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PRIVILEGED COMMUNICATION AND THE SOCIAL WORKER

REV. ANTHONY F. LOGATTO*

COMMUNICATIONS of a confidential and intimate nature, while posing many problems of evidence, as to law, ethics, and professions, are of particular concern to the social work profession. The profession, with minor exceptions, enjoys no immunity in the law. It is not protected by the precious right known as privileged communication. The problem, in essence, is this: social work rests upon relationship between worker and client, and an essential element of this relationship is confidentiality. The worker, on the one hand receives from the client a type of information which a person bares only to a confessor, a physician or a lawyer. On the other hand, he must be alert to the fact that in an unusual case he may be called upon to reveal this information which the client gives in all good faith, implicitly believing that whatever is said is sacred, as it were, and incommunicable. Early in the history of the profession, its first authoritative spokesman, Mary E. Richmond, wrote that "in the whole range of professional contacts there is no more confidential relation than that which exists between the social worker and the person or family receiving treatment."¹ Dr. McGuinn even more concretely characterizes the relationship in these apt words: "The social worker touches human life more intimately in many ways than the doctor or the lawyer. He enters the sanctum of the home, listens to confidences almost too sacred for utterance and the presumption is clearer than the sun that the person who confides this information expects the social worker to protect it; especially from those channels where it would be used against him."²

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¹ RICHMOND, WHAT IS SOCIAL CASE WORK? 29 (1922).

² McGuinn, The Professional Secret in Social Service Work 189 (unpublished doctoral dissertation in the School of Social Service Library at Fordham University) (1935).

And yet the law to date offers no solution to the dilemma, leaving the social worker in a conflict between adherence to the law and fidelity to a trust. "He finds himself in the seemingly anomalous position of being obliged to reveal the very confidences which his professional status commands him to preserve."³

Legal Survey

Since social work emerged as a profession only with the turn of the century, its legal history is not so replete as the venerable histories of other professions traditionally enjoying privileged communication.⁴ Only as recently as 1930 does there appear what seems to be the earliest case specifically ruling on the issue of privileged communication as related to the social work profession.⁵ In this case a social agency asserted the privilege as a defense against producing case records in court. The court sustained the privilege. But in a subsequent case, occurring shortly thereafter, in the same court, with another justice presiding, the defense was struck down with the comment that: "Nothing is so confidential as to prevent bringing to light the facts in any case. I appreciate the stand taken, but in the absence of a statutory prohibition the application must be granted."⁶

As to the degree of protection afforded by statutory prohibitions, these appear

³ McGuinn, *The Professional Secret in Social Work*, 1 BOSTON COLLEGE SCHOOL OF SOCIAL WORK STUDIES 1, 2 (1938).

⁴ See 14 ENCYC. SOC. SCI. *Social Work* 165-73 (1934).

⁵ *Perlman v. Perlman*, Index No. 5105, N. Y. Sup. Ct., Bronx County, June 30, 1930.

⁶ *In the Matter of the City of New York* (Sup. Ct., Bronx County), 91 N.Y.L.J., Feb. 1, 1934, p. 529, col. 7.

more in shreds than in full statutes. Section 155 of the old Public Welfare Law of New York provided that all communications and information, relating to a person receiving relief or service, obtained by any public welfare official or employee in the course of his work shall be considered confidential and shall be disclosed only to the state board of social welfare, or its authorized representative, a legislative body, or, by authority of the Commissioner, to a person or agency considered by the Commissioner entitled to such information.⁷ But in the case of *People v. Feurnstein*,⁸ the defendant, found guilty of perjury, moved to dismiss the indictment, relying on Section 155 of the Public Welfare Law, on the ground that the evidence was illegally obtained from the records of the Home Relief Bureau. The court denied the motion on the theory that a beneficiary of a governmental agency waived confidentiality when he publicly revealed his relationship with that agency. The court also ruled, as a second ground, that the statute made disclosure discretionary rather than prohibiting it absolutely.⁹ In another

⁷ The present statute, Section 136(2) of the New York Social Welfare Law, reads: "All communications and information relating to a person receiving public assistance or care obtained by any public welfare official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the state board of social welfare or its authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized representative or, by authority of the county, city or town public welfare official, to a person or agency considered entitled to such information."

⁸ 161 Misc. 426, 293 N.Y. Supp. 239 (Queens County Ct. 1936).

