by the PHN a tendency of the troubled to trust and confide in them by necessity or sentiment. The clientele of a DSSH social worker is restricted by standards of income, or in the case of private agencies, age of client or the type of problem. On the other hand, the clientele of the PHN is universal of the population of the State, not being similarly constrained by eligibility requirements. In the absence of assistance by social workers, the PHN may, by necessity provide counseling or intervene in crisis situations.<sup>45</sup> The PHNs are often viewed as the least threatening of the "helping professions" and connotations of the nursing profession may be touched with less negative associations from a psychological standpoint to the clients. Finally, the nurses observe that the purposes and results of the PHN are more tangible in comparison to the social worker.<sup>46</sup>

A function, relatively new to the PHN, is that of an observer for the court. The PHN may be asked by the court to observe and report on the trial visitations of the parents with their legally removed child, or the PHN may be asked to report on the progress of the child or the parents.<sup>47</sup>

Progress reports of a child in a foster home may also be requested from the child's original nurse if the foster home is located outside her district.<sup>48</sup>

In the court-ordered observation function, no confidentiality question is involved because the client would be aware of the duty of the PHN. However, even simple comments or reports to the courts, whether detrimental or positive, would in the view of some nurses, affect the maintenance of rapport and trust with the client.

Relations between supervisor and line workers are generally very good. The RPN IV is generally considered to be an able, independent practitioner requiring very little supervision. Professional consultations and discussions between supervisors and line workers are routinely had.

### Outreach and School Counselors

Outreach and School Counselors in General. School counselors, in general, assist student-clients in coping with and solving a variety of problems. No longer is the counselor's function merely one of educational-vocational assistance. Counseling and guidance have expanded to include assistance into the social and personal as well as the traditional career planning and academic problems of the student-client.

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The impetus of counseling has recently shifted from merely the solution of immediate problems to encompass the development of the traits of self-independence and the ability "to make rational and realistic educational and career decisions and plans".<sup>49</sup> This changing focus has been expressed as follows:

*The guidance program and counseling services need to expand beyond its current preoccupation with problems and crisis and encompass systematic developmental and preventive approaches and services. Students are asking for more help with career guidance. The field of guidance itself is redefining its basic function to be that of development of personal skills and attitudes which would enable the individual to make decisions rationally and to cope constructively with the changes and increasing alternatives which are characteristic of the world in which he now lives and will live.*<sup>50</sup>

Similar to those of the school counselors, the functions of the outreach counselors have been expressed as follows:

- (a) *Effectively assist the alienated student to understand and accept himself as an individual with an awareness of his own ideas, feelings, values, talents, and needs;*
- (b) *Help the alienated student to competently cope with and solve personal, academic, and other problems which influence his achievement and actions in school;*<sup>51</sup>

\* \* \*

A principal distinction between the outreach and school counselor is that the outreach counselor's target clientele is the school-alienated, "hard problem" student. How each of these counseling groups perform their roles are further detailed in the two sections that follow.

General Discussion of the Outreach Counselor in Hawaii.  
The outreach counselor program is funded by the Comprehensive School Alienation Program (CSAP). A brief history of the program follows:

*The Department initiated the Statewide Dropout Program on a limited scale in February, 1969. The State Legislature provided the funds to enlarge the scope of the program in September, 1969. In September, 1970, a number of programs was reorganized and subsumed under the title of Statewide Dropout*

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*Program. These were the Special Motivation Program, Neighborhood Youth Corps Program, and the newly acquired Vocational-Technical Work Study Program (Vocational Education Act of 1969, P.L. 90-576). In September, 1971, the State Legislature directed the reorganization of the Statewide Dropout Program into the Comprehensive School Alienation Program.<sup>52</sup>*

The intent of the CSAP is as follows:

*The structure of the Comprehensive School Alienation Program attempts to assist schools in meeting and/or preventing critical problems that endanger not only the particular student source but also the entire school. With the increase of overt negative actions such as drug abuse, hijacking and fighting, and with more attention being required to handle subtle symptoms of alienation such as irregular school attendance and negative school attitudes, schools can no longer be expected to assign responsibilities for coping with these problems to regular staff members as additional functions. The current program is designed to provide schools with supplementary resources to contend flexibly with their specific unmet needs.<sup>53</sup>*

The outreach counselor is one of the "supplementary resources" provided by CSAP. CSAP funds 36 outreach counselors, who are assigned to selected schools throughout the State.<sup>54</sup> Generally, the principal of the assigned school is the outreach counselor's immediate supervisor. An exception is the Windward School District where the outreach counselors are assigned to the District Office and operate within school complexes.<sup>55</sup>

The qualifications of an outreach counselor are a B.A. degree and an understanding and willingness to work with troubled children. A counseling certificate is not necessary, although currently 34 of 36 outreach counselors do possess a certificate.<sup>56</sup>

The function of an outreach counselor is difficult to define since it is a relatively new activity. The following are guidelines excerpted from the *Guidelines for Comprehensive School Alienation Program*:

(1) To the students:

(a) Effectively assist the alienated student to understand and accept himself as an

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*individual with an awareness of his own ideas, feelings, values, talents, and needs;*

- (b) Help the alienated student to competently cope with and solve personal, academic, and other problems which influence his achievement and actions in school;*
- (c) Collect and effectively use meaningful information about the alienated student through conferences, tests, and other available data;*
- (d) Assist the student through counseling and providing possible alternatives such as work-study and job training for meeting immediate problems;*
- (e) Maintain contacts with other staff, teachers, and parents, and community agencies to either provide necessary information about a student or collect appropriate information; and*
- (f) View their role as a confidential, personal, professional and potentially critical influence on the student.*

### *(2) To the parents:*

- (a) Hold conferences with parents to interpret school programs, to gather pertinent information, and to inform or advise about student problems;*
- (b) Inform parents about and make referrals to other school or community counseling and guidance services; and*
- (c) Provide parents with information about school problems, procedures, and programs affecting their students.*

### *(3) To the community:*

- (a) Identify community referral agencies and services;*
- (b) Provide liaison services between the school and other community agencies*

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*and groups to best meet the needs of the alienated students;*

- (c) Make appropriate referrals of students to public or private agencies in the community;*
- (d) Provide follow-up referral and action on agency recommendations;*
- (e) Help students acquire values such as mutual respect and cooperation;*
- (f) Participate in community affairs and organizations; and*
- (g) Help in the solution of community problems either outside of or relating to education by constructive participation in community activities.*

### *(4) To school staff:*

- (a) Share individual student information as needed to help teachers and other staff identify and deal with special needs or problems; and*
- (b) Be an integral part of the school guidance and counseling program.<sup>57</sup>*

In theory the primary function of the outreach counselor is to motivate the alienated student to successfully complete school. The outreach counselor, however, assumes much more than simple scholastic counseling. Since the target group served is the hard-core, potential drop-outs, making clients aware of their scholastic responsibilities also includes solving their social or personal problems. The following are the distinctions between outreach counselors and regular school counselors:

- (1) Outreach counselors are funded by CSAP, regular counselors are on the state general payroll.
- (2) The state legislature created the position of the outreach counselor, in the belief that the needs of a certain segment of the student population were not being adequately met under the then prevailing system.



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- (3) The target group of the outreach counselors are the alienated students. The target group of the regular counselors are all the students in the school to which a counselor is assigned.
- (4) Outreach counselors are on call 24 hours to aggressively reach out to help students when and where needed. They very frequently interact with and utilize community resources since most of these students require additional help.
- (5) Outreach counselors have the run of the community. Regular counselors are campus-based.<sup>58</sup>
- (6) Outreach counselors have not attained the status of a recognized profession but rather carry out a program or function.

The outreach counselor is approached on problems relating to venereal disease, pregnancy, family, runaway, and even may involve legal counseling. The prevailing attitude among outreach counselors is that clients cannot be turned away because they have nowhere else to go.

In assuming added responsibilities, most outreach counselors realize that their own capacities are limited. Community resources and specialized professionals are referred to and utilized. The knowledge of alternative resources and a basic understanding of students constitute the working tools of the outreach counselor.

To properly understand the role of the outreach, three implied, interrelated but distinct, general functions--scholastic, social, and legal counseling--must be reviewed and explained.

(1) Scholastic counseling. One principal function of the outreach counselor is the motivation of clients who are alienated from or by the regular school program. Consultation with teachers or providing a variation in curricula or courses are utilized to alleviate the alienation problem. If the client absolutely cannot proceed through the regular system, alternative schools such as the Storefront School, Olomana, or General Adult Education, are suggested with the goal being to graduate the client.

(2) Social counseling. The purpose of social counseling is to assist the client through the difficulties of his "adolescent development stage", whether caused by internal or external causative factors. Social counseling includes advice

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on venereal disease, pregnancy, marriage, and family counseling. The outreach counselor may also provide long-term counseling and be a crisis interventionist in times of immediate stress.

Generally, families are counseled only if they desire it. This function is not specifically spelled out in the *Guidelines*, but is a necessary procedure to lessen the guilt and anger of the parents, when their "kid goes wrong". Parents are also counseled on how to cope with behavioral problems and what solutions or treatment are available through various sources.

Conversely, if misbehavior is a reaction to or result of an adverse home environment, families are counseled by the outreach counselor to try to rectify the situation. The outreach counselor, however, does not initially approach the parents. If the parents do not desire the assistance of the outreach counselors or the familial situation becomes too complex, referral is made to the appropriate community resource.

The outreach counselor's position as a client advocate is not entirely parallel to the lawyer's advocacy of his client. A lawyer must defend his client even if the client is guilty of the alleged crime; due process as a constitutional right must be guaranteed. The outreach counselor recognizes that a client should suffer the consequences of his actions. Deserved punishment is sometimes considered to be therapeutically beneficial.

The disciplinary concept also enters into the role of the outreach counselor. If the client is wrong or guilty, the outreach counselor does not "fight the case" but merely assures the equanimity of the situation. Discipline is considered beneficial in some cases. This does not imply that the outreach counselor actively investigates his clients or abandons them if they are guilty. Rather, he remains with the client offering justification, understanding, solace, reinforcement or whatever is necessary to sustain and assist the client. When asked by the disciplinarian, the outreach counselor who ostensibly has a comprehensive insight of the client, offers suggestions that would "personalize" the punishment to compensate for the psychological or mental deficiencies of the client. Disciplinary functions and counseling functions are considered to be exclusive of each other, and performance of both simultaneously is not considered by the outreach counselors to be practical.

The goal of social counseling is to sustain the client in periods of crisis and to instill and build character and independence.

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(3) Legal Counseling. In this area the outreach counselor assumes one duty, i.e. simply to inform his client of legal rights when apprehended or interrogated for a crime. Because juvenile suspects are sometimes not informed of their right to remain silent, right to an attorney, or the right of the presence of an adult at interrogations, the outreach counselor may inform the client that he possesses these rights. This function is not performed by all outreach counselors. Some outreach counselors maintain that they have good relationships with the police. Some outreach counselors maintain that the police generally do not press them for information and treat clients rather fairly.

Trust is a directly related variable to the amount and magnitude of the functions of an outreach counselor. Clients usually are the low-income, troubled students who trust no one, least of all a representative of the "establishment". Rapport is important, and is regarded by the outreach counselor as the most essential base from which to work. The degree of rapport also decides the content and quality of professional-client interactions. An outreach counselor regarded with suspicion would not receive the in-depth, confidential communications to adequately administer to the needs of the client while the outreach counselor with a good reputation would receive not only more clients but also their complete confidence. Thus, the function of a "trusted" counselor would be magnified to accommodate the diversity and variety of clients and problems.

Another function the outreach counselor may have can be derived by examining the "mission and intent" passage on page 26.

This passage suggests a dual role for CSAP personnel: that of an insurer of the safety of the "entire school", and a helper to the "student source" of the "critical problems". It implies that the "critical problems" of the school should be met by treating the problem source. If the "specific and unmet" needs of the problem source are treated and cured, the entire school community would benefit. Thus, in the context of the passage, the outreach counselor has two objectives, to guide and motivate the "problem" student and in doing so, insure and maintain the welfare of the school community.

Individual outreach counselors vary as to the degree to which the advocacy of the client is subordinated for the welfare of the school community. Some counselors regard themselves as total client-advocates. Others take into consideration the duty to the school community. There is no standard reaction to the dilemma. The only safe generalization which can be made is that all actions taken by an outreach counselor would be intended for the benefit of the child.

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General Discussion of School Counselors in Hawaii. The school counseling and guidance program is centralized in the special programs branch of the Department of Education (DOE). There are approximately 204 DOE counselors in the State of Hawaii.

Qualifications. The qualification for a counseling position in the DOE is the Professional Counselor's Specialist Certificate which requirements can be met in two ways: the possession of a masters degree in counseling and guidance or completion of a department-approved program. Counselors in the latter category reach the position by promotion through the teaching ranks. Certificates are earned through special programs and classes. The following are the minimum requirements for the Professional Counselor's Specialist Certificate:

### Minimum Qualification Requirements:

Education and Experience: Incumbent must meet one of the following requirements (A or B):

- A. A master's degree or a year's planned program of post-graduate studies approved by an accredited institution with a designated major or specialization in school counseling and guidance.

(Note: An internship or a practicum or at least one semester's duration designed to provide adequate experience in school counseling and guidance and a good understanding of the classroom teaching situation must be part of the program.)

- B. A bachelor's degree plus a minimum of 30 semester hours of school counseling and guidance course work in a planned program approved by the Hawaii State Department of Education.

This program requires the incumbent to meet the following requirements:

1. Possession of a bachelor's degree.
2. A minimum of 30 semester hours of course work beyond the bachelor's degree directly related to school counseling and guidance (which includes a practicum). One year of satisfactory supervised school counseling experience (intern,

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trainee or assistant) may be substituted for a practicum.

3. Course work in all of the following areas:
  - a. Principles of educational and school guidance philosophies.
  - b. Principles of learning theories.
  - c. Individual counseling theory and procedures.
  - d. Tests and measurement theory, research and procedures.
  - e. Dynamics of individual behavior.
  - f. Dynamics of group behavior.
  - g. Educational and career planning.
  - h. Human development.

### Knowledge of:

1. Principles of educational philosophy, psychology, practices, techniques and objectives.
2. Communication ethics and the standards of the American Personnel and Guidance Association.
3. Educational tests, measurements and statistics.
4. Community health, social and employment resources.

### Ability to:

1. Relate to people.
2. Relate to the problems and concerns of the pupil, parent, colleagues, school administration and the community.
3. Project enthusiasm, display vitality, sympathy, humor and firmness.

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4. *Maintain a high sense of integrity with respect to communication which may be considered confidential in nature.*<sup>59</sup>

As of January 1974, 77 per cent of the counselors in the DOE system the professional counseling certificate.<sup>60</sup>

The school counselor's function is to provide assistance to voluntary and involuntary students in the general areas of personal, social, and educational problems, and career planning.

The following is the DOE position description of the school counselor and it enumerates the functions very well:

### Duties Summary

*The counselor, under the general direction of a principal and/or vice-principal and with the assistance of the district curriculum specialist for special services, performs a variety of specialized student activities relating to the school guidance program involving students, teachers, other staff specialists, parents and community agencies. The major activities include counseling, student appraisal consultation with colleagues, parent conference, case conference, referral/coordination with other programs and resources in and outside the department, and program evaluation and planning. Performs such other related duties as may be properly assigned.*

### Duties and Responsibilities

#### A. Relating to Students

1. *Assists students to understand and accept themselves as individuals with an awareness of their own ideas, feelings, values, talents, needs and cultural roles.*
2. *Helps students to assess with and become aware of alternatives in dealing with personal, social and academic problems.*
3. *Assists students in making decisions about educational plans and career objectives.*

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4. *Provides students with pertinent information and counseling which will assist them in achieving desirable goals.*

### B. Relating to Colleagues

1. *Shares appropriate student information with staff members with a special regard to confidentiality.*
2. *Helps teachers identify and work with students with special problems.*
3. *Initiates and participates in in-service training programs, staff meetings and case conferences.*
4. *Assists teachers in obtaining guidance materials.*
5. *Provides information and resources relative to the characteristics and needs of the community and student population for use in curriculum development and instruction.*

### C. Relating to Parents

1. *Assists parents in developing realistic perceptions of their children's development, abilities, interests, aptitudes and attitudes as related to personal-social development, educational and occupational planning and school progress.*
2. *Confers with parents to gather pertinent information and to inform and advise about pupil problems and interpret school programs.*
3. *Informs parents about and assists in making referrals if necessary to other educational and community resources.*
4. *Provides parents with information about applicable school policies and procedures, school course offerings, educational and occupational opportunities*

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*and requirements and resources that can contribute to the development of their children.*

### *D. Relating to Community*

- 1. Identifies and works with appropriate community services.*
- 2. Serves as liaison between the school and other community services; makes referrals and assists with follow-up.*

### *E. Relating to Program Planning and Changes*

- 1. Assesses student and school needs.*
- 2. Provides assistance in planning, implementing and evaluating the guidance program.*
- 3. Apprises administrators when the school program fails to respond to the needs of individual students and groups of students.<sup>61</sup>*

In the preceding discussion concerning the outreach counselors, the distinction between outreach and regular school counselors was stated. This distinction is not strictly enforced. Individual counselors, sometimes on their own initiative pursue and handle "hard" problems. School counselors are campus-based, but this does not mean they are restricted to the campus. They do engage in some off-campus activities in the course of delivering their services.<sup>62</sup>

The counseling role in the disciplinary process of the student is generally one of neutral advocacy. The American School Counselors Association Code of Ethics states, "Punitive action is not part of the counseling process."<sup>63</sup> The counselor, however, is not completely divorced from the disciplinary process. The counselor does not investigate alleged wrong-doings of his client or enforce school rules or society's laws. Nor is the counselor's advocacy synonymous to that of a lawyer's, in that the counselor does not defend the client even if the client is guilty of the alleged wrong-doing. A recognized premise by most counselors is that clients must be punished if deserving so. Counselors consider deserved punishment to be beneficial in the molding of character, and a necessary sanction to instill and maintain societal values and laws.



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If a client confesses to a counselor of a wrong-doing, the counselor's role in the disciplinary process is to persuade the guilty client to realize his error, voluntarily confess, and suffer the appropriate consequences. Methods used to persuade the wrongdoer to confess are peer-influenced pressure if the peer group already knows about the wrong-doing, or intense one-to-one counseling. If the client is apprehended, the counselor with a general comprehension of the client and his background would make available this insight to the disciplinarian to "personalize the punishment". The counselor may volunteer a recommendation of a punishment to suit the individual and his problems, and to avoid unduly harsh punishment that may alienate or embitter the client. Above all, the counselor tries to insure fairness in the disciplinary process.

If the client refuses to confess, the counselor's conduct generally is left to his personal judgment. Some counselors would take their own initiative and report the matter. Others would keep the matter confidential in order to maintain rapport, which may be more beneficial in the long-term sense. No safe generalization can be made of the counselor's actions in this situation because the personal judgment of individual counselors vary.

The relations of a counselor with his immediate supervisor, the principal, varies according to the individuals involved. Again, no safe generalizations can be made. Some relationships are mutually respectful with a minimum amount of supervisory intervention. In other relationships, the principal may assume a forceful role and closely supervise the duties and work of the counselor. In some instances, because of short staffing due to budget constraints, school counselors may be relied on to perform functions of an administrative nature. However, in summary, it is the relationship between principal and counselor which decides the role the counselor plays in the disciplinary process.

Private schools also employ counselors. Although the number employed is not known, private school counselors generally perform the same functions and encounter the same problems as the public school counselors.

### **Factors in Counseling Relevant to Privilege**

*The Client.* Terminology varies with the status and position of the party served and the orientation of the different functions. Social workers term the party they serve as a client. Medically-oriented public health nurses

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and scholastically-oriented counselors refer to the party they serve as a patient and a student, respectively. Overall, the term "client" taken in the dictionary definition, "...a person who engages the professional advice or services of another...", suffices as a term applicable in defining the party served for all the professions to be examined.

Generally, all of the clients of the respective professions seek assistance on a "voluntary" basis. Those who are not "voluntary" in the strictest sense of the word, are those who are reluctant or hostile towards receiving services. Some, especially clients of the counselors, are actively recruited.

One major type of "involuntary" client is the person served by the Child Protective Service Unit of the Department of Social Services and Housing (DSSH).<sup>64</sup> The mandated function of social workers in this unit is to investigate complaints of alleged child abuse or neglect. Thus, the social worker initiates an investigation to determine the validity of the complaint, and then proceeds with whatever action is deemed necessary to rectify the situation.

There are two concepts of clients that must be explained. First, is the single client. Obviously, a single client is an individual whose problems directly affects only himself. That client may be part of a larger group, but interactions by the professional with the group would not be necessary in the therapeutic process. The professional utilizes his talent and knowledge to assist the single client in solving immediate and long-range problems with the professional considering himself as a client-advocate insofar as he mobilizes all effort for the welfare of the client. Advocacy by the professional, however, ceases at the participation in an illegal, or legal but morally wrong, act. Advocacy also appears to stop at the active cover-up of a perpetrated misdeed.

Second, is the concept of the family unit. The family unit is the group which asks for assistance or engages the professional for the needed services. It may not necessarily be a nuclear family, but may also include grandparents, step-parents and/or stepchildren. Illustratively, the role of the social worker and the public health nurse is to contribute toward the maintenance of a unified, happy family. The child, however, is considered to be the primary client.<sup>65</sup> If child abuse or neglect occurs, or the familial situation is detrimental to the child, the child's welfare is of paramount concern. The professional, in these cases, protects the child even to the disadvantage of the parent-client-offender. In the case of the outreach and regular school counselor,

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although in agreement with the family unit concept, they do not employ it as frequently as the social worker or public health nurse. Their clientele is of a population whose problems tend to be of a personal nature or are peer-inspired. Interaction with the family takes the form of eliciting assistance to help the problem client and to reduce the guilt and anger of the parents.

The regular school counselor's approach to the family unit as a client is similar to that of the outreach counselor. Some family counseling is done, but only to a small degree.<sup>66</sup> Parents are useful as a component in the therapy of a problem child. They are made to understand their child's problems and given suggestions to alleviate or better cope with the situation.

If the family environment is contributing to the detriment of the child, then the counselor may intervene by referral to a specialized community resource or provide some counseling. The family unit as an integral extension of the child is considered the client, though not to the extent of the social worker and the public health nurse.

*Confidential Treatment.* Standards as to what constitute confidential information and the proper dissemination of such information varies--not, however, from profession to profession, but from individual to individual.