⁹ *Ibid.*

case, however, the petition on the part of a private citizen for an order to examine welfare records was refused.¹⁰ The court pointed to the same provision of the Public Welfare Law holding such records confidential. Then, addressing itself to the motive of the petitioner, the court observed that the statutes contained adequate safeguards against improprieties in the distribution of funds for public relief, and, the court added, "it does not appear that the public interest requires that the records of the Commissioner of Public Welfare be disclosed to any taxpayer who may wish to examine them for whatever purpose."¹¹

The limited degree of privilege is reflected in similar statutes throughout various jurisdictions. A Kentucky statute provides that all information received by probation or parole officers in the course of duty cannot be used as evidence in court, or disclosed to other than a judge or officer of the department unless otherwise ordered by the judge or department.¹² The records of adoption are usually granted some privacy. A Maine statute provides that all probate of records dealing with adoption are confidential and may be examined only upon the authorization of a judge of a probate court.¹³ A refinement of the language appears in the Alaska statute providing that the records of those receiving public assistance may not be used for other than official business, *i.e.*,

not for commercial purposes or publication in newspapers.¹⁴

The federal government, which traditionally left most welfare and health matters to the states, with the outset of the great depression of the thirties, stepped into these areas, more and more deeply to the extent that today the federal government is virtually a partner in most of the health and welfare programs within the states, whether under public or private auspices.¹⁵ Much, if not most, of the federal participation finds justification in the Social Security Act. One author characterizes that act as "the first effort by the federal government to afford legal protection against disclosure to the confidences entrusted by its citizens to social workers."¹⁶ The act makes mandatory, on all states receiving federal funds as grants-in-aid, the inclusion of a confidentiality clause in their own enabling statutes. Thus section 2 reads, in part: "A State plan for old-age assistance must . . . provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old-age assistance. . . ."¹⁷ Similar provisions apply to aid to dependent children,¹⁸ aid to the blind,¹⁹ the perma-

¹⁰ *Coopersberg v. Taylor*, 148 Misc. 824, 266 N.Y. Supp. 359 (Sup. Ct. 1933).

¹¹ *Id.* at 825, 266 N.Y. Supp. at 360. Also, an opinion of the Attorney General of New York State holds that the confidentiality of records applies not only to those who received assistance but also to those who made application for relief. See 57 OPS. ATT'Y GEN. 164-66 (1936).

¹² KY. REV. STAT. ANN. § 439.220 (1955).

¹³ ME. REV. STAT. ANN. ch. 158, § 39 (1954).

¹⁴ ALASKA COMP. LAWS ANN. § 51-1-3 (1949).

¹⁵ "In the 1930's the United States government began to demonstrate that it considered one of its functions and obligations to be the enrichment and protection of family life and individual life." ALVES, CONFIDENTIALITY IN SOCIAL WORK 80 (1959).

¹⁶ ALVES, *op. cit. supra* note 15, at 79.

¹⁷ Social Security Act § 2(a)(8), 53 Stat. 1360 (1939), 42 U.S.C. § 302(a)(8) (1958).

¹⁸ Social Security Act § 402(a)(8), 53 Stat. 1379 (1939), 42 U.S.C. § 602(a)(8) (1958).

¹⁹ Social Security Act § 1002(a)(9), 53 Stat. 1397 (1939), 42 U.S.C. § 1202(a)(9) (1958).

nently and totally disabled,²⁰ etc.²¹ It is the firm conviction of the social work profession that such provisions protect

needy persons against identification as a special group segregated on the basis of their need alone, and prevents their exploitation for commercial, personal, or political purposes. It also protects their civil liberties by prohibiting the use of such information as a basis for prosecution and other court proceedings except in connection with the enforcement of the public assistance laws.²²

How well this worked in practice, however, is seen in what follows.

An action by an insurance company against their insured to void a policy on the grounds of falsification of age rested on proof of age secured from the county public welfare records.²³ Over the objections of the insured that such records were privileged and hence inadmissible except for purposes directly connected with the administration of pensions, as provided in the state statute, the court held the records admissible. The court stated that only voluntary disclosures by employees of the welfare department were forbidden, and that the law was not intended to preclude

²⁰ Social Security Act § 1402(a)(9), 64 Stat. 555 (1950), 42 U.S.C. § 1352(a)(9) (1958).

²¹ Some authorities feel that these statutes are merely in line with similar statutes already existing whereby access to the records of tax authorities, regulatory and fact-finding agencies of government is discretionary with the proper authorities. Others feel rather that "the thinking which culminated in the above amendments to the Social Security Act, making public welfare records confidential, stemmed more from the fact that the federal government had actually entered the professional field." ALVES, *op. cit. supra* note 15, at 80.

²² Martz, *The Contribution of Social Work to the Administration of Public Assistance*, 37 SOCIAL CASEWORK 55 (1956).

²³ Bell v. Bankers Life & Cas. Co., 327 Ill. App. 321, 64 N.E.2d 204 (1945).

the courts from the records when the court found them pertinent to a legal inquiry.