Most professionals consider confidential information to be all information intended by the client to be confidential. Confidentiality may not necessarily be orally guaranteed. Instead it may be an implied understanding on the part of the client and the professional. Confidential information, in the professional's view, may also include observations and professionally irrelevant information. For example, the observation by a professional of a marijuana plant in the backyard of a client may be ignored and kept confidential if it is not a contributing factor to the problems of the client.

The degree of confidentiality guaranteed to the client varies with the judgment of the individual professional. Some professionals guarantee total confidentiality; others qualify the degree of confidentiality guaranteed by expressing options for disclosure. Also, lacking privileged communication, some counselors believe that it is dishonest and disrespectful of the client to lead him to believe that they can guarantee complete confidentiality.

The professional who does not desire a total guarantee of confidentiality may declare in the initial contacts that confidential information may be released, if in the opinion of the professional it would be for the best interest of the

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client. Options used by professionals to keep possible avenues of disclosure open are:

*I will keep everything you say confidential as long as I can.*

*I reserve the right to tell anyone if I feel it is in your best interest. But I'll try to discuss it with you first.*

*If you want me to keep everything confidential, don't tell me everything because I may have to tell someone else.*

In instances when a professional suspects that legal proceedings are a strong possibility, he may refrain from giving a total guarantee of confidentiality or even any guarantee at all. The professional has then, left himself an avenue to disclose information if pressures are put on him to disclose. Another refraining or cautious device is an implicit or explicit caution to the client not to make any incriminating statements. In this way, the professional is protected because he possesses no relevant information and the client is protected from disclosures which may be incriminating.

Some professionals, mainly outreach counselors, feel that conditions of confidentiality short of a total guarantee are a "cop-out", and an indirect turning away of a desperate, troubled client. Other professionals would give a total guarantee, and adhere to the guarantee even at the risk of resultant penalties. Still others believe that helping the client face and cope with the conditions of confidentiality in resolving his problem is part and parcel of the counseling process and skills.

The clients of the outreach counselor appear to have a greater potential for wrongdoing, and have less trust and respect for the "establishment". Rapport and trust are considered to be a most important base to work from. Outreach counselors, more than any other counseling group, profess to give a total guarantee of confidentiality to establish, maintain, and preserve rapport which would be essential for short- and long-term treatment.

The school counselor may also assume a more dominant role regarding the adolescent client. The degree of dominance, and reduction of the client's leading role in the therapeutic process may correspond to the counselor's assessment of the client's maturity. Less mature clients may require greater counselor-initiated plans and action. At the same time, the responsibility of the counselor to the client increases. Such activity on the counselor's part is always for the purpose

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of the client's welfare. A total guarantee of confidentiality would negate any initiative on the part of the counselor, and in fact, place the client in the dominant position. Thus, a total guarantee is very rarely, if ever, given by the school counselors.

There is also no standard timing for the declaration of confidentiality by the professional to the client. The assurance of confidentiality varies with the individual professional. Confidentiality is, and is meant to be, a reassurance to the client and is generally presented as such. It is presented at varying phases of the relationship, usually when the client is hesitant to discuss secret matters. Some professionals present the guarantee at the initial contact with the client; others do not mention it at all. The guarantee is sometimes not given at all, but evolves into an implied agreement by both parties as the relationship progresses.

There also appears to be no standard procedure in warning the client of the potential for legal proceedings.

In the social worker's experience, legal proceedings would probably involve child abuse or neglect cases. Such a warning is considered to be unnecessary and even detrimental to relations with a client. Legal proceedings are rare, with the exception of the Child Protective Service Unit, and cannot always be foreseen. Since the Child Protective Service Unit's function is to investigate allegations of child abuse or neglect, it is possible that during the investigation, when a determination that the complaint's validity is made, the social worker may then tell the parents of the possibilities of legal proceedings.

Public health nurses see no need to give such a warning because the likelihood of testifying against the client appears remote. They do not view their function as a role of "enforcer". However, a belated warning may be given to the client at the first inkling of entanglement in legal proceedings.

Most department or agency policies dictate that confidential information can only be released outside the immediate sphere of the organization with the written consent of the client. These policies are strictly followed in regards to recorded material.<sup>67</sup> Confidential information, however, is shared verbally between professionals who service a mutual client if intended for the welfare of the client. The amount of confidential information shared, and the professional shared with, are based on an individual professional's judgment.

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A discussion of professional ethics concerning the dissemination of confidential information is difficult. The National Association of Social Workers' Code of Ethics does not establish guidelines for the propriety of disseminating confidential information. It simply states that the social worker "...use in a responsible manner information gained in a professional relationship".<sup>68</sup> Such a broad statement can be interpreted in many ways. Thus, the dissemination and use of confidential information again is left to the discretion of the individual, as long as it is handled in a "...responsible manner".

The Code for Professional Nurses appears to define use of confidential information with very little leeway for disclosure:

*The nurse respects and holds in confidence all information of a confidential nature obtained in the course of nursing work unless required by law to divulge it.*<sup>69</sup>

However, in the interpretation of the foregoing statement, defining the propriety of disseminating confidential information, confidentiality is not as absolute as the first statement appears to be:

*Patients often confide in their nurses, sharing anxieties, hopes, fears, and plans about their illnesses and their private and public lives. The nurse receives all information in a non-judgmental manner, using it to promote the patient's welfare, never to his disadvantage. Recognizing that patients have the right of privacy, the nurse makes known details about the treatment or physical, personal or social condition of a patient only to others who are professionally concerned in a direct way with the patient's health care.*<sup>70</sup>

The outreach counseling function is a relatively new one and there is no codified material setting forth the conditions of ethical conduct. Most outreach counselors would only release confidential information that would be used in a positive manner to the client. Although some outreach counselors belong to the Hawaii School Counselors Association, it is not known, nor can it be safely assumed, that outreach counselor-members adhere to the Hawaii School Counselors Association Code of Ethics.

The Hawaii School Counselors Association is the local affiliate of the American School Counselors Association

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(ASCA). The discussion that follows revolves around the ASCA Code of Ethics.

The ASCA Code of Ethics does not define confidential information. There also may or may not be a distinction between the usage of the words "confidential information" as opposed to "information", "pertinent data", and "personal information about a client". All of the preceding terms concern information about the client, either directly verbalized to the counselor or based on an interpretation of the comprehensive picture of the client.

Proper dissemination of confidential information is defined:

1. F. *...Confidential information may be released only with consent of the individual except when required by court order.*

\* \* \*

- I. A. *The school counselor*

\* \* \*

3. *Should respect at all times the confidences of the counselee; should the counselee's condition be such as to endanger the health, welfare, and/or safety of self or others, the counselor is expected to report this fact to an appropriate responsible person.<sup>71</sup>*

Item 1.F. is a stronger statement for confidentiality than item I.A.3. The discretion and judgment of the individual school counselor determines the standard by which to conduct himself.

Dissemination is also allowed, as with all other examined professionals, with the client's permission.

- III. A. *The school counselor*

\* \* \*

5. *may share confidential information when working with the same counselee, with the counselee's knowledge and permission.<sup>72</sup>*

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Dissemination may also be proper to other professionals. The term "confidential information" is not specifically used in some of the following statements. Instead, such terms as "personal information", "information", and "pertinent data" are used. The discretion of the individual counselor would determine what constitutes confidential information.

### III. A. *The school counselor*

1. *shall use discretion within legal limits and requirements of the state in releasing personal information about a counselee to maintain the confidences of the counselee.*

2. *shall contribute pertinent data to cumulative records and make it accessible to professional staff (except personal factors and problems which are highly confidential in nature).*

\* \* \*

4. *shall cooperate with other pupil personnel workers by sharing information and/or obtaining recommendations which would benefit the counselee.*

5. *may share confidential information when working with the same counselee, with the counselee's knowledge and permission.<sup>73</sup>*

Dissemination may also be proper to parents:

### II. A. *The school counselor*

\* \* \*

3. *shall share, communicate and interpret pertinent data, and the counselee's academic progress with his parents.<sup>74</sup>*

Different terms are utilized in characterizing the range of professions with which the sharing of confidential information is allowed. Since the terms, "professional perimeter" and "professional cadre" appear to be synonymous with the "professional community", "professional community" will hereinafter be used to denote the accepted professions with which



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information is shared. It is to be noted that individual professionals have personal ideas as to the extent of the "professional community". The prevailing common denominator of a professional within the "professional community" is that the person be working toward the benefit of a mutual client.

The degree and amount of information shared, depends upon the capacity of the requesting professional. Only information pertinent toward the performance of the requesting professional's function would be disclosed.

In the case of the school counselors, parents and teachers are an important part of the therapy process. Parents are not professionals in the strictest sense of the word, but because of the minority of the clients and their filial concern, are utilized by the counselor. The extent of parental involvement would depend on the individual counselor's discretion.

Counselors and the Courts. A social worker's interaction with the court usually involves the detachment of a child from his family and foster home placement. The removal of the child generally results from child abuse/neglect, or stressful conditions potentially dangerous or detrimental to the child, or occurs in the hope that temporary separation of the family might relieve the problem.

In detaching a child from the family, the social worker may have to present negative information obtained in a professional-client relationship against the parents. Herein lies a conflict even when done on the basis of benefitting the child. To the social worker, this procedure is legally justified and can be rationalized ethically.

Since the social worker's focus is on the benefit of the child, some examination into the child advocacy concept must be made.

The goal of social work as a whole is best expressed in the opening paragraphs of the National Association of Social Workers Code of Ethics:

*Social work is based on humanitarian democratic ideals. Professional social workers are dedicated to service for the welfare of mankind, to the disciplined use of a recognized body of knowledge about human beings and their interactions, and the marshalling of community resources to promote the well-being of all without discrimination.<sup>75</sup>*

When dealing with a family unit, the ultimate goal is the well-being and preservation of the family. It is recognized, however, that not all strife situations can be

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reconciled and that the separation of the family may be the best course of action. Marital separation or legal removal of the child from the family are temporary devices used to halt discord. Longer term suspension of family relationships may be recommended or sought if the parties do not or cannot respond to treatment.

Reasons for the legal removal of a child from his family are "...the physical or mental illness of the parents, parental rejection, neglect and/or abuse, family breakdown and the child's behavioral problems".<sup>76</sup>

The social work profession recognizes that society is responsible to all children:

*The concept of parens patriae suggests that society has ultimate parental responsibilities to all children in the community. Therefore, when a child cannot be adequately cared for in his home, society must provide adequate alternative care. The child welfare agency is the formal institutionalized arrangement through which the community discharges such responsibility. The concern of the community, expressed through the agency, for all adequate care of all children requires the establishment of procedures and standards to protect the interest of all significant parties to the transaction--the natural parents, the child, the temporary or substitute parents. The agency, through the selection/licensing process, certifies that the approved foster family or adoptive home has met minimum standards of child care.*<sup>77</sup>

It should be remembered, however, that the parent is a client also. In justifying to the courts the need for the State to secure legal custody of a child, confidential information obtained from the parent-client is sometimes used against the parent.

Disclosure can be justified but the ethical problems of the disclosure do not escape the social worker. The question is reduced to "...the interest and rights of the individual in contrast to the demands of society".<sup>78</sup> In these situations the rights of the parents are subordinate to the responsibility to society, for it is argued that "protective services carry with them the force of community concern for children whose parents are not meeting their responsibilities".<sup>79</sup>

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In addition, the Hawaii statute<sup>80</sup> relating to child abuse/neglect or potential child abuse/neglect situations mandate that the interest of the child is paramount.

Thus, ethically and legally, social workers are child advocates. Responsibilities to the parent, however, are not dismissed. Removal of the child is not considered to be final, and simultaneous treatment of the parties involved is continued in hopes of a final lasting reunion.

If the social worker elects to pursue legal action in any case, a petition and a report are submitted to the court. The petition is merely a formal statement, outlining the specific reasons for the actions sought. The report assesses the familial situation. It includes only relevant information to the case, and excludes hearsay. Confidential information, whether for or against any client, is included if necessary. Finally, a recommendation is made.

It should be remembered that in all cases there is a potential for legal proceedings. This potential is usually not discovered and pointed out to the client until well after relations begin. The mention of the possibility of court actions from the social work counselor's view only hurts rapport and generates hostilities and anxieties on the part of the client. Since the percentage of cases actually reaching court is very small, the warning is dispensed with as unnecessary. When faced with uncooperative parents, instigation of court action is sometimes used as a warning, but never as a threat.

Complicating the matter is the lack of standard procedures for guaranteeing confidentiality. Some workers guarantee absolute confidentiality; some do not mention it until asked. Others keep their options open by telling the client that information is confidential until circumstances force disclosure. Counselors maintain these guarantees are made in good faith and not meant to lure the clients by entrapment. Parents, however, are not told that the child's benefit is primary concern.

When it becomes increasingly evident that the child may be removed from his home, the parents are then notified of the impending attempt for removal. It is also explained that it is for the child's, and in the long run, the family's best interest.

Although the report to the court is supposedly confidential to the court, some social workers review the contents prior to legal proceedings with the clients. The social worker attempts to make the parents understand why the action

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is being taken. Very few cases are contested. While the social worker is usually able to convince the parents that removal is the best alternative available, parents sometimes also assume a fatalistic attitude and believe that protest would be futile and resign themselves to the action.

In court, the social worker must testify if called upon, because he, as a representative of the State, is initiating the action. Testimony is presented in the presence of the parents and their attorney with opportunity for cross-examination.

Social workers view all legal proceedings and court actions for the benefit of the child, and parents are seen not as enemies but as clients in need of treatment.

Most legal removals of the child from the family result from child abuse/neglect. Child abuse/neglect cases are generalized by severity and time. They are differentiated into "hard" and "lesser" cases. "Hard" cases are considered to be cases in which the child is severely abused or when the police have referred the case. "Lesser" cases are borderline cases in which investigation must be first conducted to decide if the complaint is valid and, if necessary, what subsequent action should be taken.<sup>81</sup>

The time factor is important in determining whether a breach of confidentiality occurs. Time is simply distinguished as "before the fact", measured from the time a professional-client relationship is developed before abuse/neglect occurs; or "after the fact", i.e. when a professional-client relationship develops after the abuse/neglect. If a social worker has developed a professional-client relationship "before the fact", with access to confidential information, when the abuse or neglect occurs, the social worker may have to use confidential information obtained against the parents.

The Child Protective Service Unit (CPS), a short-term crisis intervention unit, investigates complaints of child abuse/neglect. Because the unit initiates the investigation, their clients are "involuntary". All of their cases fall in the "after the fact" category. This unit is strictly a child advocate unit since the focus is on the benefit of the child.<sup>82</sup>

Children involved in "hard" cases are immediately placed under PINS.<sup>83</sup> The social worker then has 48 hours in which to investigate and decide whether the State should apply for legal custody. In "lesser" cases it is harder to establish abuse or neglect. Investigation may include interviews with

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the parents, the child and even neighbors and relatives. Doctors are sometimes consulted to determine the degree of injury or the state of health of the child.

There is no standard procedure to investigate child abuse/neglect. The problem is first outlined to the client. Some workers warn the clients that they may be taken to court; others do not. Confidentiality is brought up by some and not others.

Social workers investigating abuse and/or neglect feel that there is a conflict within their roles that is difficult to justify to the clients. They are on the one hand, helpers; and on the other, accusers.<sup>84</sup> While the child must be protected, by the same token, the parents cannot be ignored. Social worker sentiment generally appears to be that since parents suffer more than the child, they deserve more compassion and although their actions are not considered within the norm by society, being triggered by emotional disturbance or an abnormal psyche, the parents should be treated and not condemned.

Recognizing that the social worker who, in effect, "accuses" the parents cannot maintain a working level of rapport, the case disposition from court is referred to a follow-up worker to effectuate family reconciliation. The court usually orders the new social worker to submit progress reports. Confidentiality does not appear to be an issue because the client as well as the worker understands that presentations must be made to the court.

Social workers of the private social service agencies are usually involved in the treatment in the aftermath of child abuse/neglect. Clients, after passing through the Child Protective Service Unit, may choose to leave the state agency for a private one. If the private agency discovers or suspects child abuse/neglect "before the fact", it would submit a complaint to the Child Protective Service Unit. Social workers of private agencies also testify if called upon for the legal removal of their child-client.

Public health nurses are more apt to be involved in child abuse/neglect cases. By law, nurses are required to report suspected abuse or neglect. In these types of cases, the child's benefit is the primary concern. Advance warnings in the initial contacts with clients of the potential for legal proceedings are usually not given. While testimony against the parent-client is distasteful, it is rationalized as necessary by law and intended for the best interest of the child.

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The public health nurses do not want the stigma of involvement in court. Public health nurses who were subpoenaed and who testified negatively against their clients encountered resistance and strain after renewing relations. Rapport was eventually regained, but not to the previous level enjoyed, and only after a considerable amount of time.

Friction also appears to be developing in the social worker and PHN-client relationship. Information conveyed by the public health nurse to the social worker in a professional capacity is sometimes included in the abuse/neglect-connected report to the court. Public health nurses feel that DSSH social workers are using them to corroborate and strengthen their positions in child abuse/neglect cases and that this situation is unfair because they must renew relations with the client, while the social worker is sometimes changed if rapport cannot be re-established. Geographic boundaries make it difficult and impractical for a public health nurse to change clients. The rapport lost by the public health nurse is replaced by personal hostility and mistrust.

The public health nurses also do not relish the role of being reporter to the court. As previously mentioned, the court sometimes asks the public health nurse to supervise and evaluate the trial visitations of separated families. They feel that it is not their function to monitor social behavior which is impractical and a waste of time because the parents obviously will not display any bad traits while under observation. More importantly, they feel trust and rapport may be hindered or even lost.

Public health nurses find testifying in court very difficult as they do not view their role as an enforcer of the child abuse/neglect laws. While the public health nurses would be most happy to pursue their professional objective, health problems, they realize circumstances have forced their entrance into the social services and enforcement area.<sup>85</sup>

Reasons for court appearances of the outreach counselor and regular school counselors could not be ascertained, although such appearances do not appear to occur with any frequency.

Classical Confrontation. The "classical confrontation" is the conflict of the obligation to society with the obligation to the client. Theoretically, all the professions examined can experience the "classical confrontation". The "confrontation" involves whether or not the divulging of a perpetrated or contemplated crime by a client to a professional in confidence should be disclosed to third parties.

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Although the consensus of the professions is that all confidential information cannot be disclosed or acted upon without the consent of the client, given a "confrontation" situation, the time variable intersecting with the magnitude of the crime will ultimately dictate the decision of the professional to disclose or not. The time factor simply is whether the crime occurred before the client revealed the act to the professional, a "past crime", or if the client reveals the intention of committing a crime, a "future crime". The magnitude of a crime is classified as a "major" or "minor" crime. Loss of life or the serious intent to inflict self-injury or bodily harm to a third party is generally considered to be a "major crime". These four variables, intersecting into four different situations constitute a framework into which a generalization of the professional's actions may be made. The four situations are the "past-minor", "past-major", "future-minor" and "future-major" situations. These types of situations are rarely experienced by the professional. The Bureau's investigation did not uncover any situation involving the "major situations". In each of these situations, the individual professional's personal standards seem to override professional standards. The following is the general course of actions the professional would take in a "classical confrontation" situation.

In the "past-minor" situation, the consensus of professionals state that confidentiality would be maintained. An example of this type of situation is the disclosure by a client to a professional in confidence of a burglary. The natural course of action of the professional would be to persuade the client to report himself to the proper authorities. The reasoning behind the advice is that it would soothe the client's conscience; a conviction that a transgressor of society's laws must face the consequences; and, the belief that if the client is not caught he would forever "be on the run". Failing to persuade the client into turning himself in, most professionals would not betray confidence.

In the "past-major" situation, actions would vary with individual professionals. The consensus of professionals also dictates that, ethically, the information should be kept confidential. Again, the professional would try to persuade the client into reporting himself to the proper authorities. Failing to do so, a few professionals feel that as law-abiding citizens, they should report the matter to the authorities. Prevailing practice of the majority, however, is to keep the information confidential.

In the "future-minor" situation, the consensus of professionals appears to be that, ethically, the information should be kept confidential. Failing to persuade the client

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to desist from his contemplated action, most professionals feel that ethically they cannot take any action. Practice, however, varies with the individual professional. Some professionals would personally intervene during the contemplated action. For example, the professional would appear at a gang fight site and try to break it up himself. Theoretically, this would be a breach of confidence to the client who told him about the fight. Professionals, however, maintain that the client in relaying the information is subconsciously asking for help. Prevailing practice in the "future-minor" situation is to keep the matter confidential for reasons of professional ethics.

In the "future-major" situation, while the consensus of professionals seem to indicate that, ethically, disclosures of this type by the client remain confidential, this position, however, is overridden by and replaced with personal standards. Failing to persuade the client out of his intentions of committing a major crime, the professional would subordinate ethics and act upon the dictate of his conscience. Subsequent actions of the professional would vary, but the victim's welfare would be given priority interest. Some of the actions which would be taken are an anonymous phone call to the police or to the intended victim, removal of the victim to safety, the consultation of another professional, or outright disclosure to the police. Those actions in which the professional personally intervenes are rationalized as not being a breach of confidence. All actions are intended to be for the client's best interest, whether or not they result in a breach of confidentiality.

The professional has very little conflict when the crime or intended crime is of a minor nature. Individual conscience manifests itself when the professional encounters a major crime, i.e. bodily injury or loss of a life. While professionally, all of the groups examined are to be theoretically dispassionate and clinical, when, however, the client poses a danger to society, the professional must alone or in consultation with colleagues decide the seriousness of the threat to society and act accordingly.



## Chapter IV

### THE BASIS FOR PRIVILEGED COMMUNICATIONS

This chapter discusses and examines the legal theoretical bases for a grant of privileged communication and certain aspects of four surveyed professions that involve the privilege tests. The professions covered are the social worker, school counselor, outreach counselor, and public health nurse.

#### The Wigmore Tests

Wigmore argues that:

*...four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:*

- (1) The communications must originate in a confidence that they will not be disclosed.*
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.*
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.*

*Only if these four conditions are present should a privilege be recognized.*

Wigmore insists the four conditions he describes are generally recognized and accepted by the courts nationally and that these tests must govern the grant and the specific application of all privileges.

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However, Wigmore's own evaluation of privilege in the middle of this century finds that these four conditions are either not, or are doubtfully, present in the cases of the four most commonly observed privileges. In the attorney-client privilege, Wigmore first states that all four conditions are met, and then casts doubt on the fourth. He questions whether the withdrawal of privilege would result in injury to the client-attorney relationship greater than the benefit gained "for the correct disposal of litigation".<sup>1</sup>

In the case of the spousal privilege, Wigmore states that the first three conditions are "clearly" met, though the fourth is in doubt. However, he also raises a question as to the presence and application of the first condition, i.e. that the communication originate in confidence.