In *State ex rel. Haugland v. Smythe*,²⁴ the administrator of a county welfare department petitioned the Supreme Court of Washington for a writ of certiorari to review the order of a judge of the juvenile court to produce all case records relating to a juvenile before the court in an adjudication of delinquency proceedings. The agency administrator appeared in court without the case records but with a summary of the case records containing such facts as the administrator thought pertinent. The administrator relied on Rule 8 of the Rules and Regulations promulgated by the State of Washington, Department of Social Security, which is very specific and entitled "Prohibition against Release of Confidential Information in Court Action." The section reads:

No employee or representative of the department shall release any confidential information concerning public assistance applicants or recipients either by written records or oral testimony in any court proceeding, except where such proceeding involves the administration of the public assistance program. In the event that any employee or representative of the department or any record of the department is subpoenaed, the representative of the department shall answer the subpoena and shall in court plead the regulation and the law safeguarding public assistance information as the basis for withholding such information from disclosure in court.

The juvenile court judge turned aside the administration's summary and ordered the case records themselves to be submitted. He gave the following reasons: (1) in a prior summary submitted by the welfare department substantial errors of fact were in-

²⁴ 25 Wash. 2d 161, 169 P.2d 706 (1946).

cluded and the conclusions drawn therefrom were inadequate; (2) summaries which do not include sources of information leave the court in the dark as to how to evaluate the worker's opinion; (3) summaries take time, records are available at once; (4) finally, untrained workers draw up the summaries and hence they are of dubious value.²⁵ In upholding the order of the juvenile court the supreme court added that it was not the intent of the Social Security Act, or of the state legislation cited, that they be applied to the juvenile court, since the statute "makes adequate provision not only for private hearings in such matters, but also for the withholding of all reports in such cases from public inspection and for their destruction."²⁶ The court observed that the secrecy of such records "will as wholeheartedly be respected and as sedulously be preserved by the juvenile court as it will be by the officers of the welfare department."²⁷

As to the possibility of losing the federal grant-in-aid because of the apparent breach of the provisions as to confidentiality,²⁸ the court dismissed this line of reasoning:

[N]or do we believe that any Federal board, acquainted with the manner in which juve-

²⁵ See *State ex rel. Haugland v. Smythe*, 25 Wash. 2d 161, ___, 169 P.2d 706, 708 (1946).

²⁶ *Id.* at ___, 169 P.2d at 711.

²⁷ *Id.* at ___, 169 P.2d at 711.

²⁸ See Social Security Act § 404, 49 Stat. 628 (1935), 42 U.S.C. § 604 (1958), which states: "In the case of any State plan for aid to dependent children which has been approved by the Secretary, if the Secretary after reasonable notice and opportunity for hearing to the State agency . . . finds . . . that in the administration of the plan there is a failure to comply substantially with any provision required by section 402(a) to be included in the plan; the Secretary shall notify such State agency that further payments will not be made to the State until the Secretary is satisfied . . . there is no longer any such failure to comply."

nile hearings are conducted in this state and the ends which they are earnestly seeking to accomplish, will arbitrarily or peremptorily terminate its obligations to furnish public assistance within this jurisdiction simply because the juvenile courts are given access to the records of the county welfare department for judicial inspection and use in matters vitally affecting those for whom such public assistance is required.²⁹

A much deeper invasion into the privacy of agency records occurred in the case of *State ex rel. State v. Church*³⁰ where the Supreme Court of the State of Washington affirmed the lower court's order that the administrator of the county welfare department produce the department's records at a criminal trial. The appellate court recognized the intent of the welfare department rule to restrict disclosure of records except for purposes directly related to administration of the public assistance program, but observed, in the language of the *Haugland* case: "It is significant that this provision of the rules and regulations does not command or suggest that the officer thus subpoenaed shall in all events disobey any order of the court relative to the production of such records and the disclosure of information contained therein, but only prescribes that the officer shall by proper plea inform the court of the existence and prohibitive requirement of the rules."³¹ The strong objection of counsel that this was a criminal trial and a matter of public record and therefore to be distinguished from the *Haugland* case was not persuasive; neither was the able description by counsel of the dire effects this court's ruling could have

²⁹ *State ex rel. Haugland v. Smythe*, *supra* note 25, at ___, 169 P.2d at 711.

³⁰ 35 Wash. 2d 170, 211 P.2d 701 (1949).