Recognition of the physician-patient privilege is a "fallacy", he argues, in that the second criterion, the essential nature of confidentiality, and the fourth, the greater injury to the relationship engendered by disclosure, are simply not present.<sup>2</sup>

Dean Wigmore approached the clerical-penitent privilege with the observation that "...the objection to its recognition has probably lain in the tacit denial of the third condition", that is, that general community opinion does not think the penitential relationship is one which "ought to be sedulously fostered".<sup>3</sup> However, Wigmore found no cases in the United Kingdom or in the United States denying clerical privilege for this reason. Instead, he found a widely wavering support for, and denial of, clerical privilege during the three centuries following the Reformation in Britain, and concludes stating, "On the whole, then, this privilege has adequate grounds for recognition".<sup>4</sup>

The general rule, since the late 1700's, has been that the fact a communication was made in the gravest and most explicit confidence, or under the mutually assumed implication of confidence and secrecy, did not create a privilege. This rule is fairly uniformly recognized today in all common law jurisdictions, though there are occasional exceptions. Wigmore cites many American cases which assume or apply this doctrine to claims of privilege for communications to clerks and articulated clerks, commercial agents and factors, trustees, bankers, brokers, sureties, journalists, and accountants among others.<sup>5</sup> No pledge of privacy or oath of secrecy would avail against a court's demand for testimony in cases involving these professions.

During Wigmore's time, however, there did appear statutory grants of privilege to certain professions other than

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doctor, lawyer, and priest. To place a proper light on privilege for these professions, Wigmore and McNaughten cast back twenty-five years to find:

*The sounder attitude, the one reflected by the bench and bar, appears in the report of the American Bar Association's Committee on the Improvement of the Law of Evidence in 1937-38. The Committee's personnel consisted of five members (three being judges), and sixty-five advisory members (one from each state and territory and fifteen at large, these being chiefly professors of the law of evidence), thus providing a veritable cross section of professional opinion. The relevant part of their report is as follows:*

*Novel Privileges. Of recent years, there have appeared on the statute book [sic] of several Legislatures certain novel privileges of secrecy. Their history has not been traced; but they bear the marks of having been enacted at the instances of certain occupational organizations of semi-national scope. The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long established privileges for certain professional communications.<sup>6</sup>*

McNaughten further notes that the Model Code of Evidence (1942 edition) and the Uniform Rules of Evidence (1953), approved by the National Conference of Commissioners on Uniform State Laws, "excluded all of the so-called novel privileges".<sup>7</sup>

### 1. The Origin in Secrecy Test

Wigmore's first test of privilege requires that the communication originate in a confidence on the part of the client that what he reveals will not be disclosed. Since the origination in confidence test is one based on the subjective intent of the communicator, it becomes very difficult to apply this test factually to determine whether the test is met in a given situation.

In one law review article, the following observation is made:

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When anyone reveals his innermost feelings about himself, his family and his closest friends, he naturally desires that his statements be kept secret; but it is a different thing to say that he is confident that they will be. Thus it is arguable whether the expectancy of confidentiality in the social worker-client relationship is inherent or emanates from the social worker's explicit or implicit assurances of secrecy. If evidence were uncovered which revealed that the majority of clients do not go to a social worker expecting confidentiality but only desiring it, then some doubt would exist as to whether the social work profession fulfills Wigmore's first requirement. However, the answer may be that because the social worker probably assures his client of confidentiality at the outset of an interview, most communications are made after a "confidence that they will not be disclosed" has been established, thus satisfying the requirement.

But it may be that at least some clients come to the social workers knowing that they have no privilege, because they have consulted a lawyer in contemplation of litigation or are already experienced in such matters. Communications made under such circumstances could never originate "in a confidence that they will not be disclosed."<sup>8</sup>

Another law review article suggests consideration of several objective factors applicable to a school counseling situation.

One possible objective factor is the setting in which the communication arises. A conversation between two persons in a private room, for example, would seem more likely to originate in confidence than the same conversation in a crowded room. The existence of auditory and visual privacy in the counseling relationship is a recognized counseling principle.... The physical setting within which counseling generally occurs, therefore, suggests that the communications originate in confidence.

Another factor which may indicate whether communications arise in confidence is the nature of the matter communicated. Since few persons willingly reveal matters of a personal or incriminating nature unless they feel they can trust the confidant, these matters would generally originate in confidence. It is unlikely that a student would communicate with

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counselors regarding matters of a personal nature, such as delinquency or drug use, any more than he would communicate such matters publicly, unless he felt the counselor would not disclose the information. In fact, the student would even be less likely to confer with a counselor than with the general public since the counselor is frequently known to be directly associated with the school authority structure.

An additional factor might be the presence of either an explicit or implicit assurance of confidentiality. For instance, where the confidant expressly promises not to disclose the conversation, communications arising after this assurance would appear to have originated in confidence. Even in the absence of any explicit assurance, however, other factors such as the setting of the communication may combine to produce an implicit assurance. Before the counselor can establish a relationship with a student he must initially obtain the student's trust. The critical element in the establishment of the necessary trust is an explicit assurance by the counselor of the confidentiality of the communications. Moreover, considering the setting within which counseling occurs, the nature of the matters discussed, and possible actions on the counselor's part, the student is often implicitly assured of confidentiality....

The relative positions maintained by the parties may also indicate whether the communication arose in confidence. For example, confidential relationships are often legally protected where the parties do not deal on equal terms, causing the weaker party to place his trust in the dominant party. A student usually comes to the counselor because he feels that the counselor can help him. Since the counselor is trained to help the student, the student places himself in the counselor's hands in order to benefit from the counselor's expertise. In a situation where this disparity in the power and knowledge of the parties exists, there is a great likelihood of and need for trust and confidence between the parties.<sup>9</sup>

### 2. The Essential Confidentiality Test

Wigmore's second test of a privilege requires that the element of confidentiality be essential to the full and

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satisfactory maintenance of the relationship. In this context Wigmore never defined what he meant by the term "confidentiality". By inference it is apparent he employed this term interchangeably with the term "trust", likewise undefined. The purpose of this second test or criterion is further to restrict testimonial privileges to those relationships which depend upon the free and open communication of matters of a personal, or incriminating, nature. For example, the attorney-client relationship depends heavily upon the free disclosure of potentially incriminating or otherwise damaging matter, since the client is usually not aware of what information is necessary to permit the attorney to be of assistance. Without free and unreserved communication, such relationships would be rendered largely ineffective. It has been argued, in the instance of school counseling, that a similar situation exists.

*The student-counselor relationship is characterized by a similar need for free and open communication, especially in the area of personal problem counseling. It is a basic principle of counseling that the student should be encouraged to discuss his problem freely in the hope that he will arrive at a better understanding of himself with a minimum of guidance from the counselor. If positive assistance is warranted, however, the counselor must then have the necessary facts in order to adequately assist the student. Furthermore, when acting as a referral agent, it is even more essential for the student to openly discuss his problem in order for the counselor to make a proper referral. In the absence of a feeling or assurance of confidentiality in any of these situations, it seems unlikely the student will be inclined toward free disclosure of personal or incriminating matters. Without student disclosure, the role of the counselor may be rendered largely ineffective. Considering the trend toward increased personal-problem counseling and its concomitant likelihood of involving matters of either a humiliating or incriminating nature, the necessary free and open communication will probably not be achieved unless the counselor can provide students with an assurance of confidentiality.<sup>10</sup>*

### 3. The Favored Occupation Test

Dean Wigmore's third test for a privilege requires the professional relation to "be one which in the opinion of the community ought to be sedulously fostered". In other words,

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the society's consensus must be of such depth and pervasiveness that it demands a public policy which fosters, encourages, and protects the profession, its practice, and the resulting professional relationships.

A possible means of evaluating whether this test is met is through an examination of roles of a particular professional relation in a community.

*...Some of the people who seek the services of social caseworkers are:*

*married couples, torn by discord or temporarily in conflict with each other; parents baffled by their child's behavior or distressed over their relationship with him; childless couples who want to complete their family through adoption; unmarried mothers who need help in planning for their own and their child's future; persons of all ages who, owing to unemployment, chronic illness, or desertation require public assistance funds in order to maintain a normal life; industrial workers beset by difficulties that are endangering their capacity to hold a job; persons whose lives have been disrupted by long or severe illnesses or incapacity and who need help in regaining their place in society; adolescents who need guidance in choice of a vocation or in making healthy social relations and whose ties with their parents are strained [and] aging persons who need to readjust their lives following retirement or who are incapacitated by illness.*

*If the social work profession is capable of helping such persons learn to make their lives more useful to themselves and society, then there is little doubt that the social worker-client relationship "ought to be sedulously fostered." If it is not able to help them, then no privilege should be granted.<sup>11</sup>*

With regard to school counselors, the observation has been made that because of the deleterious effect which testimonial:

*...privileges have upon the truth-finding process, they have been extended only to those relationships which are deemed to be of sufficient social value*

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to justify protection. Although a determination of the relative societal importance of any particular confidential relationship will necessarily involve some subjective value judgments, that importance will frequently be suggested by an analysis of the societal function which is served by the confidential relationship in question.

Generally stated, the function of school counseling is to help students better understand themselves and their environment. From a role traditionally confined to rendering educational-vocational assistance, school counseling has expanded to encompass problems of a more personal nature. In light of the rising incidence of personal problems, the counselor is particularly well-suited to assist students in the resolution of these problems by virtue of both his increased training and his strategic position within the school. Although a large segment of the public is relatively unaware of the counselor's function, its value has not gone unrecognized.

Some indication of a growing societal recognition of the importance of school counseling is the inclusion of counseling programs in the vast majority of educational systems.... Further evidence of societal recognition of the need for adequate counseling services for all students is the increasing rigidity of counselor certification requirements.<sup>12</sup>

Application of this test to the professional relationships of the public health nurse raises the question of a definition of the profession of nursing generally, and of public health nursing specifically. The belief that the physician's privilege of communication is sufficiently broad fully to encompass the protection of the patient's communication to nurses is commonly argued. This treats the profession of nursing as dependent, ancillary, and subordinate to the licensed practice of medicine. Excluded here is any recognition of the consultative, advisory, and prescriptive services nursing now provides, and particularly provided by the public health nurse.

On the other hand, W. R. Habeeb has written:

*Summarizing the decisions [on issues of nurses' privilege]...it appears that there is a conflict on the question whether the statutes which merely extend the privilege to physicians and surgeons*



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include nurses by implication. In a number of cases the privilege has been denied, the courts taking the view that the statutes, being in derogation of the common law, should be strictly construed and limited to those persons specifically named, whereas, in other cases, the privilege has been recognized, the courts taking the view that the privilege extended to the physician would be ineffective if the nurse is permitted to testify. Even in the jurisdictions recognizing the privilege, however, the nurse will be required to testify if she is acting as an independent person and not as an assistant or agent of the physician or surgeon.

As heretofore indicated, some of the statutes expressly extend the privilege to nurses. But it seems that such privilege is limited to communications necessary to enable nurses to act in their professional capacity.<sup>13</sup>

Holding that statements made to a public health nurse by a person whom she was investigating as a tubercular case, and her observations as to his condition, were not privileged communications, the court in *Wills v. National Life & Accid. Ins. Co.* (1928) 28 Ohio App 497, 162 NE 822, said: "As to the testimony of the public health nurse we think there can be no question, because she is not a physician, and is not named in the statute relating to privilege communications, and while there are some authorities which hold that, even as to a nurse, the communication is privileged, yet we find upon examination of the cases cited that the reason for the holdings can be attributed to the provisions of the local statute, and consequently those authorities are not applicable in a state where a nurse is not included among those named in the statute defining privilege communications."

Further, Habeeb cites the fact that even in a state granting a statutory privilege to "registered" or "professional" nurses (New York), the privilege has been limited by the state courts to those communications necessary to enable nurses to act in their professional capacities.

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*...in Re Avery's Estate,...it was held that a visiting nurse was properly permitted to testify that the deceased patient was mentally alert at all times; that his memory was good; that he expressed interest in his farm and the prices of produce; that he related to her the history of his farm and many events concerning neighbors, and appeared to be interested in life. The court stated that this testimony could not be barred as a confidential communication between patient and nurse, since the witness testified only to what she observed and not to any matters that might have been communicated to her by the decedent to enable her to act in her professional capacity, the information being such as any layman would have testified to.*<sup>14</sup>

### 4. The Balance of Damage Test

Dean Wigmore's final test of a privilege requires that the injury to the professional relation caused by the compulsory disclosure of a communication must be greater than the benefit thereby gained for the correct disposal of litigation. The application of this measure is uneven. On one side, the lack of privilege is applicable to, and affects, the entire professional function in every professional contact with all clients served in the jurisdiction. On the other, the power to compel the professional to testify is applicable to a single case at a time, and these cases are limited to those in which a professional's testimony would be relevant.

Wigmore's final test requires some measurement of the "injury" to the professional relationship arising from the deprivation of privilege. This estimate must be made of the fact that the client's relationship with the caseworker, the counselor, or the nurse is wholly dependent upon the client's continued perception of an intimate mental trust and rapport resulting in help. These professions have argued for decades that any possibility of disclosure jeopardizes this very personal, tenuous, and intimate mental relationship.

Contrariwise, argument has held that the "single case at a time" benefit fails to represent the facts which prevail. The existence of privilege for a given profession provides practitioners with a protective stance when first contacted by an investigating law officer. These observations apply equally to the social worker, counselors, and the public health nurse. Hence, the balance of damage to criminal litigation in a jurisdiction granting privilege would be broader.

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Application of this test requires a legislature or a court to make a value judgment:

...balancing the injury that will be done to the [professional] relationship by disclosure plus the frequency with which disclosures may occur, against the benefit gained by the correct disposal of litigation. Naturally, the working relation between a social worker and his client is destroyed whenever the social worker testifies against his client....

Judging by the scarcity of reported cases in which a social worker-client privilege was at issue, it can be assumed that caseworkers are not frequently compelled to testify....

Against these facts and speculations as to the harm that results from forced disclosure and the frequency with which disclosure occurs, society's interest in the correct disposal of litigation must be balanced. That interest is obviously great, but does not seem to have a constant value, i.e., society as a whole has a greater interest in the correct disposal of a charge of murder than it has in a charge of peace disturbance arising from a marital quarrel. Thus the answer to Wigmore's fourth requirement can be viewed as depending upon the facts of the particular case rather than a predetermined evaluation. For example, the correct disposal of the murder charge probably outweighs any injury that would inure to the social worker-client relation. But the desirability of preserving a marriage of thirty years seems to override the benefit which would be gained by the correct disposal of the charge of peace disturbance.<sup>15</sup>

Much the same may be said of the counselor and the public health nurse. One evaluation of the student-counselor relationship in the light of this test has maintained:

The harm to the student-counselor relationship resulting from in court disclosure must be weighed against the benefit inuring to the administration of justice by full disclosure. Complete disclosure of all available evidence increases the likelihood of accurate disposal of litigation. While few question the legitimacy of this interest, it is difficult to make an abstract determination of its value since so much depends on the facts of each

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case. In a given case, for example, the value of particular evidence may vary depending upon whether the trial is civil or criminal and whether the claim is of major or minor proportions. The importance of particular testimony may also vary depending upon the availability of other evidence. For example, if a witness is only going to corroborate other testimony, the benefit to justice may be less than if the testimony were necessary to establish an essential element of the case. Despite the aforementioned difficulties in ascertaining the precise benefit to justice, however, there remain several means of achieving some estimation of that benefit.

Further, it has been:

...suggested that exclusion of the counselor's testimony may unduly burden juvenile court proceedings. More specifically,...a testimonial privilege would prevent the court from receiving all of the information necessary for reaching a decision in the best interests of the youth.... There are independent indications that the juvenile proceedings will not be impaired. As with most privileges, a testimonial privilege for the student-counselor relationship could be waived by the student where he felt that counselor disclosure would be in his best interest.... Another indication is that, even where the student is reluctant to waive the privilege, a good possibility still exists that either the counselor or his parents could persuade him that the disclosure would be in his best interests. A final consideration is the possible effect which counselor disclosure could have in such proceedings when it is against the student's wishes.

There seems to be a good possibility that such disclosure would greatly decrease the chances that the student would ever again readily place his trust in other persons. Since this trust is critical to the rehabilitation of the youth, and since the purpose of juvenile proceedings is to ultimately effect such rehabilitation, the lack of a privilege, and not its existence, could hamper the effectiveness of those proceedings. The precise effect is, of course, speculative.<sup>16</sup>

## **Chapter V**

### **THE WIGMORE TESTS IN APPLICATION**

#### **Counseling Profession Surveys**

During the course of the study, two surveys, a year apart, were undertaken by the Bureau. The surveys questioned the social workers, school and outreach counselors, and public health nurses. In addition, psychiatrists were polled as a group having privileged status. The text of the surveys, referred to as Survey I and Survey II, are set forth in the appendices. Table 1 shows the number of individuals canvassed and responding.

The intended purpose of Survey I of the counseling professions was to learn something about professional attitudes of the various practitioners, based on individual reactions to hypothetical "classical confrontation" situations. Additionally, some background information as to education, experience, type of work, and nature of clientele was sought.

Survey II was intended to ascertain whether, and to what degree, actual need for a privilege of nondisclosure was demonstrated by the professions in practice.

Relevant selected results of the surveys are discussed in the application of the Wigmore tests to the surveyed professions.

#### **Wigmore: Origin in Secrecy Test**

As previously stated, this test is difficult of application since, according to Wigmore, the test is to be measured by the subjective outlook of the communicant. Use of proxy objective standards to ascertain the communicant's state of mind may be the only feasible method of so determining. Such objective factors would include, for example, the setting in which the professional interviews or confers with the client, e.g. the school or agency office or the home and the one-to-one basis in which a conference takes place. The possible situations in which objective factors might negate the idea that communications originate in secrecy are where a group, rather than one individual, is involved in the counseling and where the family as a unit is being counseled. In the Bureau's judgment, most of the communications from the clients of the surveyed professions do originate in confidence.

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Table 1

PROFESSIONS SURVEYED: TOTAL CANVASSED, TOTAL RESPONDING,  
BY COUNT AND PERCENTAGE, STATE OF HAWAII

Profession	SURVEY I			SURVEY II		
	Total		Responses as % of Total	Total		Responses as % of Total
	Canvassed	Responding		Canvassed	Responding	
Outreach Counselor, detached worker <sup>1</sup>	38	29 16** Average 23	76.3% 42.1** 59.2	39*	25	64.1%
Public Health Nurses <sup>2</sup>	127	59	46.5	115*	73	63.5
School Counselors & social workers <sup>1</sup>	222	132	59.5	212*	127	59.9
Social workers <sup>3</sup>	380	181	47.6	376*	183	48.7
Psychiatrists <sup>4</sup>	<u>49</u>	<u>28</u>	<u>57.1</u>	<u>49</u>	<u>32</u>	<u>65.3</u>
TOTALS	816	423	51.8%	791	440	55.6%

\*Adjusted for personnel changes in one year period.

\*\*The outreach counselors were sent questionnaires in two parts.

<sup>1</sup>Composed of Hawaii State Department of Education Personnel.

<sup>2</sup>From list of all public health nurses in Hawaii furnished by State Department of Health.

<sup>3</sup>Includes counselors and social workers in State departments of education, health, and social services and housing and non-retired, non-military, non-student members of the National Association of Social Workers, Hawaii Chapter.

<sup>4</sup>List compiled from state telephone directories.

### Wigmore: The Essential Confidentiality Test

To the professions surveyed, essential confidentiality is equated with the element of rapport. From interviews, a substantial number of some of the practitioner groups, i.e. outreach counselors and certain social workers, feel strongly that establishment of a sense of rapport between the client and the counselor is absolutely essential to the fostering and maintenance of the counselor-counselee relationship. Interviews, however, also indicate that rapport with clients is in fact being achieved and maintained in spite of procedures, which appear to be anti-rapport in nature, practiced by certain practitioner groups. These procedures are of two types. First, there exists the apparently general practice of most school counselors that a student-client should not disclose to the counselor anything which the student does not desire to be passed on to a third party if, in the judgment of the counselor, disclosure would be to the student's best interest. It should be noted that, by and large, although this caution is given, the counselor generally does not reveal what is communicated. Secondly, conflict occurs in the use of the "family unit" practice primarily by certain groups of social work counselors and public health nurses, particularly in child custody and placement and child abuse cases, together with the application of the best interests of the child principle. Incompatibility occurs because under family unit practice, the entire family, which is composed of several individuals, is considered the client. However, when a specific situation materializes requiring disclosure, which in the judgment of the professional is for the welfare of the child but which may incidentally be adverse to the parent, the counselor will make disclosure. This anti-rapport conduct is rationalized or minimized in several ways. One, there is a change in characterization of the clients, the child being denominated the "primary client", the others, secondary clients. Secondly, attempts, often successful, are made to persuade the secondary clients into permitting disclosure.

The Survey I questionnaire included a question to ascertain the degree of necessity of rapport in the view of the surveyed professions. The question asked whether based on experience, statutorily granted privilege was unnecessary, nice to have, helpful to achieve rapport and absolutely necessary. The results are displayed in Table 2.

Other than the responding outreach counselors group, which was about evenly divided between items b, c, and d, the remaining surveyed professions ranged from roughly a fifth to a third who thought privilege was absolutely necessary. Of the latter group, 10 to 15 per cent thought privilege didn't

Table 2

DEGREE OF NEED FOR GRANT OF STATUTORY PRIVILEGE  
FOUR COUNSELING GROUPS

	OUTREACH COUNSELORS <sup>1</sup>		PUB. HEALTH NURSES <sup>2</sup>		SCHOOL COUNSELORS <sup>1</sup> & SOCIAL WORKERS		SOCIAL WORKERS <sup>3</sup>	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
(a) Virtually unnecessary	0	--	3	5.1	2	1.5	8	4.4
(b) Nice to have but can do without	5	31.3	6	10.2	21	15.9	26	14.4
(c) Necessary - it would ease the establishment of rapport with some students, patients, or clients	5	31.3	38	64.4	64	48.5	78	43.1
(d) Absolutely necessary to the adequate performance of any counselor	6	37.5	11	18.6	37	28.0	61	33.7
(e) No answer			1	1.7	8	6.1	8	4.4

<sup>1</sup>Composed of Hawaii State Department of Education Personnel.

<sup>2</sup>From list of all public health nurses in Hawaii furnished by State Department of Health.