³¹ *State ex rel. State v. Church*, 35 Wash. 2d 170, ___, 211 P.2d 701, 703 (1949).

on the entire administration of the public assistance programs throughout the country.³²

But this was not the end of the road: By 1951, three states, in response to public agitation about "chiselers" on relief rolls, enacted changes in their assistance laws permitting the names of assistance recipients to be made known to the public on the theory that this would shame some recipients off the rolls and deter others from trying to get on.³³ To authorize these changes in state laws enough pressure was exercised in Congress to amend the Social Security Act by incorporating into the General Revenue Act of 1951 a rider with an anti-confidentiality clause. The amendment reads: "No State or any agency or political division thereof shall be deprived of any grant-in-aid or other payment to which it otherwise is or has become entitled pursuant to Title I, IV, X, or XIV of the Social Security Act, as amended, by reason of the enactment or enforcement by such State of any legislation prescribing any conditions under which public access may be had to records of the disbursement of any such funds or payments within such State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes."³⁴ About thirty states now have laws permitting public inspection of records concerning persons receiving federally-aided public assistance.³⁵ It is interesting to note that only a limited number of requests for inspection have been

made.³⁶ In Illinois, the first state to enact the new legislation, only sixty-two requests were received during the first six months after passage of the law. "The relief rolls did not decrease or increase as a result of these new laws."³⁷ These rather innocuous results seem to have confused both the proponents and the opponents of the new policy in the law. It must be borne in mind, however, that the Jenner Amendment, as it is called, refers only to the fact and the amount of assistance, and not to other personal information contained in case records.³⁸

In terms of a practical solution many welfare departments have struck up a relationship of mutual understanding with the local courts. The experience of a county welfare department in Illinois might be typical:

With the tradition of the confidential nature of Juvenile Court records, it was very easy to carry over the same idea to the new Bureau of Public Welfare. . . . If the information requested was not of a confidential nature we have told the courts that the information was not confidential and that we would be glad to submit it if the court wished. In other cases in which there was any question we have presented the matter to the courts in somewhat this way — 'The Bureau of Public Welfare attempts to work with persons who are in difficulty, urging the individual who comes to us for counsel and assistance to give us all of the facts regarding his affairs in order that we might be in a position to act intelligently. If the individual gives information to us in good faith, it is not fair to the individual to publish what he has given us.' In every instance this line of argument has been accepted by

³² *Id.* at —, 211 P.2d at 703-04.

³³ Martz, *The Contribution of Social Work to the Administration of Public Assistance*, 37 SOCIAL CASEWORK 57-58 (1956).

³⁴ Revenue Act of 1951, ch. 521, § 618, 65 Stat. 569.

³⁵ Martz, *supra* note 33, at 59.

³⁶ *Ibid.*

³⁷ ALVES, CONFIDENTIALITY IN SOCIAL WORK 89 (1959).

³⁸ See ALVES, *op. cit. supra* note 37, at 90.

the courts and the confidential nature of the records respected.³⁹

This is a far cry, however, from the status of privilege and, in a critical case, the whole structure might fall upon the unhappy head of a very unhappy client.

The School Records Controversy in New York

Casework, psychology, psychiatry, counselling and guidance are separate, yet not distinct, forms of mental help.⁴⁰ This paper is primarily interested in the social work area and might in broad general terms encompass the areas of casework, counselling and guidance.⁴¹ But social workers function closely with psychologists and psychiatrists, in fact their services are often housed under the same roof, and in conjunction with each other in a so-called "team," which means that the various approaches converge on a problem to give a total service to the client at the one time and in the same place. The plot thickens,

³⁹ Family Welfare Ass'n of America [currently, Family Service Ass'n of America], *Safeguarding the Confidential Nature of Case Records in Public Agencies* 3 (Jan. 1940).

⁴⁰ There are no exact and generally accepted definitions of these disciplines having to do with mental health. The lines of demarcation are general and to some extent over-lapping. In fact, there is considerable and, it might be added, unresolved, controversy as to whether or not they are all forms of therapy. Be that as it may, these areas do have working definitions, and do not offer too much difficulty in practice. At any rate, it is not within the province of this paper to enter this labyrinth of function and semantics.

⁴¹ The writer asks the indulgence of the reader to accept these generalizations about social work and the related professions, understanding that full interpretation and documentation would be burdensome as well as irrelevant at this time. These matters are well covered and available in the standard manuals and periodicals of the professions involved.

however, when it is explained that social work case records may include materials, reports and interviews resulting from the participation of some or of all of these "team" members. The social work record is generally the central repository of this information. There is the additional complication that information, findings, and other confidential materials are exchanged between and among the various professional persons and agencies that have worked with a particular individual or family. This means that psychological and psychiatric records may contain casework reports and, of course, vice-versa. These introductory remarks set the stage for the recent school records controversy in New York and the involvement of social work therein.

In September of 1960, there occurred the unexpected release by the New York State Department of Education of a directive that parents of public school children be permitted to inspect the records of their children. These records include, among other things, progress reports, subject grades, intelligence quotients, tests, achievement scores and psychological and psychiatric reports. The matter came to light in a departmental hearing before the Commissioner of the Department of Education, in which the appellant sought to restrain the Department of Education from carrying out its directive.⁴² In arriving at his decision the Commissioner acknowledged that certain records of the kind here involved are privileged and confidential. Thus Section 7611 of the New York Education Law provides that "the confidential relations and communications between a psychologist . . . and his client are placed on the same basis

⁴² In the Matter of Thibadeau, N. Y. Dep't of Educ., No. 6849, Sept. 22, 1960.

as those provided by law between attorney and client, and nothing in this article shall be construed to require any such privileged communications to be disclosed." But such privilege, said the Commissioner, merely prevents the disclosure of the communication or record to third parties; that is, to persons other than the client. The client, continued the Commissioner, "within the meaning of the provisions referred to is the child and, since the child is a minor, and cannot exercise full legal discretion, the parent or guardian of the child."⁴³ The Commissioner held that the parent, as a matter of law, is entitled to such information; and since there were sufficient safeguards within the procedures provided for by the Department of Education, the directive was to be followed and the appeal was dismissed. The safeguard provided for refers back to a particular part of that decision which reads:

It is, of course, to be understood that, at the time of the inspection of such records by the parent, appropriate personnel should be present where necessary to prevent any misinterpretation by the parent of the meaning of the record, since some of the records here in question may not be properly evaluated and understood by some parents.⁴⁴

The difficulties of the social worker in reference to this decision resolve themselves into two. The first is the fact that social agencies, where necessary and with proper safeguards, exchange information among themselves as to their experience with clients. Since some of this information is shared with the Department of Education, especially the Bureau of Child Guidance (in the City of New York), it could very well happen that information divulged

by a parent to a social worker in a private agency at an earlier date might appear in the records of the Department of Education being reviewed by that same person. The recognition by a parent of information in the school records which was confided to the social worker, could very well shock the parent and could amount to a destruction of all faith in the confidentiality of relationship so carefully guarded by the social worker. This is the primary fear of the social worker and goes right to the heart of the matter. Unless people in trouble, coming to a social agency, can feel full faith and confidence and implicit trust in the prudence and integrity of the worker, this institution of civilized society would be severely crippled, if not destroyed.

The second fear of the social worker is that raw data given to parents, unless skillfully interpreted, can be more damaging than helpful. The safeguards within the Department of Education are perhaps more illusory than real, since the Department of Education itself will have to admit that comparatively few of its personnel are professionally prepared to interpret material of a psychological and psychiatric nature.⁴⁵ In light of the decision, a number of social service agencies revised their policy so as to curtail or eliminate completely all reports of their contacts when the same are requested by the various schools, guidance counsellors, etc.⁴⁶

⁴⁵ School personnel with clinical experience of a psychological or psychiatric type are concentrated mainly in a Bureau of Child Guidance or its equivalent and are out of all proportion numerically to the vast student body.

⁴⁶ See, e.g., Letter from Brooklyn Bureau of Social Service and Children's Aid Soc'y to Dr. John J. Theobald, Superintendent of Schools, Oct. 31, 1960. "[T]his organization is unable to continue to share its information and findings concerning

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 1-2.

The decision of the Commissioner brought strong and rapid repercussions, both favorable and unfavorable. Some parents looked upon these rulings as long overdue. As expressed by the President of the United Parents Association: "We believe that the parents have the right to receive an interpretation of their child's test scores."⁴⁷ Others expressed real concern about the ability of the Department of Education to carry out its interpretative function:

The information [about children] would have some value if preceded by extensive parent education. We cannot help wondering how the Board of Education, with its budgetary problems, can provide appropriate personnel to prevent misinterpretation and misuse of the records.⁴⁸

Dr. Frederick C. McLaughlin, Director of The Public Education Association, urged the Board not to comply with the state ruling, holding that the Association was "not opposed to the parents receiving as much information about their children as would be helpful, but strongly objected to giving parents the right to see confidential files and professional reports that may be subject to misinterpretation."⁴⁹

Various professional groups expressed strong views about this ruling of the Department of Education. The New York State Psychological Association, speaking through its counsel, said that "very highly technical psychological data might easily be misunderstood by an emotional parent."⁵⁰ Deep concern as to the impact of the recent decision had already been registered. Dr.

school pupils or their families with representatives of the Board of Education."

⁴⁷ N. Y. Times, Oct. 28, 1960, p. 28, col. 4.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ N. Y. Times, Nov. 19, 1960, p. 23, col. 8.