<sup>3</sup>Includes counselors and social workers in State departments of education, health, and social services and housing, and non-retired, non-military, non-student members of the National Association of Social Workers, Hawaii Chapter.



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matter, presumably because their work did not involve confidential situations. A substantial portion, from about one-half to two-thirds believed privilege would ease rapport. Of the four groups surveyed, the social workers and outreach counselors apparently feel the strongest, based on their experiences, that a grant of privilege is absolutely necessary. Public health nurses feel the least strongest. School social workers and counselors are not as strong in their feelings as outreach counselors although both groups deal with the same clientele, i.e. students.

In summary, although the survey indicates a consensus (44.4 per cent) of all groups that a grant of privilege would ease rapport, according to the Wigmore test, that the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties appears not to be strongly indicated from the surveyed professions as a group (27.5 per cent).

### Wigmore: The Favored Occupation Test

Whether the surveyed professions are to be given preferred treatment is a test to be properly measured by community assessment. This community assessment, in a way, can be ascertained nationally by a review of the trends of the extension of privilege to counseling type professions and occupations in other jurisdictions. Accordingly, the Bureau as part of the study conducted a survey of what other states have done with respect to the granting of privilege to counselors.

State Activities in the Area of Privilege Communications. Within the last three years fifteen states have extended privilege to communications made to school counselors. Of these, ten appear to be a complete grant for all communications.<sup>1</sup> The other five have limited or qualified the grant. For example, both Connecticut and Maryland have restricted the grant to those communications concerning drug abuse.<sup>2</sup> Nevada excepts from the grant, communications about any criminal offense punishable by death or life imprisonment.<sup>3</sup> North Carolina provides for the privilege unless it is necessary to obtain testimony for the proper administration of justice, in which case the privilege is overruled by the court.<sup>4</sup> Pennsylvania excepts from the grant of privilege, communications relating to child abuse.<sup>5</sup>

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Nurses have been granted a statutory privilege in seven states. Arkansas,<sup>6</sup> New York,<sup>7</sup> Oregon,<sup>8</sup> and Vermont,<sup>9</sup> appear to give a complete privilege. Connecticut limits the privilege to nurses serving in schools and to communications dealing with drug abuse or alcoholism.<sup>10</sup> Montana<sup>11</sup> and Pennsylvania<sup>12</sup> also limit their grant to nurses employed by a school, while Pennsylvania further limits the grant by excepting communications about child abuse.

Only five states grant privilege to social workers. California grants privilege to social workers engaged in psychotherapy of a nonmedical nature.<sup>13</sup> Louisiana appears to be the only state granting privilege to all communications to a social worker.<sup>14</sup> Michigan excepts from its grant of privilege situations where disclosure is part of the required supervisory process of the agency.<sup>15</sup> New York<sup>16</sup> and Utah<sup>17</sup> make similar exceptions from the grant by excluding communications indicating that the client is contemplating a crime or harmful act or made by a client child under sixteen which indicate that the child is the subject of a crime.

No state appears to extend a grant of privilege to the occupation of outreach counselors.

The conclusion which may be drawn from the survey of other states is that if any trend exists in extending privilege among the states it has only recently appeared in relation to school counselors, and there is no discernible trend with respect to the other counseling groups. Another observation which can be made is that in those jurisdictions in which privilege was extended to a counseling profession, the legislation was enacted apparently without any in-depth study of the matter before passage.

### **Wigmore: The Balance of Damage Test**

If Wigmore's last test were confined to a weighing of the positive against the negative effects of granting privilege to a counseling professional, the test might be easier to apply. However, this balancing must take place specifically with respect to the correct disposition of litigation. In attempting to apply this test as envisioned by Wigmore, the Bureau suggests that the following points uncovered in our research have a bearing on the test, although in the final analysis, what weight is to be given to these considerations rests with the policy maker.

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Response of Law Enforcement Agencies. A survey was undertaken in 1974 by the Bureau of the police chiefs and prosecuting attorneys of the four counties as to what their position would be with respect to the advisability of a statutory grant of privilege to social workers, outreach workers, school counselors, public health nurses, psychotherapists, and psychologists. All prosecuting attorneys' offices<sup>18</sup> and police departments (with the exception of the Kauai Police Department, which did not respond) were unanimous in their opposition to extending privileged communication to counselors for the reason that criminal investigations and rehabilitation of a criminal would be impeded.

Burden on Conscience ("Classical Confrontation"). Generally, all of the counseling professionals expressed a belief that in dealing with their clients, and with respect to whether disclosure of confidential information would be made under a given situation, the professional has to weigh his duty to society versus his duty to the client. In terms of degrees of conflict, this concept has been discussed previously in Chapter III as the classical confrontation situation.

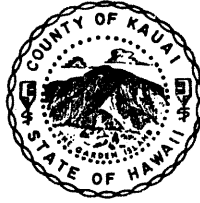
Survey I attempted to ascertain in a theoretical sense, the degree of effect on the conscience with the question that because privilege would silence a counselor, would the "...undisclosable knowledge...be too demanding mentally or too much of a burden for your conscience." There was general agreement that it would not be (see Table 3).

However when the result of the above abstract answer is compared with answers to a series of hypothetical questions bringing out a forced disclosure situation and past minor and future classical confrontation situations, there does appear to be situations in which, despite the foregoing assertion that a counselor's conscience would not be bothered, that in fact a counselor's actions will be affected by his duty to society. This feeling that there is a duty to society, superseding duty to client, is most pronounced in the "avoidance of future harm" situation. That is, if a situation develops whereby revealing the confidences of a client, a counselor can avert harm or injury to a person other than the counselor's client, the counselor will do so, although disclosure may occur in indirect ways. On the other hand, the survey revealed a general consensus that confidences with respect to a past "minor" infraction by a client would not be disclosed.

Tables 4 and 5 display the results of answers to hypothetical situations posed to the four counseling groups. While the hypotheticals were not precisely identical, they

Exhibit 1

GERALD S. MATSUNAGA  
PROSECUTING ATTORNEY



COUNTY OF KAUAI  
OFFICE OF THE PROSECUTING ATTORNEY  
ROOM 210, 3016 UMI STREET  
LIHUE, HAWAII 96766

September 23, 1974


Ms. Letitia Uyehara, Researcher  
Mr. James J. McCarthy, Researcher  
Legislative Reference Bureau  
State of Hawaii  
State Capitol Room 004  
Honolulu, Hawaii 96813

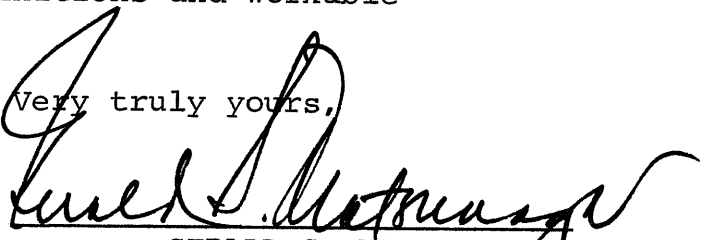
Dear Ms. Uyehara and Mr. McCarthy:

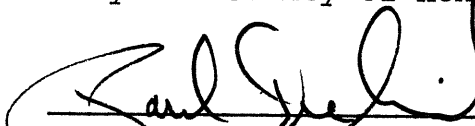
The State Prosecuting Attorneys' Committee met on June 21, 1974, and June 22, 1974, to discuss your inquiry pertaining to privileged communication as mandated by the 1974 State Legislature in Senate Resolution 263.

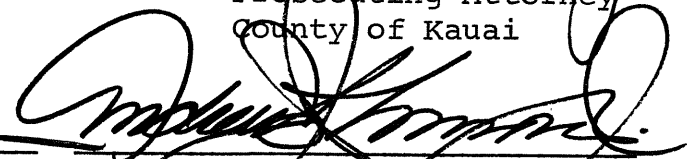
The Committee has unanimously agreed to oppose any extension in the area of privileged communication until such time as clearer definitions and workable guidelines are established.

Very truly yours,

  
BARRY CHUNG  
Prosecuting Attorney  
City and County of Honolulu

  
GERALD S. MATSUNAGA  
Prosecuting Attorney  
County of Kauai

  
PAUL DE SILVA  
Prosecuting Attorney  
County of Hawaii

  
ANDREW JOHNSON  
Deputy County Attorney  
County of Maui


  
HIROMU SUZAWA  
Deputy Attorney General  
State of Hawaii

Table 3

## SURVEY I

WOULD SILENCE OF PRIVILEGE BE TOO GREAT A BURDEN ON CONSCIENCE?  
RESPONSES OF FOUR COUNSELING GROUPS

RESPONSE	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
Yes	2	12.5	17	28.8	14	10.6	20	11.1
No	13	81.3	39	66.1	109	82.6	154	85.1
No Answer	1	6.2	3	5.1	9	6.8	7	3.8
Total Responding	16	100.0	59	100.0	132	100.0	181	100.0

Source: Legislative Reference Bureau Survey I.

Table 4

## SURVEY I

PAST MINOR--INQUIRY BY NON-LAW ENFORCEMENT OFFICIAL  
RESPONSES OF FOUR COUNSELING GROUPS

NATURE OF COUNSELOR ACTION	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
Total Confidentiality	6	37.5	29	49.2	49	37.1	110	60.8
Indirect Disclosure	7	43.8	23	39.0	52	39.4	55	30.4
False Answer	3	18.7	3	5.0	7	5.3	6	3.3
Direct Disclosure	--	--	1	1.7	13	9.9	4	2.2
No Answer	--	--	3	5.1	11	8.3	6	3.3
Total Responding	16	100.0	59	100.0	132	100.0	181	100.0

Source: Legislative Reference Bureau Survey I.

Questions: Outreach Counselors (4.I.); Public Health Nurses (14.I.); School Counselors (23.I.); Social Workers (13.I.)

Table 5  
SURVEY I

PAST MINOR--INQUIRY BY LAW ENFORCEMENT OFFICIAL  
RESPONSES OF FOUR COUNSELING GROUPS

NATURE OF COUNSELOR ACTION	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
Total Confidentiality	14	87.5	47	79.6	112	84.9	132	72.9
Indirect Disclosure	--	--	10	16.9	--	--	34	18.8
False Answer	--	--	--	--	--	--	--	--
Direct Disclosure	--	--	--	--	9	6.8	11	6.1
No Answer	2	12.5	2	3.5	11	8.3	4	2.2
Total Responding	16	100.0	59	100.0	132	100.0	181	100.0

Source: Legislative Reference Bureau Survey I.

Questions: Outreach Counselors (4.III.); Public Health Nurses (14.II.); School Counselors (23.III);  
Social Workers (13.II.)

## PRIVILEGED COMMUNICATION AND COUNSELING

posed similar situations. In one case, the situation involved a past minor infraction of law (use of pot) in which information was requested by a nonlaw enforcement authority (school official). In the second case, information was requested by a law enforcement authority (police). The responses were tabulated into five general categories of answers. Total confidentiality means the counselor would not reveal any communication absolutely. Indirect disclosure means that although the response of the counselor did not divulge what was told, it indirectly implicates the client as being involved. False answer means the counselor gave a response that is untrue. Direct disclosure means that the counselor responded to the inquiry with information to a greater or lesser degree.

Generally, the past minor situations indicated a tendency not to disclose which becomes more pronounced when the inquirer is a law enforcement figure. In relation to the "burden on conscience" responses, it does not appear that nondisclosure of past minor acts would bother counselors to any great degree.

However, when comparison is made to responses to a hypothetical situation in which disclosure by a counselor might prevent a future harm from occurring (see Table 6), it is interesting to note that, except for public health nurses, there is relatively little support for a posture of total confidentiality. The contrary occurs, that is, there is a strong propensity for direct or indirect disclosure. With respect to "burden on conscience", it appears that to constrain a counselor from disclosing information which might possibly avert future injury to a third party would indeed weigh on the professional's conscience.

A final set of hypothetical questions related to a forced disclosure situation. That is, a counselor is subpoenaed and forced to answer under oath a question which would reveal confidences related to him (see Table 7).

The results of forced disclosure question indicates that while a majority or about two-thirds of the counselors would disclose, directly or indirectly, a large group, approximately one-third, would not.

### Need for Privilege by the Counseling Profession

The second of the surveys, Survey II, was conducted by the Bureau in an attempt to ascertain whether in actual



Table 6

## SURVEY I

PREVENTION OF FUTURE INJURY  
RESPONSES OF FOUR COUNSELING GROUPS

NATURE OF COUNSELOR ACTION	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
Total Confidentiality	--	--	31	52.5	6	4.6	40	22.1
Indirect Disclosure	8	50.0	7	11.9	30	22.8	43	23.8
False Answer	--	--	--	--	--	--	--	--
Direct Disclosure	8	50.0	20	33.9	81	61.3	74	40.9
No Answer	--	--	1	1.7	15	11.3	24	13.2
Total Responding	16	100.0	59	100.0	132	100.0	181	100.0

Source: Legislative Reference Bureau Survey I.

Questions: Outreach Counselors (5.I.); Public Health Nurses (15.I.); School Counselors (24.I.); Social Workers (14.I.)

Table 7

## SURVEY I

FORCED DISCLOSURE  
RESPONSES OF FOUR COUNSELING GROUPS

NATURE OF COUNSELOR ACTION	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
Total Confidentiality	5	31.2	19	32.2	31	23.5	66	36.5
Indirect Disclosure	10	62.5	--	--	53	40.2	20	11.1
False Answer	--	--	1	1.7	2	1.4	4	2.2
Direct Disclosure	1	6.3	31	52.5	29	22.0	80	44.1
No Answer	--	--	8	13.6	17	12.9	11	6.1
Total Responding	16	100.0	59	100.0	132	100.0	181	100.0

Source: Legislative Reference Bureau Survey I.

Questions: Outreach Counselors (5.II.); Public Health Nurses (15.II.); School Counselors (24.II.);  
Social Workers (14.II.)

## THE WIGMORE TESTS

practice, a demonstrated need existed for a grant of privilege (see Table 8). In addition, questions were posed designed to ferret out those areas or situations in which the surveyed professions were placed into a forced situation of having to disclose confidentially acquired information against the professional's ethical beliefs. With the exception of social work counselors in the department of social services and housing and some public health nurses, there is little indication that counselors are to any great extent involved in a subpoena situation (see Table 9).

In order to ascertain what kind of situations social work counselors and public health nurses were being subpoenaed to court to testify with respect to their clients, personal interviews were conducted with representatives of both groups. It appears from the personal interviews generally that the great majority of subpoena situations are not forced disclosure situations but are instances where a counselor is testifying for the client's benefit,<sup>19</sup> i.e. removal of a child from his family where child abuse or neglect may be a factor and welfare fraud cases. Another explanation that a counselor's attendance in response to a subpoena is not really a coercive situation appears to be that the subpoena was issued to protect the attorney trying the case in assuring the counselor's presence at court. That is, a counselor would be willing to appear voluntarily and so informs the attorney;<sup>20</sup> however, to cover himself before the judge who is hearing the case, the attorney will have a subpoena served anyway in the event that for whatever legitimate reason, the counselor witness does not appear, the attorney cannot be held to account by the judge.

In summary, although Survey II results indicate that a substantial number of social work counselors and to a lesser degree, public health nurses, are subpoenaed to court in what appears to be a coercive disclosure situation, such is not really the case as their appearance is in an advocacy position in favor of their clients.

Table 8

## SURVEY II

CONTACTS BY PERSONS FOR INFORMATION ABOUT CLIENTS WITH IMPLICATIONS  
FOR LEGAL PROCEEDINGS OF CRIMINAL AND NONCRIMINAL NATURE  
GENERALLY, CRIMINAL, AND NONCRIMINAL MATTERS

	COUNSELING GROUPS							
	OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS	
	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%	NO. RESPONDING	%
<u>Generally</u>								
Yes	22	88.0	45	61.6	104	81.9	153	83.6
No	3	12.0	28	38.4	17	13.4	26	14.2
Don't Remember/ No Answer	0	--	0	--	6	4.7	4	2.2
<i>Total Responding</i>	<i>25</i>	<i>100.0</i>	<i>73</i>	<i>100.0</i>	<i>127</i>	<i>100.0</i>	<i>183</i>	<i>100.0</i>
<u>Criminal</u>								
Yes	20	80.0	12	16.4	80	63.0	126	68.9
No	2	8.0	49	67.1	30	23.6	39	21.3
Don't Remember/ No Answer	3	12.0	12	16.5	17	13.4	18	9.8
<i>Total Responding</i>	<i>25</i>	<i>100.0</i>	<i>73</i>	<i>100.0</i>	<i>127</i>	<i>100.0</i>	<i>183</i>	<i>100.0</i>
<u>Noncriminal</u>								
Yes	16	64.0	41	56.2	93	73.2	139	76.0
No	6	24.0	20	27.4	18	14.2	24	13.1
Don't Remember/ No Answer	3	12.0	12	16.4	16	12.6	20	10.9
<i>Total Responding</i>	<i>25</i>	<i>100.0</i>	<i>73</i>	<i>100.0</i>	<i>127</i>	<i>100.0</i>	<i>183</i>	<i>100.0</i>

Source: Legislative Reference Bureau Survey II, questions 1, 2, and 3.

Table 9

## SURVEY II

WERE YOU EVER SUBPOENAED TO COURT TO APPEAR IN  
LEGAL PROCEEDINGS INVOLVING A CLIENT  
GENERALLY, CRIMINAL, AND NONCRIMINAL MATTERS

		COUNSELING GROUPS							
OUTREACH COUNSELORS		PUBLIC HEALTH NURSES		SCHOOL COUNSELORS		SOCIAL WORKERS			
NO.		NO.		NO.		NO.			
RESPONDING	%	RESPONDING	%	RESPONDING	%	RESPONDING	%	RESPONDING	%
<u>Generally</u>									
Yes	1	4.0	10	13.7	8	6.3	35	19.1	
No	20	80.0	52	71.2	95	74.8	123	67.2	
Don't Remember/ No Answer	4	16.0	11	15.1	24	18.9	25	13.7	
Total Responding	25	100.0	73	100.0	127	100.0	183	100.0	
<u>Criminal</u>									
Yes	3	12.0	2	2.7	11	8.7	28	15.3	
No	19	76.0	44	60.3	86	67.7	117	63.9	
Don't Remember/ No Answer	3	12.0	27	37.0	30	23.6	38	20.8	
Total Responding	25	100.0	73	100.0	127	100.0	183	100.0	
<u>Noncriminal</u>									
Yes	0	--	10	13.7	9	7.1	49	26.8	
No	16	64.0	39	53.4	73	57.5	99	54.1	
Don't Remember/ No Answer	9	36.0	24	32.9	45	35.4	35	19.1	
Total Responding	25	100.0	73	100.0	127	100.0	183	100.0	

## Chapter VI

### PRIVILEGE, CONFIDENTIALITY AND ETHICS

It has been demonstrated that privilege as strictly defined in this study does not exist for the professions discussed. What does exist is a system of confidentiality based on the practice and ethics of a given profession. It also appears that this system of confidentiality is working rather well.

#### Confidentiality Distinguished from Privilege

Privilege (in connection with communication) is defined in this report as a right with no consequent duty to disclose any passage or conveyance of information from a given person to another. The basis for privilege is legal, either by statute or case law.

Confidentiality is a status given to a communication whereby what the communicator-client discloses to the confidant-professional will be held in confidence. Generally, the seal of confidence is not absolute. That is, the confidant, in his judgment is free to reveal what is told him, for example, to another professional for purposes of consultation to assist in the diagnosis, or the prescription of a remedy, of the client's problem. What is permissible to reveal and to whom is largely dictated by the ethical code subscribed to by the professional group involved. This ethical code could be a written formalized statement of "do's and don'ts" to be observed by a professional group, e.g. the *Bar's Code of Professional Responsibility*, or a standard of behavior deemed ethically acceptable by a majority of the profession. Violation of what is ethical professional conduct might result in ouster from the profession, as disbarment or suspension of an attorney under sanction of a court, or the nonavailability of certain facilities to a doctor, or in the case of certain less formalized professions, nonacknowledgment by professional colleagues. Where confidentiality is not protected by law, failure to disclose under judicial process might result in the imposition of a fine or jail term. In this situation, it is the conviction of the professional practitioner that he would face a fine or jail term rather than disclose what was told in confidence that gives professional confidentiality its viability.

## PRIVILEGE, CONFIDENTIALITY AND ETHICS

What constitutes the standard of ethical conduct of a profession can also change from time to time and from place to place. For example, ethics of the legal profession at one time absolutely would not countenance anything, other than listing in professional directories, that would indicate specialization in legal skills. At the present, some jurisdictions permit yellow page and other nonblatant announcements of specialization by certified specialists.

The standard of ethical conduct is usually stricter than acceptable legal conduct. In other words, activities which are within the law may be activities which are proscribed from an ethical point of view. In this regard, professional ethics is heavily influenced by conscience, religious views and what is thought to be morally right or wrong. This influence may operate on two levels--what is considered ethical or acceptable professional behavior for a majority, or in the absence of a majority a substantial number, of the professional group involved, or what is considered ethically right in the case of an individual member of the profession.

### Some Problems Concerning Privilege and Confidentiality

Based on field work including interviews and surveys performed by the Bureau in the course of this study, it appears that a contributing factor to the confusion that exists in the minds of the members of the professions involved in distinguishing between privilege as a legal concept and confidentiality as an ethical concept turns on the operational method utilized by the surveyed professions. Specifically, there is a disparity in treatment of disclosure of certain information told in privacy under the "family unit" concept as opposed to a legal theoretical concept. Under the attorney-client, physician-patient and clerical-penitent relationships, privilege is personal to the client-communicator. That is, the individual who determines whether disclosure of what has been revealed can be made without breach of an understanding not to disclose is the client, patient or penitent.<sup>1</sup> Under "family unit" practice, whether the entire family or a component thereof is considered the "client", the individual who reserves the right to disclose information received from the client is the social worker, school and outreach counselor or public health nurse. This reservation of the right to disclose information revealed by the family unit member may oftentimes be explicitly articulated at the inception of the counselor-counselee relationship. For example, school and outreach counselors generally inform a student at the outset not to reveal anything unless he accepts the possibility that this information will be disclosed to a

## PRIVILEGED COMMUNICATION AND COUNSELING

third party at the counselor's discretion if by such disclosure the good or welfare of the student will be advanced.<sup>2</sup> In the case of social work counselors and public health counselors, the practice does not appear to be a uniform one both as to the timing of the warning, i.e. it may be at any stage of the relationship, and whether the warning is in fact given explicitly as a matter of course, i.e. volunteered by the counselor without inquiry on the part of the person being counseled. Without passing judgment on the desirability of the family unit method of operation by the profession, the fact remains that a disparity exists in a crucial element of the handling of privilege on the one hand and confidentiality on the other.

A second source of apparent confusion in the minds of the members of the professions involved is the inability to distinguish between what constitutes the professional standard of ethics of a group of practitioners versus the personal standard of ethics of an individual practitioner. Some individuals equate their personal standard to the professional standard without recognizing that these are two different standards, which are not necessarily the same. Others cite departmental or office policy as the governing principle. The end result of this nonrecognition of the varying standards in practice is a multiplicity of standards being applied by the individual depending on the counselor's personal judgment and the particular facts of his case.<sup>3</sup>

*The Counseling Function versus The Disciplinary Function.*  
The dual role of certain school counselors has been discussed wherein the administrative authorities of a school, due to budget constraints or other factors, require a professional to assume both a counseling role, i.e. assisting a student with behavior problems to cope with them, and a disciplinary role, i.e. informing the administration of particular student behavior which is generative of conduct disruptive of the orderly operation of a school. Both of these functions are legitimate and necessary undertakings of an educational institution. However, if the hypothesis is accepted that the counseling role is a desirable one and is to be encouraged, there is an inherent incompatibility in expecting the same individual to wear "two hats" as it were. The function of maintaining order if achieved with real or imagined participation of a school counselor operating in a dual role by the disciplining or isolating out from the student body of known or suspected problem students may possibly lead to a loss of confidence and trust in the counselor with respect to his counseling function. To preserve the integrity of both functions, it is desirable to clearly separate the roles in different individuals.



## PRIVILEGE, CONFIDENTIALITY AND ETHICS

The observation of the dual role of certain social counseling practitioners and the problems occurring thereby also appears to be true in the case of social workers and public health nurses who are engaged in family counseling activity for the purpose of resolving family problems and are also called upon to assist in apprehending and policing parents accused of child abuse. To the extent such practitioners are administratively required to furnish evidence based on confidential disclosures of a parent-client, to prove child abuse, the practice works against the establishment of a trust and confidence relationship in the counseling function.

The Element of Authorizing Disclosure. It has been pointed out that a variance exists under social work practice and certain privileged relationships in that under legal concepts exercise of the discretion to disclose vests in, and is personal to, the client. In social counseling generally, this option is turned around. It is a fair assumption that when discretion is vested in the client, he will assent to disclosure if what is revealed is not detrimental to his interest. On the other hand, when discretion to disclose is vested in the counselor, even when guided by the rule that the disclosure must be to the benefit of the client, there will occur, with some frequency, instances where there is a difference of opinion between counselor and counselee as to whether a benefit does or does not accrue to the client on account of disclosure. Moreover, under this kind of system with a highly subjective standard, i.e. what in the opinion of the counselor is good for the client, there is considerable likelihood of a variation in interpretation from one counselor to the next as to what constitutes results beneficial to the client.

The Element of Rapport. One argument advanced by a substantial number of those in the professions under consideration is that privilege is necessary in order to establish rapport between the counselor and the client. While this argument has theoretical appeal, the way in which the profession is practiced undercuts its viability in two ways:

1. In the situation discussed in the immediately preceding section where a client disagrees with the judgment call of his counselor that disclosure is to the client's benefit, rapport will necessarily suffer a setback;
2. In the situations which frequently occur where a client is warned prior to the establishment of the relationship that the ability to disclose is reserved to the counselor in his discretion,<sup>4</sup>

## PRIVILEGED COMMUNICATION AND COUNSELING

the fact that the client does confide in the counselor even under these circumstances would indicate that a grant of privilege is not absolutely necessary to gain rapport. The Bureau observes from its investigations that, on the whole, the ability to obtain rapport in the social counseling area does not appear to be an unsurmountable problem.

Protection from Suits Because of Disclosure. One fear that has been expressed by many professionals in the surveyed professions is that of suits by clients on account of disclosures of information imparted in confidence. It is further contended that granting of privilege would result, among other benefits, in providing protection from suits of this nature. The grant of privileged status to communications by clients would protect against suits if the professionals involved in fact will not communicate revelations of their clients. However, as has been pointed out previously, this is not the standard operating procedure of counselors, the general practice being to reserve the right to disclose to third parties information which in the counselor's opinion would work to the benefit of the client. Nor can it be determined at this time, under present practices, whether the social counseling professions can adjust to a system whereby all privileged statements made by a client must be disclosed or could be disclosed to certain individuals, statutorily specified. It would appear to be inconsistent with a theory of legal privilege to vest discretion in the counselor to pick and choose the individual to whom communications given in confidence by a client can be revealed.

The Bureau recognizes that the social counseling practitioner is faced with the possibility of suits and this is of genuine concern. It is suggested that some protection can be afforded by action to be undertaken by each profession itself--the school counselor, the outreach counselor, the social service counselor and the public health nurses. What is needed is for each profession to adopt by consensus of its practitioners or professional organizations in Hawaii what would constitute that profession's standard of ethics with respect to disclosing information revealed by a client. In addition, this adopted standard must be adhered to uniformly. By this action, a suit can be defended on the basis that the disclosure made by a professional under a given set of circumstances comports with the standard of care or conduct of that professional group. This kind of defense would be akin to that of a physician being sued for malpractice. One of the physician's defenses would be that the standard of care he exercised or the procedures he followed in a given set of

## PRIVILEGE, CONFIDENTIALITY AND ETHICS

circumstances met generally accepted medical practices under the same or similar circumstances.

*The Dilemma of Rehabilitation.* One of the points raised by one police department in opposing extension of privilege to the "socio-therapeutic" professions turns on the matter of rehabilitation. In a memorandum<sup>5</sup> of one of the police departments, it is stated:

*Which is of greater value to society--bringing the guilty to justice to make him aware that his course of action is unacceptable by society and then through planned rehabilitative programs try to bring him back as a useful member of the community or to conceal the illegal activities, or planned illegal activities of a student-patient-client in the name of rehabilitation? This latter course of action, I believe, is condoning criminal behavior as there is no measure of proof that this confidential communication will deter the individual from further criminal activity.*

\* \* \*

*These socio-therapeutic professions primarily concerned with the rehabilitation of an individual should encourage their student-client-patient to come forth and "lay their cards on the table" so they can start "clean". It is only after this type of self-awareness and the personal quest for help that will lead any person to be rehabilitated. This is where they should begin.*

The concept that rehabilitation of an individual begins with the recognition by that individual of his transgressions against society and a willingness to "take his medicine" is subscribed to by many in the surveyed professions, particularly those counselors whose clientele are predominantly minors. Interviews with these counselors also indicated that the more serious the offense engaged in by the minor, the greater the feeling on the part of the counselor that the offender should "own up" for purposes of his rehabilitation. In practice, while the counselor will try to persuade the client to turn himself in voluntarily, if unsuccessful, and depending on the severity of the offense or its recurrent nature, the counselor, in his good judgment and discretion, may disclose the client's activity to a third party, e.g., the minor's parents or a law enforcement official, who is in a position to change the client's behavior.

## PRIVILEGED COMMUNICATION AND COUNSELING

The practice and stance of certain of the counseling groups with reference to the concept of rehabilitation parallels the thinking of the law enforcement officials as quoted. The dilemma this theory of rehabilitation poses in connection with confidentiality and privilege is that disclosure of a client's confidence works against rapport. Thus, from a conceptual standpoint while the surveyed groups profess a need for rapport, their actions with respect to their client's are anti-rapport in nature.<sup>6</sup>

## Chapter VII

### FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Senate Concurrent Resolution No. 55-74 which requested the Bureau "to make a detailed study, incorporating the legal, jurisdictional and whatever other questions may arise relating to the granting of privileged communications to outreach counselors, social workers, and other professionals who play an advocate role..." implies in its direction a recommendation as to whether a grant of privilege should be extended to the professions designated.

#### Recommendation on Granting of Privilege

The Bureau's recommendation is that privilege not be granted to counselors as a profession at this time for the following reasons:

1. *Privilege, if granted, under the legal concept will result in a drastic disruption of the method of operation of a majority of the professions involved.*
2. *There does not appear to be a demonstrated need for the grant of privilege in order for the functions of the professions involved to be carried out. The Bureau recognizes that a grant of privilege might ease the ability of some members of the profession to gain rapport but this convenience should be weighed against the possible negative effects that might arise, i.e. the inability to disclose privileged information to a third party whom the professional believes will help the client or the inability to inform law enforcement officials of the commission of particularly distasteful anti-social acts.*
3. *The Bureau has not been able to uncover a single instance where a counselor has been disciplined by the proper authorities for refusal to disclose information obtained confidentially from a client, such refusal being based on the counselor's personal ethical standards.*

## PRIVILEGED COMMUNICATION AND COUNSELING

4. *It appears that there exist mechanisms within the system whereby professionals, such as law enforcement officials, prosecutors and judges, will recognize a sort of de facto privilege, by honoring the confidentiality of disclosures made to counseling professionals, thereby avoiding a situation of confrontation.*
5. *Before a grant of privilege can be properly tailored to meet the needs of a group such as the surveyed professions, consisting of several disparate components, to be applied to a common function, i.e. social counseling, there must exist in practice a greater degree of uniformity in the process of treating client disclosures. Moreover, a highly subjective standard such as that which exists, i.e. "I will disclose to anyone who in my judgment can use the disclosure for your benefit", is in reality no standard at all.*

### Requisites to a Grant of Privilege

The Bureau's recommendation that privilege not be granted to the surveyed professions at this time also implies that a grant of privilege may be appropriate at some future time. In the Bureau's judgment, the following conditions, not generally present now, must first exist prior to granting privilege:

1. *A need for privileged status must be clearly demonstrated based on the practices and experience of one or more of the counseling groups that their functions cannot be carried out or can be carried out only with great difficulty absent a grant of privilege.*
2. *A greater uniformity of practice and procedure than is evident now must be achieved by each different counseling group.*
3. *Minimum standards of what may and may not be disclosed with respect to confidential communications agreed to and followed by at least a majority of each counseling group must be established.*
4. *Some viable mechanism must be initiated and put into operation by each counseling group*

## FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

*whereby professional sanctions will be applied in cases where professional ethical standards of conduct are breached and a person is proved to have failed in his professional responsibilities.*

### **Recommendations to Assist the Surveyed Professions**

While the Bureau's primary recommendation is not to extend the status of privileged communications to the surveyed professions at this time, based on findings from the data obtained during the course of performing this study, the Bureau suggests the following steps to be undertaken which are not primarily of a legislative nature but which will, in our opinion, assist the work of individuals in the surveyed professions:

1. Education. *The Bureau recommends that formal educational programs be made available to the various professional counseling groups, such programs to particularly concentrate on ethics and the relationship of ethical standards and practices to legal matters. The legal rights, duties, privileges and obligations of the professional counselor vis a vis all the persons that the counselor comes into contact in performing the counseling function should also be a major subject of coverage in these programs.*
2. Counseling versus Disciplining Functions. *The Bureau recommends that administrative practices of government agencies, including the Department of Education, be reviewed by individuals in authority to eliminate situations in which a professional, whose primary duties involve the counseling function, is also required to perform agency duties which support or result in disciplinary action.*
3. Establishment of Professional Ethical Standards of Confidentiality. *The Bureau recommends that each of the surveyed professions, or subgroups thereof, through concerted professional action establish a minimum standard to be adhered to by its members in dealing with disclosures made in confidence. The specifics of the standard should be determined by a consensus of a particular profession.*

## PRIVILEGED COMMUNICATION AND COUNSELING

4. Promotion of Understanding Among Interacting Professions. The Bureau recommends that the leadership of the surveyed professions establish a dialogue with the leadership of other professions with which it comes into contact in the performance of its counseling functions to the end that mutual understanding can be achieved by each profession of the recognition and respect for each other's ethical practices, based on professional standards, regarding confidentiality.

The four recommendations made by the Bureau lend themselves to as rapid an implementation as the professions affected desire to carry them out. The Bureau believes these recommendations address themselves to the real and practical problems that confront practitioners of the surveyed professions and will, if adopted, serve to clarify the situation causing confusion that exists in the minds of those engaged in the day-to-day practice of social counseling. Implementation will also provide the basis by which a meaningful evaluation can be made at some future time as to whether a need is in fact demonstrated for a statutory grant of privilege.



# FOOTNOTES

## Chapter I

1. The outreach counselor program is an outgrowth of several federal and state funded programs: Act 125, Session Laws of Hawaii 1961; Act 68, Session Laws of Hawaii 1971; Economic Opportunity Act, P.L. 88-452, Title I-B; and Vocational Education Work Study Act, P.L. 90-576.

## Chapter II

1. Civil Code of 1859, secs. 1218, 1287.
2. Session Laws of Hawaii 1876, ch. xxxii, sec. 54
3. Briggs v. Mills, 4 H. 450 (1882); Republic v. Kahakauila and Kilikina Hake (w), 10 H. 28 (1895); The Territory v. Cheong Kwai, 15 H. 280 (1903); Territory v. Wm. L. Alford, 39 H. 460 (1952), aff'd 205 F.2d 616 (1952); State v. Hassard, 45 H. 221 (1961); United States v. T. and D. Nomura, No. 470 (U.S.D.C. Haw., Nov. 17, 1907); contra United States v. T. S. Choy and No Sang Bong, No. 344 (U.S.D.C. Haw., Dec. 17, 1907); In Re Denjiro Yokoda, No. 4 (U.S.D.C. Haw. 520, 1914).
4. Rules of the Supreme Court of the State of Hawaii, rule 16, as amended July 1, 1974.
5. V. Takamori v. Kanai, 11 H. 1 (1897); Anderson v. Rawley, 27 H. 60 (1923); Christian v. Waialua Agricultural Company, 30 H. 533 (1928); Van Gieson v. Magoon, 20 H. 146 (1910); Wery v. Pacific Trust Company, 33 H. 701 (1936); and McKeague & Davis v. Freitas, 40 H. 108 (1953).
6. Commissioners on Revision of the Statutes of New York, 3 N.Y. Rev. Stat. 737 (1836).
7. Session Laws of Hawaii 1876, ch. xxxii, sec. 55.
8. 52 H. 188 (1970).
9. Id. at 198.
10. The nine states that lack a statutory provision of clerical privilege are Alabama, Connecticut, Delaware, Massachusetts, Mississippi, New Hampshire, Pennsylvania, Rhode Island, and Texas. Alabama and Texas have state supreme court decisions requiring a cleric to testify about any communication.
11. Session Laws of Hawaii 1876, ch. xxxii, sec. 55.
12. One U.S. District Court case exists, United States v. Kekaohu, No. 3 (U.S.D.C. Haw. 259, 1907).

## Chapter III

1. The term "classical confrontation" was brought to the Bureau's attention by an interview with Shig Nakashima, Assistant Administrator, Public Welfare Division, Department of Social Services and Housing, October 6, 1975.
2. Preface, Encyclopedia of Social Work (1971), Vol. I, p. ix.

3. Ibid., p. ix.
4. Ibid., p. xi.
5. Jules H. Berman, "Public Assistance," Encyclopedia of Social Work (1971), Vol. II, p. 1014.
6. Preface, Encyclopedia of Social Work (1965), p. xi, as cited in 1971 ed., p. x.
7. Ibid.
8. Henry J. Meyer, "Profession of Social Work: Contemporary Characteristics," Encyclopedia of Social Work (1971), Vol. II, p. 963.
9. Ibid., p. 967.
10. Ibid.
11. Ibid., p. 960.
12. Interview, Nakashima.
13. Ibid.
14. Ibid.
15. Functional Statement for the Public Welfare Division of the Department of Social Services and Housing.
16. Interview, Nakashima.
17. Ibid.
18. Op. cit., Functional Statement.
19. Interview with Stephen Nakamura, Administrator, Social Services Section No. 2, Public Welfare Division, Department of Social Services and Housing, November 25, 1975.
20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid.
24. Interview with Sharon Summers, Social Worker, North Adult Services Unit, Social Services Section No. 2, Public Welfare Division, Department of Social Services and Housing, December 12, 1975; interview with Jessie Shimada, Supervisor, South Adult Services Unit, Social Services Section No. 2, Public Welfare Division, Department of Social Services and Housing, December 12, 1975.
25. Interview with Stanley Inkyo, Administrative-Supervisor, Catholic Social Services, October 17, 1975; interview with Al Orita, Administrator, Child and Family Services, October 29, 1975.
26. Ibid.
27. American Nurses' Association, Public Health Nurses Section, Functions, Standards, and Qualifications for the Practice of Public Health Nursing (New York: 1962), p. 3.

28. Ibid., p. 13.
29. Ibid.
30. U.S. Department of Health, Education, and Welfare, Public Health Service, National Institute of Health, Nurses in Public Health (Washington: U.S. Government Printing Office, 1968), p. 6.
31. Interview with Mae Kuramoto, Acting Chief, Public Health Nursing Branch, Department of Health, October 24, 1975.
32. The Oahu districts are: Kapahulu, Central, Lanakila, Pearl City-Wahiawa, Leeward, Windward.
33. Taken from the Position Description for RPN II, Department of Health, State of Hawaii.
34. Taken from the Position Description for RPN III, Department of Health, State of Hawaii.
35. Taken from the Position Description for RPN IV, Department of Health, State of Hawaii.
36. Derived from the Class Specification of the Registered Professional Nurse Series, Department of Personnel Services, State of Hawaii.
37. Ibid.
38. Derived from the Class Specification of the Para-Medical Assistant Series, Department of Personnel Services, State of Hawaii.
39. Taken from the Position Description for PMA II, Department of Health, State of Hawaii.
40. Interview, Kuramoto.
41. Ibid.
42. Ibid.
43. American Nurses' Association, Interpretation of the Statements of the Code for Professional Nurses (New York: n.d.), p. 6.
44. Interview with Noemi Campos, Public Health Nurse, Leeward District, Public Health Nursing Branch, Department of Health, November 13, 1975.
45. Interview with Thelma Shintani and Patricia McGuire, Public Health Nursing Branch, Department of Health, November 5, 1975.
46. Interviews with various public health nursing personnel.
47. Ibid.
48. Ibid.
49. Testimony to the House Committee on Education. 1975 Regular Session, on EDN 401, Counseling Volume II.
50. Ibid.
51. Office of Instructional Services, Compensatory Education Section, Department of Education, Guidelines for - Comprehensive School Alienation Program (Honolulu: Office of Library Services/TAC, 1971), p. 18.
52. Office of Instructional Services, Compensatory Education Section, Department of Education, Comprehensive School Alienation Program Annual Progress Report (Honolulu: 1975), p. 1.
53. Ibid., p. 1.
54. Ibid., p. 5.
55. Interview with Logan Kadomoto, Program Specialist (Administrative Head of the Outreach Counselors in the State of Hawaii), Special Education Branch, Department of Education, October 28, 1975.
56. Ibid.
57. Op. cit., Guidelines for - Comprehensive School Alienation Program, p. 18.
58. Interview, Kadomoto.
59. Position description entitled, "Counselor - Basic School Staff," Department of Education, State of Hawaii.
60. Interview with Clara Katekaru, Program Specialist (Head of Public School Counselors of the State of Hawaii), Department of Education, October 22, 1975.
61. Op. cit., Counselor - Basic School Staff.
62. Interview, Katekaru.
63. American School Counselors Association, Code of Ethics, Item I.D.
64. Interview, Nakashima.
65. Interviews with various public health nursing and social work personnel.
66. Interviews with various counseling personnel.
67. Hawaii Rev. Stat., sec. 346-10; also interviews with various social work, public health nursing, and counseling personnel.
68. National Association of Social Workers, Code of Ethics.
69. American Nurses' Association, The Code for Professional Nurses.
70. Op. cit., Interpretation of the Statements of the Code for Professional Nurses, p. 8.
71. Op. cit., ASCA Code of Ethics, Items I.F. and I.A.3.
72. Ibid., Item III.A.5.
73. Ibid., Item III.A.1, 2, 4, and 5.
74. Ibid., Item II.A.3.
75. Op. cit., NASW Code of Ethics.
76. Alfred Kadushin, "Child Welfare: Adoption and Foster Care," Encyclopedia of Social Work (1971), Vol. I, p. 105.
77. Ibid., p. 104.

78. Alan Keith-Lucas, "Ethics in Social Work," Encyclopedia of Social Work (1971), Vol. I, p. 325.
79. Robert M. Mulford, "Protective Services for Children," Encyclopedia of Social Work (1971), Vol. II, p. 1009.
80. Hawaii Rev. Stat., ch. 350.
81. Interview with Joyce Rumel, Social Worker, Child Protective Service Unit, Social Services Section No. 1, Public Welfare Division, Department of Social Services and Housing, October 28, 1975.
82. Interview with various personnel of the Child Protective Service Unit, Social Services Section No. 1, Public Welfare Division, Department of Social Services and Housing, October 28, 1975.
83. Hawaii Rev. Stat., secs. 571-31 and 571-32, "Persons in Need of Supervision". In summary, a minor may be taken into custody by a police officer without a court order if: (1) the minor in the presence of the police officer violates a federal, state, or local law or municipal ordinance; (2) the minor is suspected of a crime which if he were an adult would constitute a felony; (3) the minor is "seriously endangered in his surroundings"; (4) the minor is suspected of being a runaway. The minor may be held in detention for forty-eight hours. After expiration of the forty-eight hours, the minor must then be released. The minor, however, may be held in continued detention if a court orders so.
84. Interviews with various personnel of the Child Protective Service Unit.
85. Interviews with various public health nursing personnel.

## Chapter IV

1. Wigmore, Evidence in Trials at Common Law, p. 527.
2. Ibid., p. 528.
3. Ibid.
4. Ibid., p. 878.
5. Ibid., p. 529 et seq.
6. Ibid., p. 536.
7. Ibid., p. 537.
8. Note: "The Social Worker-Client Relationship and Privileged Communications," 1965 Washington University Law Quarterly 384-385.
9. Note: "Testimonial Privilege and the Student-Counselor Relationship in Secondary Schools," 56 Iowa Law Review 1333 (1971).
10. Ibid., p. 1335.
11. Op. cit., 1965 Washington University Law Quarterly 385-386.
12. 56 Iowa Law Review 1336.

13. W. R. Habeeb: "Evidence Privilege of Communications by or to Nurse or Attendant," 47 ALR 2d 742, at 743, 748 (1956).
14. Ibid., at 744-45; citing In Re Avery's Estate, 76 NYS 2d 790 (Surrogate's Court, 1948).
15. Op. cit., 1965 Washington University Law Quarterly 386-387.
16. Op. cit., 56 Iowa Law Review 1340-1341.