Hansberg, President of the Brooklyn Psychological Association, outlined some of the problems which should hopefully lead to a reconsideration and a subsequent rescinding of the rule.⁵¹ While in full agreement that the parent should have as much information about his child as possible, Dr. Hansberg pointed out that reports prepared by professionals are necessarily technical in character and if these reports in their entirety are made available to the parent, it might, in many cases, result in confusion and undue apprehension. "It is traditional," he said, "in professional practice that only the interpretation and not the technical data be communicated to the layman."⁵² Numerical test scores and technical detail are dependent in their interpretation upon innumerable subtle and complex factors particular to the individual child. The result, he feels, would be that psychologists, aware of their responsibilities and profoundly concerned with the welfare of the child, would tend to submit emasculated reports of very limited value. Dr. Hansberg appreciated the real concern on the part of the Department of Education to provide safeguards against misinterpretation. This, however, represents more "a laudable wish" than a reality, he felt. He strongly urged that the ruling be rescinded before irreparable damage could be done.⁵³

The Department of Education, undoubtedly perturbed by the potentials of the situation, issued a "clarification" in which it confirmed the rights of parents to see their children's records, but it emphasized that the earlier decisions would "not mean that isolated bits of numerical data,

⁵¹ Letter from Brooklyn Psychological Ass'n to Dr. James Allen, State Commissioner of Education, October 30, 1960.

⁵² *Ibid.*

⁵³ *Ibid.*

such as, I.Q.'s and achievement scores, should be presented, bare of interpretation, to parents, since free availability of this type of information without experience in its application could be less than helpful."⁵⁴ Dr. Walter Crewson, Associate State Education Commissioner, issued the clarifying statement, indicating that the Department recognized the difficulties involved in complying with the decision and that "in the light of these considerations, the schools must study carefully and plan for students' records and for the communication of information to parents."⁵⁵ Dr. John J. Theobald, the New York City Superintendent of Schools, said that changes would be made in "records procedures and information procedures," along the lines of the state order and further stated that steps would be taken to make sure that pupil records were carefully explained to parents to avoid "the danger of promiscuous distribution of information."⁵⁶

This was the state of affairs, and troubled indeed, when a very interesting evaluation of the constitutionality of the Commissioner's directive was made in the Supreme Court of Nassau County, New York.⁵⁷ The petitioner, on October 28, 1960, made a formal written demand upon the local public school board that it direct the Superintendent of Schools to make all school records of his son available for his inspection. On November 2nd, 1960, the demand

was refused. The school board outlined its policy to keep the parent informed as to the progress of his child through report cards, periodic private conferences with teachers, and, if requested, interpretations of the personal file of the child by qualified school personnel, again by the conference method. Petitioner, however, in the court's words "wants not conferences, but the written records."⁵⁸ Whereupon the petitioner brought this action under article 78, a special proceeding in the nature of mandamus, to compel the Superintendent to allow the parent to inspect his son's records.

The court made an extensive inquiry into the parent's rights and the school's obligations in an eleven-page opinion. Attempting to establish whether a clear legal right to relief was present, the court examined the New York State Constitution and found it silent.⁵⁹ As for enactments of the legislature, in spite of the fact that McKinney's Consolidated Laws devotes three volumes to the Education Law, "there is no legislative pronouncement in this body of statutes either granting to or taking away from a parent the right to inspect the school records of his or her child."⁶⁰ It also emerges that "neither counsel nor the court has been able to discover any legislation dealing with the nature of the school records at issue here as being either 'public' on the one hand, or 'confidential' on the other, or of the right of a parent as distinguished from the public at large to inspect them."⁶¹ The court then turned to the regulations, rulings and orders of the Commissioner of Education of the State of New York. There is no doubt, said the court, that the Commis-

⁵⁴ Clarification of the *Thibadeau* opinion from Dr. Walter Crewson, Associate Commissioner of Education, to City, Village and District Superintendents of Schools and Supervising Principals re the Availability of Pupil Records to Parents, Nov. 21, 1960, p. 2.

⁵⁵ *Id.* at 4.

⁵⁶ N. Y. Times, Nov. 29, 1960, p. 39, col. 2, 3.

⁵⁷ *Van Allen v. McCleary*, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

⁵⁸ *Id.* at 83, 211 N.Y.S.2d at 504.

⁵⁹ *Ibid.*

⁶⁰ *Id.* at 84, 211 N.Y.S.2d at 505.