## Chapter V

1. Idaho Code, sec. 9203(6); Burns Ind. Stat. Ann., sec. 20-6-20-2; Iowa Code Ann., sec. 622.10, Ky. Rev. Stat., sec. 421.216; Me. Rev. Stat. Ann., T. 20, sec. 806; Mich. Comp. Laws Ann., sec. 600.2165; Rev. Codes of Mont., sec. 93-701-4(7); N.D. Gen. Code, sec. 31-01-06.1; Ore. Rev. Stat., sec. 44.040(1)(1); S.D. Comp. Laws, sec. 19-2-5.1.
2. Conn. Gen. Stat. Ann., sec. 10-154a; Ann. Code of Md., T. 77, sec. 85A.
3. Nev. Stat., sec. 49.290.
4. Gen. Stat. of N.C., sec. 8-53.4.
5. Purdon's Pa. Stat. Ann., T. 24, sec. 13-1319.
6. Ark. Stat. Ann., sec. 28-607.
7. N.Y., CPLR, sec. 4504.
8. Ore. Rev. Stat., sec. 44.040(1)(g).
9. Va. Stat. Ann., T. 33, sec. 2551.
10. Conn. Gen. Stat. Ann., sec. 10-154a.
11. Rev. Codes of Mont., sec. 93-701-4(7).
12. Purdon's Pa. Stat. Ann., T. 24, sec. 13-1319.
13. Cal., Evid. Code, sec. 1010(c).
14. La. Rev. Stat., sec. 2714.
15. Mich. Comp. Laws Ann., sec. 338.1764.
16. N.Y., CPLR, sec. 4508.
17. Utah Code Ann., sec. 58-35-10.
18. The prosecuting attorneys were joined by a Deputy Attorney General in this opposition, which reflects the views of the State Prosecuting Attorneys' Committee (see Exhibit 1).
19. The client in these instances being the child, even under a family unit situation.
20. In the case of Department of Social Services and Housing counselors, the case is initiated by the social worker in behalf of the State. Departmental policy requires the social worker to appear at the proceedings.

## Chapter VI

1. 58 Am. Jur. Witnesses 291; ibid., 246, 248; Hawaii Rev. Stat., sec. 261-20.

2. If advanced warning of this nature is given to each member of a family unit prior to establishing a counselor-counselee relationship and the client understands and accepts this, it may be argued that there is a waiver of privilege under the legal approach.
3. The following abstract from the minutes of a seminar jointly sponsored by the Department of Education and Children's Mental Health Services Branch, Department of Health, held on May 2, 1975, entitled "For Whose Best Interest?" illustrates the confusion of some of the profession.

"D. The Question of Confidentiality of Information:

In a related vein (this is relevant both to parental consent and coordinating information above), a number of participants raised the question as to how to construe "privileged" or "confidential" information on a child. Does parental consent imply that professionals in MHD and DOE can freely exchange information from one sector to another? Does strictly consultative service (i.e., where the mental health professional never directly intervenes with the child) by-pass the question of confidentiality? Should there be different sets of standards for written vs. oral communications? There was very little agreement on these questions."

4. Particularly in the case of school counselors.
5. Memorandum from Fred Young, Criminal Investigation Division, to William Snead, Assistant Chief of Police, Technical Bureau, Honolulu Police Department, re Senate Resolution 263 (Privileged Communication), 6/10/74.
6. It should be noted that for those counselors who warn their clients, "Don't tell me anything you don't want me to reveal to a third party, if in my judgment, it will be to your best interests", disclosure is consistent with the warning, although in a sense, still anti-rapport in nature.

## Appendix A

(To be made one and twelve copies)

THE SENATE  
SEVENTH ..... LEGISLATURE, 19 74  
STATE OF HAWAII

S.C.R. NO. 55\*

C  
O  
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Y

# SENATE CONCURRENT RESOLUTION

REQUESTING THE OFFICE OF THE LEGISLATIVE REFERENCE BUREAU TO STUDY THE QUESTION OF PRIVILEGED COMMUNICATION AS IT APPLIES TO OUTREACH COUNSELORS, SOCIAL WORKERS, AND OTHER PROFESSIONALS WHO PLAY AN ADVOCATE ROLE ON BEHALF OF THEIR CLIENTELE.

WHEREAS, there is a need for guidelines relating to legislation in the area of privileged communication as it applies to professionals who play an advocate role on behalf of their clientele; and

WHEREAS, this concept of privileged communication involves much legal and technical analyses as it applies to each specific area of concern; and

WHEREAS, privileged communication is already established by statutes for doctors and their patients and for clergymen and confessors, and by common law for attorneys and their clients; and

WHEREAS, there is need for more information in this field as to roles, guidelines, and codes of conduct as they may apply to this question of who shall be granted this privilege and to what extent it shall apply; and

WHEREAS, the scope and dimension of granting this privilege to additional professional groups should be carefully determined as to the overall ramifications of granting such privileges; now therefore

BE IT RESOLVED by the Senate of the Seventh Legislature of the State of Hawaii, Regular Session of 1974, that the Office of the Legislative Reference Bureau be directed to make a detailed study, incorporating the legal, jurisdictional, and whatever other questions may arise relating to the granting of privileged communication to outreach counselors, social workers, and other professionals who play an advocate role on behalf of their clientele; and

BE IT FURTHER RESOLVED that the Office of the Legislative Reference Bureau shall present a report of this study, including the recommendations of the Bureau to the Eighth Legislature of the State of Hawaii twenty days prior to the convening of its Regular Session of 1975; and

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\*S.R. No. 263 also adopted.

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted to the Director of the Legislative Reference Bureau, the Superintendent of Education, the President of the Hawaii State Teachers Association, and the Administrator of the Outreach Counselor Program.

## Appendix B

### SURVEY I

LEGISLATIVE REFERENCE BUREAU  
State Capitol, Room 004  
Honolulu, Hawaii 96813  
Phone: 548-6237

## SCHOOL COUNSELORS & SOCIAL WORKERS QUESTIONNAIRE

*Please respond to the following questions as of June, 1974.*

1. Your present school is: an elementary school \_\_\_\_\_  
an intermediate school \_\_\_\_\_  
a secondary school \_\_\_\_\_  
other school \_\_\_\_\_  
curriculum specialist \_\_\_\_\_
- 1a. If you work in the urbanized Honolulu District, or in a school with a Honolulu, Aiea, Pearl City, Kaneohe, or Kailua postal address, please check here: \_\_\_\_\_
2. Prior teaching experience in years: elementary \_\_\_\_\_ years  
intermediate \_\_\_\_\_ years  
secondary \_\_\_\_\_ years  
other \_\_\_\_\_ years
3. State the total years you have spent in a counseling capacity: \_\_\_\_\_ years
4. State the total years you have served as a counselor in your present school: \_\_\_\_\_ years
5. Please list all higher education:

Undergraduate degree: \_\_\_\_\_, date: \_\_\_\_\_, College: \_\_\_\_\_  
Undergraduate major: \_\_\_\_\_  
Undergraduate minor: \_\_\_\_\_  
Fifth year certificate: \_\_\_\_\_ Yes \_\_\_\_\_ No Date: \_\_\_\_\_

Graduate work completed: semester hours \_\_\_\_\_  
subject \_\_\_\_\_  
University: \_\_\_\_\_

Graduate degree awarded: \_\_\_\_\_ Date \_\_\_\_\_  
Subject: \_\_\_\_\_ University: \_\_\_\_\_  
Thesis/report/dissertation title: \_\_\_\_\_

6. Please list the professional or academic societies of which you are a member.  
Do not list the HSTA, HF/T, AAUW, AAUP, NEA.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

7. For the past semester, please estimate the types of counseling you performed by the percentage of time expended:

Primary, intermediate or secondary course, academic, and study methods counseling	_____ %
College counseling	_____ %
Vocational/technical, job preparation counseling	_____ %
Peer group adjustment counseling	_____ %
School discipline problems: teacher-pupil personality adjustment counseling	_____ %
School discipline problems: counseling related to school rule, truancy, school property damage	_____ %
Counseling problems involving narcotic law violations	_____ %
Counseling problems involving delinquent/criminal offenses excluding drug cases	_____ %
Counseling problems involving students' pre-marital, marital or pregnancy or venereal disease situations	_____ %
Counseling problems involving parent-child maladjustments	_____ %
Other: (describe and list percentage)	_____ %
_____	_____ %
_____	_____ %
_____	_____ %

8. In the past semester, what percentage of your time was spent in non-counseling, disciplinary activities? \_\_\_\_\_ %
9. In the past semester, what percentage of your time was expended in performing functions and chores which were neither counseling nor disciplinary activities (such as bookkeeping, stenographic, school tour arrangements, etc.)? \_\_\_\_\_ %
10. What was the age range of students you counseled? \_\_\_\_\_ years to \_\_\_\_\_ years
11. What percentage of your students counseled were male? \_\_\_\_\_ % female? \_\_\_\_\_ %
12. What percentage of students counseled were 18 years of age or over? \_\_\_\_\_ %
13. Approximately how many students did you counsel in the past semester? \_\_\_\_\_
14. Please indicate the number of students whose primary problem area when consulting you was:

College counseling	_____
Intermediate/secondary school courses or study methods	_____
Parent-child personality or emotional adjustments	_____
Teacher-pupil personality adjustments	_____
Home runaways	_____
Pregnancy	_____
Venereal disease	_____
Unwarranted police harrassment	_____
Narcotic violations not involving the student's arrest	_____
Narcotic violations involving the student's arrest	_____
Other delinquent/criminal activities not involving student's arrest	_____
Other delinquent/criminal activities involving student's arrest	_____
Other problem areas: (describe)	_____
_____	_____
_____	_____
_____	_____



15. Your role in expulsion/suspension proceedings in your school may be described most accurately as that of: (mark one only)

Disciplinarian: (making the decision to expel or suspend) \_\_\_\_\_  
Disciplinarian: (openly advising the decision maker) \_\_\_\_\_  
A neutral observer \_\_\_\_\_  
Student's advocate or defender \_\_\_\_\_  
A school officer not present and not involved \_\_\_\_\_  
Other: (describe) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

16. Please describe the influence or effect your vice-principal or principal had this past semester upon the character and time expenditure of your counseling: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

17. In the past semester, have you consulted any of the following for help in handling your students' problems: (mark each consulted)

Physician	_____	Clergyman	_____
Psychiatrist	_____	Police Officer	_____
Psychologist	_____	Probation Officer	_____
School social worker	_____	Legal Aid Society Atty.	_____
Other social caseworker	_____	Prosecuting Attorney	_____
Fellow DOE Counselor	_____	Private Attorney	_____
Other Practitioner: (describe)	_____		
_____			
_____			
_____			

18. Of the above list of practitioners, please name the single specialty for which you have found the greatest need: \_\_\_\_\_

19. Briefly describe the major professional problem you have encountered as a school counselor: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20. Considering your past experience in counseling and the fact that a grant of privilege would silence you, unless released by the student confiding in you, do you think this undisclosable knowledge is too demanding mentally, or too much of a burden for your conscience? Yes \_\_\_\_\_ No \_\_\_\_\_
21. Based on your work as a school counselor, do you think a statutory grant of privileged communication would be: (check one only)
- |  |           |
|--|-----------|
| (a) virtually unnecessary  | (a) _____ |
| (b) nice to have but can do without  | (b) _____ |
| (c) necessary--it would ease the establishment of rapport with some students | (c) _____ |
| (d) absolutely necessary to the adequate performance of any counselor        | (d) _____ |
22. Assuming you are subpoenaed to reveal in court student-counselor communications regarding a student's personal problems (including those with possible legal implications): Do you think this would substantially deter the counseling relationship? Yes \_\_\_\_\_ No \_\_\_\_\_

For each of the following questions, assume you are the counselor involved and check one response only.

23. Assume a student you have been counseling tells you in confidence and in detail of his use and source of pot. In spite of your initial discussion of this matter with this student, you are inclined to believe his use of the drug will continue for the time being.
- I. Your vice-principal phones two days later and asks specifically if this student is "involved with drugs". You respond by stating: (check one only)
- |   |           |
|---|-----------|
| (a) You don't know the student.   | (a) _____ |
| (b) You don't know whether he is involved.  | (b) _____ |
| (c) You know but it is confidential.  | (c) _____ |
| (d) You "wouldn't believe it if the kid himself told me".   | (d) _____ |
| (e) You are morally certain that "this kid isn't involved".   | (e) _____ |
| (f) You cannot respond to such a question regarding any student without vitiating your relationship with all of them. | (f) _____ |
| (g) You do know that he is involved and give the details.   | (g) _____ |
- II. Your principal then calls you into his office, to tell you that your response (a) thru (f) above constituted non-cooperation with the vice-principal at best, and that he thought it was a dereliction of your duty. Further, he thought that if you really didn't know, it reflected adversely on your job performance. However, he is willing to give you a second chance. He asks if the specific student "is involved with any dope". You respond: (check one only)
- |  |           |
|--|-----------|
| (a) With the same answer as under question 1 above.  | (a) _____ |
| (b) That you can tell the principal, and do so.  | (b) _____ |
| (c) That you can tell the principal in confidence and that he should forget where he heard it. | (c) _____ |

III. Prior to the incidents in I and II, above, a police officer known to you to be relatively fair, stops in your office to inquire about this student, stating that he has information that the student has been either selling or giving pot away to other students frequenting a neighborhood drive-in. He inquires whether you "got any dirt on this kid". You respond: (check one only)

- (a) That you really can't discuss it with him, since anything you may have learned was acquired in confidence. (a) \_\_\_\_\_
- (b) That you know that the student is involved as a user only to your knowledge, that you doubt he is selling it since the student is always broke. (b) \_\_\_\_\_
- (c) That you can tell him with the understanding that your name is not mentioned, that this student is a user only. That this must be in confidence since to expose you will ruin your relationship with the student body. (c) \_\_\_\_\_
- (d) That you doubt this student is involved at all, rather your information is that all sales around the school are handled by four boys you know were picked up a week ago. (d) \_\_\_\_\_

24. Assume that a student you have been counseling for the past year relays the fact that he and a gang of which he is a member, have been involved in raids on beach campsites, "robbin' da hippies". Since one of the last victims fought back and injured a gang member, the group intends to go and in addition to robbery, exact revenge in the form of physical beatings administered by means of baseball bats. After discussing the potential dangers to your student, and your best efforts in attempting to dissuade his future participation: (check one only)

I. You believe that you have talked your student out of it, but are convinced the gang will proceed without him. Under this frame of mind:

- (a) You phone a best friend on the police force to report the pending time and place of this raid. (a) \_\_\_\_\_
- (b) You go to talk to the gang in an effort to forestall their raid, figuring this is the least you can do under the circumstances. Obviously failing in this effort, you make a call to a friend on the police force, as above. (b) \_\_\_\_\_
- (c) You decide to appear on the beach about an hour before the festivities, in the expectation that your presence, your reputation, and your reason will forestall any untoward events. (c) \_\_\_\_\_
- (d) You seek out the gang to tell them you are aware of their plans for the weekend, and that unless they desist from such activity, you will turn them all in. (d) \_\_\_\_\_
- (e) You reason that there is nothing else you can do which would be both professional and ethical. (e) \_\_\_\_\_
- (f) You believe that there is no way in which you can approach any other member of the gang, therefore, to prevent any injury or death, you arrange with your vice-principal to make a phone call to a friend of his on the police force giving the site and time of the raid. (f) \_\_\_\_\_

(g) With your student's permission, you talk to the gang attempting, but failing, to dissuade them from the raid. You reason there is nothing else you can do which would be professional and ethical.

(g) \_\_\_\_\_

(h) You reason that there is nothing else you can do, therefore, to prevent the possible injury of a number of innocent persons, you inform your principal of the names of the gang, the site and date of the pending foray, and arrange for him to call the police with full information on the gang.

(h) \_\_\_\_\_

II. Assume further, that in spite of your best efforts above, the gang engages in its raid most successfully. Checking with the student you counsel, you find he did not participate and is now down in the mouth for missing a good thing. Three victims are hospitalized with critical head injuries. The raid reportedly netted a quantity of beer and portable radios worth about \$300. In response to a subpoena, you appear before the county grand jury, and after giving your name, address, and occupation with the DOE, you are asked if you know X, the student you have been counseling. You respond under oath: (check one only)

(a) That you do not know him.

(a) \_\_\_\_\_

(b) That you can respond to no question the answer to which you may have acquired within your professional relationship as a student counselor as required by your professional ethics.

(b) \_\_\_\_\_

(c) That you can not discuss any information you may have regarding X, since a professional relationship has or had existed with that student, however, you can respond to queries about the gang involved.

(c) \_\_\_\_\_

(d) That you do know the student, X, and that you have reason to believe that he was not involved in the beach raid under investigation.

(d) \_\_\_\_\_

(e) That you cannot respond to any question the answer to which you may have acquired within your professional relationship as a school counselor, however, if the grand jury really wants the inside information, they should subpoena your vice-principal.

(e) \_\_\_\_\_

(f) Since you are under subpoena, and realizing a refusal to answer will result in a citation for contempt, you cite your professional ethics, which are rejected as extra-legal, and then respond fully, under duress.

(f) \_\_\_\_\_

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SOCIAL WORKERS QUESTIONNAIRE

1. The agency with which you are currently affiliated is best described as:

Child placement	_____	Primary school	_____
Hospital	_____	Intermediate school	_____
Social settlement	_____	Secondary school	_____
YW or YMCA	_____	Military social work	_____
School of social work	_____	Family service	_____
Public assistance agency	_____	Adult probation/parole	_____
Public health agency	_____	Juvenile probation/parole	_____
Mental health agency	_____	Drug abuse agency	_____

Other: (describe) \_\_\_\_\_

2. The number of years you have engaged in the practice of social work are:  
\_\_\_\_\_ years

3. Graduate work completed:

Area of concentration/subject: \_\_\_\_\_

Total semester hours completed: \_\_\_\_\_

Degree granted: \_\_\_\_\_

University: \_\_\_\_\_

4. Your present position is best described as:

Social work administrator: \_\_\_\_\_  
Social work supervisor: \_\_\_\_\_  
Social/caseworker: \_\_\_\_\_  
Other (describe): \_\_\_\_\_

5. Please describe the major function of your present position (e.g., counseling delinquent boys, child placement, drug abuse case finding, etc.):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Please state the age range of your current clientele: \_\_\_\_\_ years to \_\_\_\_\_ years.

7. Please estimate the number of your clients who, in the 12 months, discussed with you any problem which could have or did involve them in civil or criminal litigation. Number\_\_\_\_\_

8. Does the performance of your function in your present agency affiliation involve the enforcement of any law? Yes\_\_\_\_\_ No\_\_\_\_\_

If "yes", what law or statute?\_\_\_\_\_

9. Considering your past experience in social work, and the fact that a grant of privilege would silence you, unless release by the client confiding in you, do you think this undisclosable knowledge is or could be too demanding mentally, or too much of a burden for your conscience? Yes\_\_\_\_\_ No\_\_\_\_\_

10. Have you worked at any time with a physician or psychiatrist in which your communications with clientele were privileged by derivation from the medical licensee? Yes\_\_\_\_\_ No\_\_\_\_\_

If Yes: Did you find this arrangement permitted you to function fully and ethically as a social caseworker? Yes\_\_\_\_\_ No\_\_\_\_\_

Remarks:\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. Based on your professional experience, do you think a statutory grant of privileged communication is: (check one only)

(a) Virtually unnecessary (a)\_\_\_\_\_

(b) Nice to have but can do without (b)\_\_\_\_\_

(c) Necessary -- it would ease the establishment of rapport with some clients (c)\_\_\_\_\_

(d) Absolutely necessary to the adequate performance of any social worker (d)\_\_\_\_\_

12. Assume a professional caseworker in your community were subpoenaed to reveal in court the confidential discussions of one of his clients, and under the threat of contempt proceedings for a refusal to answer, did make full disclosure. Assume also that the case was routinely reported in your local newspaper.

Do you think this would substantially affect your relationships with your clients? Yes\_\_\_\_\_ No\_\_\_\_\_

Please explain:\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please respond to the following hypothetical situations assuming no change in the present law of confidentiality.

13. Assume a 22 year old college student you have been counseling tells you in confidence and in detail of his use and source of pot. In spite of your initial discussion with him, you are inclined to believe his use of the drug will continue for the time being.

I. An assistant dean of students at the University of Hawaii phones to inquire about this student, stating that the student had provided him with your phone number. The reason for the call is that this otherwise "B" student has gone into a down-slide academically this past semester and is now threatened with probationary status or worse. The dean asks specifically if this student is "involved with drugs". You respond by stating: (check one only)

- (a) You don't know the student. (a)\_\_\_\_\_
- (b) You don't know whether he is involved. (b)\_\_\_\_\_
- (c) You know but it is confidential. (c)\_\_\_\_\_
- (d) You "wouldn't believe it if the fellow himself told me". (d)\_\_\_\_\_
- (e) You are morally certain that "this man isn't involved". (e)\_\_\_\_\_
- (f) You cannot respond to such a question regarding any student without vitiating your relationship with all of them. (f)\_\_\_\_\_
- (g) You do know that he is involved and give the details. (g)\_\_\_\_\_

II. A police officer comes to your office to "verify some information" about your student client. He relates that the student's name showed up repeatedly in the reports of an undercover narcotics agent, though no serious allegations were apparent. The officer, after verifying the student's name and address, wonders whether the student is "onto any hard stuff lately?" You respond: (check one only)

- (a) That you don't know the student. (a)\_\_\_\_\_
- (b) That you don't know whether he is involved or not. (b)\_\_\_\_\_
- (c) That the officer will eventually run into somebody who will tell him, so you may as well tell him what he can easily find out elsewhere. (c)\_\_\_\_\_
- (d) You know but it is confidential. (d)\_\_\_\_\_
- (e) You can tell him only of the student's admissions to overt illegal acts, but nothing regarding his thinking, emotions or personal problems. (e)\_\_\_\_\_
- (f) Your professional ethics preclude any response to a question regarding anyone who may be a client. (f)\_\_\_\_\_

(g) You are morally certain that "this student isn't involved". (g) \_\_\_\_\_

(h) Since it is just a matter of time until the officer learns the full situation, you can discuss it in confidence and the officer should forget where he heard it. (h) \_\_\_\_\_

14. Assume you have been counseling an emotionally disturbed client for the past year, when your client informs you that he has arranged with his father-in-law's physician for the commitment of the "real cause of his troubles" to the state hospital. Your knowledge of your client's family situation indicates that no cause for the father-in-law's commitment exists, in spite of the facts that the old man is a crank and is showing some signs of senility. From all the circumstances and your client's tacit admission, you are forced to the conclusion your client's object in engineering this commitment is to acquire control of his father-in-law's property.