⁶¹ *Id.* at 85, 211 N.Y.S.2d at 506.

sioner has the power to regulate in this area,⁶² and such regulations are construed as quasi-legislative. (These are to be distinguished from those pronouncements which are quasi-judicial in character, and therefore binding only on the litigant parties.) The Commissioner of Education has filed extensive regulations as to many school matters but relevant to the matter in issue it appears that he has provided only for the maintenance of mental health records of children and that they are confidential except with the consent of the parent. But "the regulations are silent on the right of either the student or the parent to inspect the child's records."⁶³ Absent such formal regulation, the court was reluctant to find in these enactments a basis for relief and so turned to the common law. First the court referred to the common-law rule, recognized in *In the Matter of Egan*,⁶⁴ to the effect that "when not detrimental to the public interest, the right to inspect records of a public nature exists as to persons who have sufficient interest in the subject matter. . . ."⁶⁵ Secondly, *Stenstrom v. Harnett*,⁶⁶ was quoted to the extent "that although a record was not strictly speaking a public record, and although no statute specified those who were or were not entitled to inspect it, the fact that the record was required by law to be kept by a public officer, entitled a person with an *interest*

in it to inspect the record."⁶⁷ The court found that all the factors which prompted the court to issue a mandamus in that case were present in the case at bar since it has been held that members and officers of local boards of education are public officers within the definition of Section 2 of the Public Officers Law. And as for a parent's "interest" the court felt this was obvious. On this concatenated reasoning the court concluded that "absent constitutional, legislative or administrative permission or prohibition, a parent is entitled to inspect the records of his child maintained by the school authorities as required by law. The petition is accordingly granted."⁶⁸

Of great interest in this case, are the amicus curiae briefs submitted by the New York State Psychological Association and the New York State Teachers Association. The court acknowledged with deep respect the powerful arguments made concerning the need for safeguards preventing misinterpretation by parents of records of a highly professional and technical nature, the desirability of preserving the professional freedom of expression of psychologists and other teachers, uninhibited by fears of libel suits and parental retaliation, and the dangers of affording the parents material of a nature critical of the home environment of the child. But, said the court, these are matters essentially outside the realm of judicial determination. "[I]t is not the function of the court to write regulations or enact statutes. In the final analysis, the determination of these arguments rests either with the Legislature or the Commissioner of Education to whom

⁶² See N. Y. CONST. art. V, § 4; N. Y. EDUC. LAW § 305.

⁶³ *Van Allen v. McCleary*, *supra* note 57, at 86, 211 N.Y.S.2d at 507.

⁶⁴ 205 N.Y. 147, 98 N.E. 467 (1912).

⁶⁵ *Van Allen v. McCleary*, *supra* note 57, at 91-92, 211 N.Y.S.2d at 512.

⁶⁶ 131 Misc. 75, 226 N.Y. Supp. 338 (Sup. Ct. 1927), *aff'd*, 224 App. Div. 127, 230 N.Y. Supp. 28 (3d Dep't), *aff'd mem.*, 249 N.Y. 606, 164 N.E. 602 (1928).

⁶⁷ *Van Allen v. McCleary*, *supra* note 57, at 92, 211 N.Y.S.2d at 512-13.

⁶⁸ *Id.* at 93, 211 N.Y.S.2d at 514.

the Legislature has delegated broad power to act.⁶⁹

Extension of Privilege?

The present status of social service agencies — their social workers and case records — is that they are subject to subpoena under the well-recognized exceptions to the hearsay rule.⁷⁰ These exceptions include pedigree statements;⁷¹ declarations against interest;⁷² admissions.⁷³ But with the adoption of businesslike procedures, and in particular, the maintenance of case records, the exception to the hearsay rule most frequently employed is commonly known as "book entries made in the regular course of business" which finds statutory embodiment in Section 374-a of the New York Civil Practice Act.⁷⁴ This section has

⁶⁹ *Ibid.*

⁷⁰ For the benefit of the non-legally trained reader, the hearsay rule excludes evidence, either written or oral, of the existence of a fact based not on the witness' own personal knowledge or observation but on what someone else said. See RICHARDSON, EVIDENCE § 206 (8th ed. Prince 1955).

⁷¹ That is, declarations concerning the history of family descent which are transmitted from one generation to another. *Washington v. Bank of Savings*, 171 N.Y. 166, 63 N.E. 831 (1902); *Eisenlord v. Clum*, 126 N.Y. 552, 27 N.E. 1024 (1891). In *Champion v. McCarthy*, 228 Ill. 87, —, 81 N.E. 808, 811 (1907), the court noted the general rule to be that declarations of deceased members of the family of either the father or the mother may be received to establish illegitimacy as well as legitimacy.

⁷² That is, the declarations of a person since deceased against his interests including other incidental and collateral facts and circumstances contained therein. See Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944).

⁷³ That is, statements made, or acts done, by one of the parties prior to trial, concerning facts relevant to the present issues, which are inconsistent with the propositions he now seeks to establish. See *Reed v. McCord*, 160 N. Y. 330, 54 N.E. 737 (1899).

⁷⁴ N. Y. CIV. PRAC. ACT § 374-a provides: "[A]ny

been applied to render admissible the minute books and case books of a congregation;⁷⁵ baptismal records;⁷⁶ corporate books;⁷⁷ death certificates;⁷⁸ the records of an electroencephalograph test,⁷⁹ etc. Certain portions of these records are, however, protected by other sections of the New York Civil Practice Act. For example, section 352 provides that professional communications made by a physician and his patient cannot be revealed without the consent of the patient himself. This section, whether applied to an oral communication or one contained in a record, as in a hospital record, protects such communication from compulsory disclosure.⁸⁰ The privilege of nondisclosure has also been established by statute for the protection of the communications between an attorney and client, a clergyman and penitent, a psychiatrist and client, and a husband and

writing or record, . . . in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." In addition, this statute defines "business" as including any business, profession, occupation or calling of every kind.

⁷⁵ See *Zinaman v. Stivelman*, 246 App. Div. 851, 285 N.Y. Supp. 20 (2d Dep't), *aff'd*, 272 N.Y. 580, 4 N.E.2d 813 (1936).

⁷⁶ See *Abbondola v. Church of St. Vincent de Paul*, 205 Misc. 353, 123 N.Y.S.2d 32 (Sup. Ct. 1953) (dictum).

⁷⁷ See *In the Matter of Estate of Auditore*, 136 Misc. 664, 240 N.Y. Supp. 502 (Surr. Ct. 1930).

⁷⁸ See *Duffy v. 42nd St. M. & St. N. Ave. Ry.* 266 App. Div. 865, 42 N.Y.S.2d 534 (2d Dep't 1943) (memorandum decision).

⁷⁹ See *Mayole v. B. Crystal & Son, Inc.*, 266 App. Div. 1008, 44 N.Y.S.2d 411 (2d Dep't 1943).

⁸⁰ See *Williams v. Alexander*, 309 N.Y. 283, 125 N.E.2d 417 (1955).

wife.⁸¹ These represent New York extensions of the privilege. Other jurisdictions, of course, vary as to the number of professions covered and as to how far each privilege goes.⁸²

All of the foregoing leads to the obvious question, what about social work? Shall it or shall it not be privileged and take its place with the other great professions? It is true that the social work profession is a newcomer when compared with the great traditions of the lawyer, the clergyman, etc. But newness per se was never a criterion of truth or value. The old is good and the new is good, but only on its own merits. The writer as a priest of nearly twenty years' experience, and as a member of the bar, easily and honestly attests to the fact that outside of the realm of the confessional — which is a totally different category of itself and sui generis — the priest or lawyer is not in a more confidential relationship with clients or parishioners than the social worker. People come to social agencies, as they do to priests and lawyers,

in times of great stress and often at the very end of their emotional rope. Thereafter nothing is so sacred, so intimate, so soul-revealing as the outpourings of the client. The information is often not only against interest but outright incriminating, shaming and searing. Surely, this is to be protected in some way. Can the millions of clients who are served annually be left in the precarious and uncertain position that perchance their trust will be betrayed? The need for human warmth, guidance, counsel and therapy is too great and too destructive and the supply is too short. A solution must be found.

The writer is in complete agreement with the court in the *Van Allen* case that the courts are not the proper forum for determination of this kind.⁸³ A piecemeal, mosaic-like solution leaves much to be desired. Proper evaluation requires extensive presentation by expert witnesses, and many practical judgments. This is the proper area of the legislature with its unique facilities for fact-finding, professional testimony, free and open debate and evaluation. It can harness the energies and resources, skills and experiences of a nation. The writer does not dictate the answer, but an answer must be found. "If the confidential relationship [of social worker and client] were to be stripped of its cloak of confidence, the relationship would become the most shocking holocaust of human rights in the world at the present time."⁸⁴

⁸¹ See *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940).

⁸² Although the extension of the privilege is continuously being sought by many new professional groups the policy in this area continues to be one of strict limitation. Five states recognize a newspaperman-source of information privilege. See ALA. CODE tit. 7, § 370 (1960); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1961); CAL. CIV. PROC. CODE § 1881(6); N. J. REV. STAT. § 2A:84A-21 (Supp. 1960); PA. STAT. ANN. tit. 28, § 330 (Supp. 1960).

Three states extend a privilege to the accountant-client relationship. See COLO. REV. STAT. ANN. § 153-1-7(b) (1953); GA. CODE ANN. § 84-216 (1955); N.M. STAT. ANN. § 20-1-12(E) (1953).

Three states recognize a psychologist-client privilege. See ARK. STAT. ANN. § 72-1516 (1957); GA. CODE ANN. § 84-3118 (1955); WASH. REV. CODE § 18.83.110 (1957).

⁸³ See McGuinn, *The Professional Secret in Social Service Work* 189 (unpublished doctoral dissertation in Fordham University, School of Social Service Library) (1935).

⁸⁴ McGuinn, *op. cit. supra* note 83, at 191.