I. After discussing the futility, potential dangers, and patent unfairness of this move with your client, you believe that your best efforts to dissuade him have been fruitless. Under this frame of mind, there being nothing more you can do or say to your client, and with the commitment pending in the next day or so, you:

(a) Phone a friend of yours on the social service staff at the state hospital and report the facts as you know them. (a) \_\_\_\_\_

(b) Phone the physician involved "to discuss" the matter with a view to terminating his participation. (b) \_\_\_\_\_

(c) Reason that there is nothing else you can do which would be both professional and ethical. (c) \_\_\_\_\_

(d) Arrange a meeting with your client's spouse and her father and discuss the matter and its resolution in detail. (d) \_\_\_\_\_

(e) Visit your client at home in a last ditch effort to forestall his action. To reinforce your argument, you tell him that if he proceeds with this effort, you will expose him to the administrator of the state hospital. (e) \_\_\_\_\_

II. Assume that before you have the time to take any action under I, above, you are served a subpoena to appear with your records of your client in Family Court for proceedings in which the father-in-law is challenging "the regularity of his admission". Specifically: your client's capacity to sign the application for the patient's admission is under review. In response to the subpoena you appear in court, are sworn, give your name, address, and occupation, and when asked if you know your client, you respond:

(a) That you do not know him. (a) \_\_\_\_\_

(b) That you can respond to no question the answer to which you may have acquired with your professional capacity as a social worker as required by your professional ethics. (b) \_\_\_\_\_



- (c) That you cannot discuss any information you may have regarding your client, since a professional relationship has or had existed with him, however, you can respond to queries about your client's spouse and family. (c)\_\_\_\_\_
- (d) That you do know your client and that you have reason to believe that he is sane and really quite stable. (d)\_\_\_\_\_
- (e) That you cannot respond to any question the answer to which you may have acquired within your professional relationship as a social worker, however, the court might consider summoning your client's first wife. (e)\_\_\_\_\_
- (f) Since you are under subpoena, and realizing a refusal to answer will result in a citation for contempt, you cite your professional ethical objections, which are rejected as extra-legal, and then respond fully, under duress. (f)\_\_\_\_\_

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PUBLIC WELFARE SOCIAL WORKERS QUESTIONNAIRE

1. The agency with which you are currently affiliated is best described as:

Child placement	_____	Primary school	_____
Hospital	_____	Intermediate school	_____
Social settlement	_____	Secondary school	_____
YW or YMCA	_____	Military social work	_____
School of social work	_____	Family service	_____
Public assistance agency	_____	Adult probation/parole	_____
Public health agency	_____	Juvenile probation/parole	_____
Mental health agency	_____	Drug abuse agency	_____

Other: (describe) \_\_\_\_\_

2. The number of years you have engaged in the practice of social work are:  
\_\_\_\_\_ years

3. Graduate work completed:

Area of concentration/subject: \_\_\_\_\_

Total semester hours completed: \_\_\_\_\_

Degree granted: \_\_\_\_\_

University: \_\_\_\_\_

4. Your present position is best described as:

Social work administrator: \_\_\_\_\_  
Social work supervisor: \_\_\_\_\_  
Social/caseworker: \_\_\_\_\_  
Other (describe): \_\_\_\_\_

5. Please describe the major function of your present position (e.g., counseling delinquent boys, child placement, drug abuse case finding, etc.):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Please state the age range of your current clientele: \_\_\_\_\_ years to \_\_\_\_\_ years.

7. Please estimate the number of your clients who, in the 12 months, discussed with you any problem which could have or did involve them in civil or criminal litigation. Number\_\_\_\_\_

8. Does the performance of your function in your present agency affiliation involve the enforcement of any law? Yes\_\_\_\_\_ No\_\_\_\_\_

If "yes", what law or statute?\_\_\_\_\_

9. Considering your past experience in social work, and the fact that a grant of privilege would silence you, unless release by the client confiding in you, do you think this undisclosable knowledge is or could be too demanding mentally, or too much of a burden for your conscience? Yes\_\_\_\_\_ No\_\_\_\_\_

10. Have you worked at any time with a physician or psychiatrist in which your communications with clientele were privileged by derivation from the medical licensee? Yes\_\_\_\_\_ No\_\_\_\_\_

If Yes: Did you find this arrangement permitted you to function fully and ethically as a social caseworker? Yes\_\_\_\_\_ No\_\_\_\_\_

Remarks:\_\_\_\_\_

\_\_\_\_\_

11. Based on your professional experience, do you think a statutory grant of privileged communication is: (check one only)

(a) Virtually unnecessary (a)\_\_\_\_\_

(b) Nice to have but can do without (b)\_\_\_\_\_

(c) Necessary -- it would ease the establishment of rapport with some clients (c)\_\_\_\_\_

(d) Absolutely necessary to the adequate performance of any social worker (d)\_\_\_\_\_

12. Assume a professional caseworker in your community were subpoenaed to reveal in court the confidential discussions of one of his clients, and under the threat of contempt proceedings for a refusal to answer, did make full disclosure. Assume also that the case was routinely reported in your local newspaper.

Do you think this would substantially affect your relationships with your clients? Yes\_\_\_\_\_ No\_\_\_\_\_

Please explain:\_\_\_\_\_

\_\_\_\_\_

Please respond to the following hypothetical situations assuming no change in the present law of confidentiality.

13. Assume a 22 year old college student you have been counseling tells you in confidence and in detail of his use and source of pot. In spite of your initial discussion with him, you are inclined to believe his use of the drug will continue for the time being.

I. An assistant dean of students at the University of Hawaii phones to inquire about this student, stating that the student had provided him with your phone number. The reason for the call is that this otherwise "B" student has gone into a down-slide academically this past semester and is now threatened with probationary status or worse. The dean asks specifically if this student is "involved with drugs". You respond by stating: (check one only)

- (a) You don't know the student. (a)\_\_\_\_\_
- (b) You don't know whether he is involved. (b)\_\_\_\_\_
- (c) You know but it is confidential. (c)\_\_\_\_\_
- (d) You "wouldn't believe it if the fellow himself told me". (d)\_\_\_\_\_
- (e) You are morally certain that "this man isn't involved". (e)\_\_\_\_\_
- (f) You cannot respond to such a question regarding any student without vitiating your relationship with all of them. (f)\_\_\_\_\_
- (g) You do know that he is involved and give the details. (g)\_\_\_\_\_

II. A police officer comes to your office to "verify some information" about your student client. He relates that the student's name showed up repeatedly in the reports of an undercover narcotics agent, though no serious allegations were apparent. The officer, after verifying the student's name and address, wonders whether the student is "onto any hard stuff lately?" You respond: (check one only)

- (a) That you don't know the student. (a)\_\_\_\_\_
- (b) That you don't know whether he is involved or not. (b)\_\_\_\_\_
- (c) That the officer will eventually run into somebody who will tell him, so you may as well tell him what he can easily find out elsewhere. (c)\_\_\_\_\_
- (d) You know but it is confidential. (d)\_\_\_\_\_
- (e) You can tell him only of the student's admissions to overt illegal acts, but nothing regarding his thinking, emotions or personal problems. (e)\_\_\_\_\_
- (f) Your professional ethics preclude any response to a question regarding anyone who may be a client. (f)\_\_\_\_\_

(g) You are morally certain that "this student isn't involved". (g) \_\_\_\_\_

(h) Since it is just a matter of time until the officer learns the full situation, you can discuss it in confidence and the officer should forget where he heard it. (h) \_\_\_\_\_

14. Assume you have been counseling an emotionally disturbed client for the past year, when your client informs you that he has arranged with his father-in-law's physician for the commitment of the "real cause of his troubles" to the state hospital. Your knowledge of your client's family situation indicates that no cause for the father-in-law's commitment exists, in spite of the facts that the old man is a crank and is showing some signs of senility. From all the circumstances and your client's tacit admission, you are forced to the conclusion your client's object in engineering this commitment is to acquire control of his father-in-law's property.

I. After discussing the futility, potential dangers, and patent unfairness of this move with your client, you believe that your best efforts to dissuade him have been fruitless. Under this frame of mind, there being nothing more you can do or say to your client, and with the commitment pending in the next day or so, you:

(a) Phone a friend of yours on the social service staff at the state hospital and report the facts as you know them. (a) \_\_\_\_\_

(b) Phone the physician involved "to discuss" the matter with a view to terminating his participation. (b) \_\_\_\_\_

(c) Reason that there is nothing else you can do which would be both professional and ethical. (c) \_\_\_\_\_

(d) Arrange a meeting with your client's spouse and her father and discuss the matter and its resolution in detail. (d) \_\_\_\_\_

(e) Visit your client at home in a last ditch effort to forestall his action. To reinforce your argument, you tell him that if he proceeds with this effort, you will expose him to the administrator of the state hospital. (e) \_\_\_\_\_

II. Assume that before you have the time to take any action under I, above, you are served a subpoena to appear with your records of your client in Family Court for proceedings in which the father-in-law is challenging "the regularity of his admission". Specifically: your client's capacity to sign the application for the patient's admission is under review. In response to the subpoena you appear in court, are sworn, give your name, address, and occupation, and when asked if you know your client, you respond:

(a) That you do not know him. (a) \_\_\_\_\_

(b) That you can respond to no question the answer to which you may have acquired with your professional capacity as a social worker as required by your professional ethics. (b) \_\_\_\_\_

- (c) That you cannot discuss any information you may have regarding your client, since a professional relationship has or had existed with him, however, you can respond to queries about your client's spouse and family. (c) \_\_\_\_\_
- (d) That you do know your client and that you have reason to believe that he is sane and really quite stable. (d) \_\_\_\_\_
- (e) That you cannot respond to any question the answer to which you may have acquired within your professional relationship as a social worker, however, the court might consider summoning your client's first wife. (e) \_\_\_\_\_
- (f) Since you are under subpoena, and realizing a refusal to answer will result in a citation for contempt, you cite your professional ethical objections, which are rejected as extra-legal, and then respond fully, under duress. (f) \_\_\_\_\_

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PSYCHIATRIST'S QUESTIONNAIRE

1. Please state the number of years you have been engaged in the practice of psychiatry: Years \_\_\_\_\_

Of this total, how many years were spent in the private, as opposed to state or governmentally employed, practice of psychiatry? Years \_\_\_\_\_

2. Have you at any time invoked privilege in behalf of a patient with any court or governmental body or officer? Yes \_\_\_\_\_ No \_\_\_\_\_

Was your invocation of privilege honored? Yes \_\_\_\_\_ No \_\_\_\_\_

Remarks: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Could you engage in the practice of psychiatry without the statutory grant of privileged communication? Yes \_\_\_\_\_ No \_\_\_\_\_

Remarks: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

4. In your view, should this privilege be extended to all communications made in a group therapy session? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, would you recommend any limitations? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

5. In your opinion, what percentage of your patients believe there is a law preventing others from compelling you to disclose in court the patient's confidential communications to you?

None - 0% \_\_\_\_\_  
Percentage: \_\_\_\_\_ %  
All - 100% \_\_\_\_\_

6. Does such a belief have any effect of encouraging free disclosure to you?  
Yes \_\_\_\_\_ No \_\_\_\_\_

7. Does a disbelief have any effect of hindering free disclosure? Yes \_\_\_\_\_ No \_\_\_\_\_

8. In your experience, have news reports of the testimony of a court-appointed psychiatrist resulted in serious question by, or loss of rapport with any of your patients?  
Yes \_\_\_\_\_ No \_\_\_\_\_

Remarks: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

9. Assuming you moved to a state which did not grant the physician-patient privilege, would the possibility of testifying in court in any way affect your record keeping?  
Yes \_\_\_\_\_ No \_\_\_\_\_

In what way? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Please check each of the following professions to which you believe the statutory grant of privileged communication should be extended:

All social workers	_____	Family counselors	_____
Psychiatric social workers	_____	Clinical psychologists	_____
Medical social workers	_____	School psychologists	_____
Drug abuse/prevention workers	_____	Clergymen	_____
Tax accountants	_____	All registered nurses	_____
School counselors	_____	Public health nurses	_____
Marriage counselors	_____	Psychiatric nurses	_____



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PUBLIC HEALTH NURSES' QUESTIONNAIRE

1. Your present position is best described as:

Public health nursing administrator \_\_\_\_\_  
Public health nursing supervisor \_\_\_\_\_  
Public health nurse \_\_\_\_\_  
Other (describe) \_\_\_\_\_

2. Please state the number of years you have been engaged in the practice of public health nursing. Years \_\_\_\_\_

3. Please list all schooling beyond high school:

Undergraduate work completed:

College attended: \_\_\_\_\_  
College major: \_\_\_\_\_ Minor: \_\_\_\_\_  
School of nursing: \_\_\_\_\_  
City: \_\_\_\_\_  
Certificate: \_\_\_\_\_ Date: \_\_\_\_\_  
Degree awarded: \_\_\_\_\_ Date: \_\_\_\_\_

Graduate work completed:

Graduate work completed: \_\_\_\_\_  
Area of concentration/subject: \_\_\_\_\_  
Total semester hours completed: \_\_\_\_\_  
Degree granted: \_\_\_\_\_  
University: \_\_\_\_\_

4. Please describe the last two post-graduate courses, seminars, or symposia on new therapy, technique, method, etc., which you may have attended:

(a) Name of course, etc. \_\_\_\_\_  
Subject: \_\_\_\_\_  
Place where held: \_\_\_\_\_  
Duration: \_\_\_\_\_ days. Date: \_\_\_\_\_ (year)  
Tuition cost: \$ \_\_\_\_\_. Who paid this? \_\_\_\_\_

(b) Name of course, etc. \_\_\_\_\_

Subject: \_\_\_\_\_

Place where held: \_\_\_\_\_

Duration: \_\_\_\_\_ days. Date: \_\_\_\_\_ (year)

Tuition cost: \$ \_\_\_\_\_. Who paid this? \_\_\_\_\_

5. Please name any professional or academic association in nursing, public health, or medicine of which you are a member. \_\_\_\_\_

6. Please describe the major function of your present position (e.g., maternal-infant health, general case finding, etc.). \_\_\_\_\_

7. Have you at any time been called upon to testify as to what a patient of your's told you in confidence (e.g., as in a competency hearing, custody, divorce, or criminal litigation)?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If so, briefly describe. \_\_\_\_\_

8. Please estimate the number of your patients who, in the past 12 months, discussed with you any problem which could have or did involve them in civil or criminal litigation.  
Number \_\_\_\_\_

9. Does the performance of your function in your present agency affiliation involve the enforcement of any law?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If "yes", what law or statute? \_\_\_\_\_

10. Considering your past experience in public health nursing, and the fact that a grant of privilege would silence you, unless released by the patient confiding in you, do you think this undisclosable knowledge is or could be too demanding mentally, or too much of a burden for your conscience? Yes \_\_\_\_\_ No \_\_\_\_\_

11. Have you worked at any time with a physician or psychiatrist in which your communications with patients were privileged by derivation from the medical licensee?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If "yes", did you find this arrangement permitted you to function fully and ethically as a professional?  
Yes \_\_\_\_\_ No \_\_\_\_\_

Remarks: \_\_\_\_\_

12. Based on your professional experience, do you think a statutory grant of privileged communication for public health nurses is: (check one only)

- (a) Virtually unnecessary (a)\_\_\_\_\_
- (b) Nice to have but can do without (b)\_\_\_\_\_
- (c) Necessary--it would ease the establishment of rapport with some patients (c)\_\_\_\_\_
- (d) Absolutely necessary to the adequate performance of any public health nurse (d)\_\_\_\_\_

13. Assume a public health nurse in your community was subpoenaed to reveal in court the confidential discussions of one of her patients, and under the threat of contempt proceedings for a refusal to answer, did make full disclosure. Assume also that the case was routinely reported in your local newspaper.

Do you think this would substantially affect your relationships with your patients? Yes \_\_\_\_\_ No \_\_\_\_\_

Please explain. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please respond to the following hypothetical situations assuming no change in the present law of confidentiality.

14. Assume a 19-year-old community college student you have been counseling, as part of your supervision of his family's medical service, tells you in confidence and in detail of his use and source of pot. In spite of your initial discussion with him, you are inclined to believe his use of the drug will continue for the time being.

I. An assistant dean of students at the community college phones to inquire about this patient, stating that the student had provided him with your phone number. The reason for the call is that this otherwise "B" student has gone into a down-slide academically this past semester and is now threatened with probationary status or worse. The dean asks specifically if this student is "involved with drugs". You respond by stating: (check one only)

- (a) You don't know the student. (a)\_\_\_\_\_
- (b) You don't know whether he is involved. (b)\_\_\_\_\_
- (c) You know but it is confidential. (c)\_\_\_\_\_
- (d) You "wouldn't believe it if the fellow himself told me". (d)\_\_\_\_\_

(Question continued overleaf)

(e) You are morally certain that "this man isn't involved". (e)\_\_\_\_\_

(f) You cannot respond to such a question regarding any patient without vitiating your relationship with all of them. (f)\_\_\_\_\_

(g) You do know that he is involved and give the details. (g)\_\_\_\_\_

II. A police officer comes to your office to "verify some information" about your student patient. He relates that the student's name showed up repeatedly in the reports of an undercover narcotics agent, though no serious allegations were apparent. The officer, after verifying the student's name and address, wonders whether the student is "onto any hard stuff lately?" You respond: (check one only)

(a) That you don't know the student. (a)\_\_\_\_\_

(b) That you don't know whether he is involved or not. (b)\_\_\_\_\_

(c) That the officer will eventually run into somebody who will tell him, so you may as well tell him what he can easily find out elsewhere. (c)\_\_\_\_\_

(d) You know but it is confidential. (d)\_\_\_\_\_

(e) You can tell him only of the patients' admissions to overt illegal acts, but nothing regarding his thinking, emotions or personal problems. (e)\_\_\_\_\_

(f) Your professional ethics preclude any response to a question regarding anyone who may be a patient. (f)\_\_\_\_\_

(g) You are morally certain that "this student isn't involved". (g)\_\_\_\_\_

(h) Since it is just a matter of time until the officer learns the full situation, you can discuss it in confidence and the officer should forget where he heard it. (h)\_\_\_\_\_

15. *Assume you have been counseling an emotionally disturbed middle aged man for the past year, when your patient informs you that he has finally arranged with his "new legal aid lawyer" to institute custody proceedings against his former wife with a view to regaining custody of their children. Your knowledge of your patient's home situation, as well as that of his former wife, indicates that no cause for his custody action exists, in spite of the*

*facts that his ex-wife is a bit of a crank and mildly alcoholic. From all the circumstances and your patient's tacit admission, you are forced to the conclusion your patient's sole object is to spite his former spouse.*

I. After discussing the futility, potential dangers, and patent unfairness of this move with your patient, you believe that your best efforts to dissuade him have been fruitless. Under this frame of mind, there being nothing more you can do or say to your patient, and with some action pending in the next day or so, you:

- (a) Phone a friend of yours on the social service staff at family court and report the facts as you know them. (a)\_\_\_\_\_
- (b) Phone the legal aid attorney involved "to discuss" the matter with a view to terminating his participation. (b)\_\_\_\_\_
- (c) Reason that there is nothing else you can do which would be both professional and ethical. (c)\_\_\_\_\_
- (d) Arrange a meeting with your patient's former spouse and discuss the matter and its resolution in detail. (d)\_\_\_\_\_
- (e) Visit your patient at home in a last ditch effort to forestall his action. To reinforce your argument, you tell him that if he proceeds with his effort, you will expose him to the family court. (e)\_\_\_\_\_

II. Assume that before you have the time to take any action under "I", above, you are served a subpoena to appear with your records of your patient in family court for proceedings in which your patient is petitioning the court for the custody of his children. Specifically, his former wife's attorney wishes to examine you under oath regarding your patient's mental stability and capacity to sign his petition for custody and to have the care and custody of the children. In response to the subpoena, you appear in court, are sworn, give your name, address, and occupation, and when asked if you know your patient, you respond:

- (a) That you do not know him. (a)\_\_\_\_\_
- (b) That you can respond to no question the answer to which you may have acquired with your professional capacity as a public health nurse as required by your professional ethics. (b)\_\_\_\_\_

(Question continued overleaf)

- (c) That you cannot discuss any information you may have regarding your patient, since a professional relationship has or had existed with him, however, you can respond to queries about your patient's former spouse. (c) \_\_\_\_\_
- (d) That you do know your patient and that you have reason to believe that he is sane and really quite stable. (d) \_\_\_\_\_
- (e) That you cannot respond to any question the answer to which you may have acquired within your professional relationship as a public health nurse, however, the court might consider summoning your patient's current girl friend. (e) \_\_\_\_\_
- (f) Since you are under subpoena, and realizing a refusal to answer will result in a citation for contempt, you cite your professional ethical objections, which are rejected as extra-legal, and then respond fully, under duress. (f) \_\_\_\_\_

LEGISLATIVE REFERENCE BUREAU

State Capitol, Room 004

Honolulu, Hawaii 96813

Phone: 548-6237

OUTREACH COUNSELORS QUESTIONNAIRE

1. In a month, on the average, how many students do you deal with intensively?
2. Are these students in the same social peer group?
3. What are the ages of the students you are currently dealing with?
4. How many students have you intensively handled since the beginning of the 1973-74 school year?
5. How many students have been dropped from your caseload in this past school year? In general, what are the reasons for these terminations?
6. Please list the occupational title or description of the person whom you have found to be helpful and constructive to you when you have encountered students with extremely difficult or insoluble problems. (Do not list any names.)

7. In your day-to-day work with your students, what other professional helper expertise do you find you need or would like to have available for consultation? Please explain.
8. How often do your students ask you for a loan of money?
9. Describe and characterize your relations with social caseworkers assigned by any agency to your students or their families. Please explain in detail.



10. Describe and characterize your relations with any police officers your students have been involved with. Please elaborate.

11. Describe and characterize your relations with any family court probation officers to whom your students have been assigned? Please explain in detail.

12. In dealing with your students, what kind of relationship, if any, is established with family members?

13. What single factor, reason, approach, or occurrence has been most effective in your establishment of rapport with students?
14. Has any student who had confided in you ever accused you of reporting or welching on him? How did this affect your relationship with your students?
15. Are the students you serve fully aware of the fact that you are employed by the Department of Education?

16. How do your students assure themselves that you will maintain their confidences in their disclosures to you?

17. What difference would the statutory grant of privilege make in your relations with the students whom you serve?

18. Please cite one incident for which you most needed the protection of privileged communication?

19. If a privilege statute is drafted, what should it protect--the student, the outreach counselor, or should privilege be limited to specific communications, such as a student's admission of a felony? Please state reasons for your response.

20. State specifically and in detail the primary reason you believe a statute granting privileged communication to outreach counselors is necessary.

21. Assuming the passage of a privilege statute covering outreach counselors, what other professionals do you think the statute should apply to?

22. Are there any other aspects of your position, not covered here, which you think have a bearing upon the granting of privileged communication status to your relationship with students?

OUTREACH COUNSELORS  
ADDITIONAL QUESTIONNAIRE

1. Considering your past experience in counseling and the fact that a grant of privilege would silence you, unless released by the student confiding in you, do you think this undisclosable knowledge is too demanding mentally, or too much of a burden for your conscience? Yes \_\_\_\_\_ No \_\_\_\_\_
2. Based on your work as a school counselor, do you think a statutory grant of privileged communication would be: (check one only)
  - (a) virtually unnecessary (a) \_\_\_\_\_
  - (b) nice to have but can do without (b) \_\_\_\_\_
  - (c) necessary--it would ease the establishment of rapport with some students (c) \_\_\_\_\_
  - (d) absolutely necessary to the adequate performance of any counselor (d) \_\_\_\_\_
3. Assuming you are subpoenaed to reveal in court student-counselor communications regarding a student's personal problems (including those with possible legal implications): Do you think this would substantially deter the counseling relationship? Yes \_\_\_\_\_ No \_\_\_\_\_

For each of the following questions, assume you are the counselor involved and check one response only.

4. Assume a student you have been counseling tells you in confidence and in detail of his use and source of pot. In spite of your initial discussion of this matter with this student, you are inclined to believe his use of the drug will continue for the time being.
  - I. Your vice-principal phones two days later and asks specifically if this student is "involved with drugs". You respond by stating: (check one only)
    - (a) You don't know the student. (a) \_\_\_\_\_
    - (b) You don't know whether he is involved. (b) \_\_\_\_\_
    - (c) You know but it is confidential. (c) \_\_\_\_\_
    - (d) You "wouldn't believe it if the kid himself told me" (d) \_\_\_\_\_
    - (e) You are morally certain that "this kid isn't involved". (e) \_\_\_\_\_
    - (f) You cannot respond to such a question regarding any student without vitiating your relationship with all of them. (f) \_\_\_\_\_
    - (g) You do know that he is involved and give the details. (g) \_\_\_\_\_
  - II. Your principal then calls you into his office, to tell you that your response (a) thru (f) above constituted non-cooperation with the vice-principal at best, and that he thought it was a dereliction of your duty. Further, he thought that if you really didn't know, it reflected adversely on your job performance. However, he is willing to give you a second chance. He asks if the specific student "is involved with any dope". You respond: (check one only)
    - (a) With the same answer as under question 1 above. (a) \_\_\_\_\_
    - (b) That you can tell the principal, and do so. (b) \_\_\_\_\_
    - (c) That you can tell the principal in confidence and that he should forget where he heard it. (c) \_\_\_\_\_

III. Prior to the incidents in I and II, above, a police officer known to you to be relatively fair, stops in your office to inquire about this student, stating that he has information that the student has been either selling or giving pot away to other students frequenting a neighborhood drive-in. He inquires whether you "got any dirt on this kid". You respond: (check one only)

- (a) That you really can't discuss it with him, since anything you may have learned was acquired in confidence. (a) \_\_\_\_\_
- (b) That you know that the student is involved as a user only to your knowledge, that you doubt he is selling it since the student is always broke. (b) \_\_\_\_\_
- (c) That you can tell him with the understanding that your name is not mentioned, that this student is a user only. That this must be in confidence since to expose you will ruin your relationship with the student body. (c) \_\_\_\_\_
- (d) That you doubt this student is involved at all, rather your information is that all sales around the school are handled by four boys you know were picked up a week ago. (d) \_\_\_\_\_

5. Assume that a student you have been counseling for the past year relays the fact that he and a gang of which he is a member, have been involved in raids on beach campsites, "robbin' da hippies". Since one of the last victims fought back and injured a gang member, the group intends to go and in addition to robbery, exact revenge in the form of physical beatings administered by means of baseball bats. After discussing the potential dangers to your student, and your best efforts in attempting to dissuade his future participation: (check one only)

I. You believe that you have talked your student out of it, but are convinced the gang will proceed without him. Under this frame of mind:

- (a) You phone a best friend on the police force to report the pending time and place of this raid. (a) \_\_\_\_\_
- (b) You go to talk to the gang in an effort to forestall their raid, figuring this is the least you can do under the circumstances. Obviously failing in this effort, you make a call to a friend on the police force, as above. (b) \_\_\_\_\_
- (c) You decide to appear on the beach about an hour before the festivities, in the expectation that your presence, your reputation, and your reason will forestall any untoward events. (c) \_\_\_\_\_
- (d) You seek out the gang to tell them you are aware of their plans for the weekend, and that unless they desist from such activity, you will turn them all in. (d) \_\_\_\_\_
- (e) You reason that there is nothing else you can do which would be both professional and ethical. (e) \_\_\_\_\_
- (f) You believe that there is no way in which you can approach any other member of the gang, therefore, to prevent any injury or death, you arrange with your vice-principal to make a phone call to a friend of his on the police force giving the site and time of the raid. (f) \_\_\_\_\_



(g) With your student's permission, you talk to the gang attempting, but failing, to dissuade them from the raid. You reason there is nothing else you can do which would be professional and ethical.

(g) \_\_\_\_\_

(h) You reason that there is nothing else you can do, therefore, to prevent the possible injury of a number of innocent persons, you inform your principal of the names of the gang, the site and date of the pending foray, and arrange for him to call the police with full information on the gang.

(h) \_\_\_\_\_

II. Assume further, that in spite of your best efforts above, the gang engages in its raid most successfully. Checking with the student you counsel, you find he did not participate and is now down in the mouth for missing a good thing. Three victims are hospitalized with critical head injuries. The raid reportedly netted a quantity of beer and portable radios worth about \$300. In response to a subpoena, you appear before the county grand jury, and after giving your name, address, and occupation with the DOE, you are asked if you know X, the student you have been counseling. You respond under oath: (check one only)

(a) That you do not know him.

(a) \_\_\_\_\_

(b) That you can respond to no question the answer to which you may have acquired within your professional relationship as a student counselor as required by your professional ethics.

(b) \_\_\_\_\_

(c) That you can not discuss any information you may have regarding X, since a professional relationship has or had existed with that student, however, you can respond to queries about the gang involved.

(c) \_\_\_\_\_

(d) That you do know the student, X, and that you have reason to believe that he was not involved in the beach raid under investigation.

(d) \_\_\_\_\_

(e) That you cannot respond to any question the answer to which you may have acquired within your professional relationship as a school counselor, however, if the grand jury really wants the inside information, they should subpoena your vice-principal.

(e) \_\_\_\_\_

(f) Since you are under subpoena, and realizing a refusal to answer will result in a citation for contempt, you cite your professional ethics, which are rejected as extra-legal, and then respond fully, under duress.

(f) \_\_\_\_\_

# Appendix C

## SURVEY II

LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol, Room 004  
Honolulu, Hawaii 96813  
Telephone: 548-6237

### SCHOOL COUNSELOR'S AND SOCIAL WORKER'S QUESTIONNAIRE\*

*For purposes of this questionnaire, assume that juvenile law offender proceedings are criminal proceedings. Please read the term client to mean your patient, student, or counselee, as appropriate.*

1. Have you ever been contacted by any person, whether a law enforcement official or private person, regarding any of your clients with regard to any type of legal proceeding or potential legal proceeding?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
2. Were any of these contacts relating to noncriminal matters?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
3. Were any of these contacts relating to criminal matters?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
4. Were any of these contacts relating to criminal matters where your client was a victim?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
5. a. Were any of the contacts relating to criminal matters where your client was suspected of being guilty of or involved in a crime?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_  
b. Were there instances in which you could not determine the intent of the contact, although you knew or surmised that the contact involved investigation or other inquiry into a criminal matter?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
6. a. Were any of the contacts relating to noncriminal matters where your client was suspected of being responsible for some noncriminal action?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_  
b. Were there instances in which you could not determine the intent of the contact, although you knew or surmised that the contact involved inquiry into a noncriminal matter?  
Yes \_\_\_\_\_  
No \_\_\_\_\_  
Don't \_\_\_\_\_  
Remember \_\_\_\_\_
7. Were you ever asked to give information which your client requested that you not reveal?  
(a) Generally Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(b) In a criminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(c) In a noncriminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_
8. Were you ever asked to give information which your client probably would have expected you not to divulge?  
(a) Generally Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(b) In a criminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(c) In a noncriminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_
9. Were you ever asked to give information which you feel, that due to your professional function, was in any way confidential?  
(a) Generally Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(b) In a criminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(c) In a noncriminal matter? Yes \_\_\_\_\_ No \_\_\_\_\_ Don't Remember \_\_\_\_\_

\*This questionnaire was also sent to public health nurses, outreach counselors, psychiatrists, and public welfare social workers.

10. Were you ever asked to give information which you feel was helpful to your client?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
11. In any contacts relating to criminal matters, was the contact made (check all applicable):
- |   |       |
|---|-------|
| (a) By telephone only   | _____ |
| (b) By the person or investigator visiting you                | _____ |
| (c) By you visiting the person or investigator at his request | _____ |
| (d) Other (describe) _____                                    |       |
12. Did any person or investigator ever mention the possibility of seeking a subpoena which would compel your testimony, where you were reluctant to give information?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
13. Did the mention of a subpoena cause you to reassess your position, either to provide information, or to refuse to disclose information, regardless of whether you changed your position or not?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
14. Did a subpoena, in fact, ever issue to order your appearance in any legal proceeding?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| Did it summon you to:        |           |          |                      |
| Grand jury?                  | Yes _____ | No _____ | Don't Remember _____ |
| Criminal trial?              | Yes _____ | No _____ | Don't Remember _____ |
| Other (describe)?            | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
15. Did you ever appear in response to any subpoena?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
16. Were any of the subpoenas which were issued ever canceled for any reason?
- |                              |           |          |                      |
|------------------------------|-----------|----------|----------------------|
| (a) Generally                | Yes _____ | No _____ | Don't Remember _____ |
| (b) In a criminal matter?    | Yes _____ | No _____ | Don't Remember _____ |
| (c) In a noncriminal matter? | Yes _____ | No _____ | Don't Remember _____ |
17. How many years have you been in full-time positions involving counselling, social work, outreach work, etc., where you have come into contact on a one-to-one basis, with persons who may be described as your clients?
- Years \_\_\_\_\_
- Part-Time? Years \_\_\_\_\_
18. Can you recall the number of times you have been subpoenaed to a legal proceeding to give information generally detrimental to your clients (include all instances, whether you gave information or not, whether subpoena canceled, etc.)?
- Yes \_\_\_\_\_. If so, how many times?
- |             |                |                   |
|-------------|----------------|-------------------|
| Total _____ | Criminal _____ | Noncriminal _____ |
|-------------|----------------|-------------------|
- No, but it was: Often \_\_\_\_\_ Infrequent \_\_\_\_\_ Rare \_\_\_\_\_
- No, don't remember at all \_\_\_\_\_
19. Do you presently work with a private or public agency?
- Public \_\_\_\_\_
- Private \_\_\_\_\_
- Is it a social agency?
- Yes \_\_\_\_\_
- No \_\_\_\_\_

## Appendix D

### LIST OF PERSONS INTERVIEWED

#### SOCIAL WORKERS

The following social workers are employed in the Public Welfare Division of the Department of Social Services and Housing:

1. NAKASHIMA, SHIG  
Assistant Administrator of the Public Welfare Division, Oct. 6, 1975.
2. BOYAR, CLARA  
Administrator, Social Services Section No. 1, Oct. 10, 1975.
3. NAKAMURA, STEPHEN  
Administrator, Social Services Section No. 2, Nov. 25, 1975.
4. MIYAMOTO, CAROL  
Supervisor, North Foster Care Unit, Social Services Section No. 1, Oct. 21, 1975.
5. KOMORI, BERNICE  
Supervisor, South Foster Care Unit, Social Services Section No. 1, Oct. 14, 1975.
6. NOJIMA, BETTY  
Supervisor, North Family and Children's Services Unit, Social Services Section No. 1, Oct. 16, 1975.
7. LEE, MARGARET  
Supervisor, South Family and Children's Services Unit, Social Services Section No. 1, Oct. 15, 1975.
8. MCPHERSON, SUZANNE  
Social Worker, Child Protective Service Unit, Social Services Section No. 1, Oct. 28, 1975.
9. REITER, MAXINE  
Social Worker, Child Protective Service Unit, Social Services Section No. 1, Oct. 28, 1975.
10. RUMEL, MARILYN JOYCE  
Social Worker, Child Protective Service Unit, Social Services Section No. 1, Oct. 28, 1975.

11. WISE, ALLAN  
Social Worker, Child Protective Service Unit,  
Social Services Section No. 1, Oct. 28, 1975.
12. LEE, PEGGY  
Supervisor, Self-Support Unit, Social Services  
Section No. 2, Dec. 23, 1975.
13. SHIMADA, JESSIE  
Supervisor, South Adult Services Unit, Social  
Services Section No. 2, Dec. 12, 1975.
14. SUMMERS, SHARON  
Supervisor, North Adult Services Unit, Social  
Services Section No. 2, Dec. 12, 1975.

The following are practitioners outside of the Department of Social Services and Housing:

15. INKYO, STANLEY  
Administrative-Supervisor, Catholic Social Services,  
Oct. 17, 1975.
16. OKASHIGE, JANYCE  
Supervisor, Children's Day Treatment Center, Mental  
Health Division, Department of Health, Oct. 8, 1975.
17. ORITA, AL  
Administrator, Child and Family Services, Oct. 29,  
1975.

#### PUBLIC HEALTH NURSES

All of the nurses interviewed were employed by the Public Health Nursing Branch of the Department of Health:

1. KURAMOTO, MAE  
Acting Chief of the Public Health Nursing Branch,  
Oct. 24, 1975.
2. CAMPOS, NOEMI  
Nurse, Leeward District, Nov. 13, 1975.
3. CHANG, SUSAN  
Nurse, Lanakila District, Nov. 13, 1975.
4. MCGUIRE, PATRICIA  
Nurse, Kapahulu District, Nov. 5, 1975.

5. NEMOTO, SATSUKI  
Nurse, Windward District, Nov. 5, 1975.
6. NGUM, JEAN  
Nurse, Windward District, Nov. 5, 1975.
7. OTA, RUTH  
Nurse, Windward District, Nov. 5, 1975.
8. SHINTANI, THELMA  
Nurse, Kapahulu District, Nov. 5, 1975.
9. SHIMODA, MIYOKO  
Nurse, Windward District, Nov. 5, 1975.

#### OUTREACH COUNSELORS

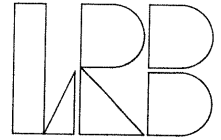
1. KADOMOTO, LOGAN  
Program Specialist, Special Programs Branch,  
Department of Education, Oct. 28, 1975.
2. BANNAN, JAMES  
Outreach Counselor, Stevenson Intermediate,  
Dec. 15, 1975.
3. IZUKA, DAN  
Outreach Counselor, Aiea High, Nov. 13, 1975.
4. KENNEY, DICK  
Outreach Counselor, Pearl City High, Dec. 19, 1975.
5. SASAKI, CHRIS  
Outreach Counselor, Kaiulani Elementary, Dec. 19,  
1975.
6. TONAKI, ED  
Outreach Counselor, Storefront School, Nov. 6,  
1975.

#### SCHOOL COUNSELORS

1. KATEKARU, CLARA  
Program Specialist, Guidance and Counseling, Special  
Programs Branch, Department of Education, Oct. 22,  
1975.
2. KANZAKI, YURI  
Counselor, Aiea High, Dec. 16, 1975.

2. ALEXANDER, CHARLES  
Counselor, St. Louis High, Dec. 1, 1975.
4. KINI, PUANANI  
Counselor, Kamehameha High, Dec. 12, 1975.
5. LEE, KRISTL  
Counselor, Kamehameha High, Dec. 12, 1975.
6. OKAMURA, FRED  
Counselor, Iolani High, Dec. 17, 1975.

## Appendix E



LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol Room 004  
Honolulu, Hawaii 96813  
Phone 548-6237

January 16, 1976

C-3771

C  
O  
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Y

Mr. Charles G. Clark  
Superintendent of Education  
Department of Education  
1390 Miller Street  
Honolulu, Hawaii 96813

Dear Mr. Clark:

Enclosed is an advance confidential copy of the Legislative Reference Bureau's Report on *Privileged Communication and Counseling in Hawaii*. This report was prepared in response to Senate Concurrent Resolution 55 and Senate Resolution 263 of the 1974 legislative session.

The enclosed advance copy is not for general distribution as it is preliminary to the final report and thus subject to change. The enclosed report is the property of the Bureau and its use should be appropriately restricted.

We would appreciate a review of this report by you or appropriate members of your staff and submission of comments concerning the report. Such comments may be made by separate letter or by notations on the report itself. While we desire your complete review of the report, we particularly direct your attention to, and solicit comments regarding, chapters III, VI and VII.

We request that you return your copy of the report by February 6, 1976 in order to allow for possible incorporation of your comments.

If there are any questions, please do not hesitate to contact the undersigned at 548-6237. Thank you for your cooperation and assistance.

Very truly yours,

Samuel B. K. Chang  
Director

SBKC:my  
Enc.

Note: This letter was also sent to Mr. George Yuen, Director of Health, and Mr. Andrew Chang, Director of Social Services. As of February 6, 1976, no comments were received from any of the departments.





STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
P. O. BOX 2360  
HONOLULU, HAWAII 96804

OFFICE OF THE SUPERINTENDENT

February 5, 1976

FEB 12 1976

Mr. Samuel B. K. Chang, Director  
Legislative Reference Bureau  
State Capitol, Room 004  
Honolulu, Hawaii 96813

Dear Mr. Chang:

Thank you for the opportunity accorded my staff to review the Legislative Reference Bureau's preliminary report on Privileged Communication and Counseling in Hawaii.

The report has been reviewed by my staff in charge of three counseling programs--Mr. Logan Kadomoto of the Outreach Counseling Program, Mrs. Clara Katekaru of the Regular School Counseling Program, and Mrs. Beverly Lee, DOE-Family Court Liaison. Their collective critique is attached. They have also written directly on the pages of the Bureau's report to clarify statements and to suggest changes on information which they deem misleading or incorrect.

The study was indeed a monumental task. We commend your staff for an outstanding job. We are grateful in that it not only clarifies the question of privileged communication for the time being, but also points to ways in which our counseling groups can further upgrade themselves in the areas of service delivery, professional ethics and the relationship of ethical standards and practices to legal standards.

You can be assured that the findings will be studied carefully and we will strive to implement in collaboration with the Hawaii School Counselors Association those recommendations which apply to the Department of Education.

Please feel free to call the following if you have any questions:  
Mr. Kadomoto at 548-4659, and Mrs. Katekaru and Mrs. Lee at 548-7819.

Sincerely,

  
Charles G. Clark  
Superintendent

CGC:ds  
Attachment



STATE OF HAWAII

DEPARTMENT OF EDUCATION

P. O. BOX 2360

HONOLULU, HAWAII 96804

FEB 12 1976

OFFICE OF INSTRUCTIONAL SERVICES  
SPECIAL PROGRAMS  
BRANCH

February 5, 1976

TO: Mr. Charles G. Clark, Superintendent of Education

FROM: Logan Kadomoto, Program Specialist, Comprehensive School  
Alienation Program  
Clara Katekaru, Program Specialist, Guidance and Counseling Program  
Beverly Lee, DOE-Family Court Liaison

SUBJECT: Critique of Legislative Reference Bureau's Report on Privileged Communication and Counseling in Hawaii

We herewith submit to you our collective response to our review of the report.

First, we would like to commend the researchers who prepared this report. To our knowledge this is the first study of such scope and depth conducted in Hawaii on this subject. It is very timely in view of recent legal decisions impinging on professional counseling competency and the enactment of the Federal Privacy Act.

In our opinion this study has dealt objectively and quite thoroughly with a difficult area which is also fraught with sensitive and complex issues.

The study has involved a large number of counseling professionals from a number of work settings in its questionnaire surveys and interviews. We thus believe that the conclusions and recommendations are based on sufficient data, inspite of certain limitations which will be enumerated later, and, therefore, valid. The recommendation not to grant privileged communication to the surveyed counseling professional groups is a logical conclusion we accept regardless of our initial individual positions on the issue.

We are well aware of the huge task of the researcher in compiling, analyzing and interpreting the mountainous amount of information. Therefore, we are especially pleased with the resultant generally accurate description of individual counseling group's professional responsibilities and job tasks and conditions, especially those of the outreach counselors, a relatively new group.

The problems and concerns faced by the different groups about confidentiality and ethics in relation to job function and legal requirements and frequent consequent dilemma are generally interpreted and reported accurately and sensitively.

February 5, 1976

There are, however, some reported data and descriptions pertaining to outreach and school counselors which need correction or clarification. These are written directly on the pages of the report. Paper clips mark the pages to be examined. We would be happy to clarify any questions you or the Bureau may have about these notations.

We observed a couple of deficiencies in the data sources:

1. Only one public school counselor was interviewed. We believe representatives from all three levels--elementary, intermediate and high school--should have been involved. Just as it is in any group, there are divergent views and practices among this group of counselors which number 204 and these should have been included in the study, the inclusion of four private school counselors notwithstanding. The one public school counselor represents only .5% of the DOE counselors; even in comparative size of representation by groups, this group suffers from underrepresentation.
2. The views of the University trainers of the various counseling groups should have been included for information on whether the counselor beliefs and practices in the areas at issue are function of their training or lack or deficiency in training. To us this information is critical for we believe that the competency to deal with confidentiality with and without privileged communication should be developed in training.

The recommendations for the improvement toward a more uniform professional stance and practices are relevant and constructive and should be followed up.

We would like to conclude by reiterating our gratitude and praise for this outstanding study.

LK:CK:BL:ds  
Attachment

# PUBLISHED REPORTS OF THE LEGISLATIVE REFERENCE BUREAU

- 1965** 1. Public Land Policy in Hawaii: The Multiple-Use Approach. Rev. 1969. 95 p. \$2.50
- 1966** 1. Hawaii Legislative Manual: A Handbook for Legislators. Third Edition. 81 p. \$1.50 (out of print)  
2. Public Land Policy in Hawaii: Land Reserved for Public Use. 95 p. (out of print)  
3. Education in a Changing World of Work in a Democratic Society. 157 p. \$2
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