June 12, 1961

Memorandum No. 21(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article - Rule 27)

This memorandum concerns Rule 27 relating to the Physician-Patient Privilege. A subsequent memorandum will suggest that the Commission establish a special privilege (providing more protection) for a confidential communication to a psychiatrist or psychologist.

Attached as Exhibit I (white pages) is Rule 27 as revised by the Commission. The exhibit contains a detailed discussion of the revised rule.

Attached as Exhibit II (yellow pages) is an extract of the Minutes of the Southern Section of the State Bar Committee. Attached as Exhibit III (pink pages) is an extract of the Minutes of the Northern Section of the State Bar Committee. You will note from the extract that the Northern Section has not yet completed its consideration of Rule 27.

Also attached is our research consultant's study relating to Rule 27. (References in this memorandum to this research study are indicated as "Study")

The following matters should be noted in connection with Rule 27:

1. Both the Northern and Southern Section suggest that in Rule 27(1)(b) the clause "a guardian of the patient when the patient is incompetent" be changed to "any guardian . . .".

2. Both the Northern and Southern Section object to the provision in the definition of patient - Rule 27(1)(c) - that uses the words "sole

purpose". The Northern Section suggested that "principal" be substituted for "sole"; the Southern Section suggested the word "sole" be deleted.

Both Sections object to the phrase "preliminary to such treatment" and suggest that this phrase be deleted.

If the purpose of the privilege is to encourage the patient to make the disclosures necessary so that the physician may diagnose the condition and treat it, these seem to be reasonable limitations on the privilege. See, however, the comments of the Northern and Southern Sections as contained in the extract of their minutes.

3. The Northern Section discussed but made no decision on the Commission's action in broadening subdivision (2)(d) to permit the physician to claim the privilege if the patient is living and other conditions are satisfied. The Southern Section approved the idea that the physician should be able to claim the privilege but the members had reservations about the logic which permits the physician to claim the privilege only when the patient is alive. The Southern section deleted the language from Rule 27(2)(d)(iii) "the patient is living and". This is, again, a matter of how testimony will come in if the patient is dead. On pages 9-12 of the Study the consultant points out the problem under the existing California law:

> It is axiomatic that a person possessed of a privilege has the option to claim or to waive the privilege. It has never been doubted, therefore, that under C.C.P. § 1881(4) the patient could himself waive the privilege. However, we have had in this State and to some extent we may still have an odd situation in cases arising after the death of the patient. This situation stems from the nineteenth century doctrine which California borrowed from the New York decisions of that era. That doctrine is that the patient's privilege survives his death and nobody can waive the privilege in behalf of the decedent.

The proposed revision by the Southern Section might create a situation where no one could waive the privilege and the physician would feel bound by professional ethics to claim it. Is this desirable? What is the purpose of the privilege and does the Southern Section's revision serve to carry it out? It should be noted that the privilege beongs to the patient, not the physician.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Exhibit I

Revised 11/10/59

Note: This is Uniform Rule 27 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike-out material for deleted material.

RULE 27. PHYSICIAN-PATIENT PRIVILEGE.

(1) As used in this rule [,] :

(a) "Confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) "Holder of the privilege" means (i) the patient when he is competent, (ii) a guardian of the patient when the patient is incompetent and (iii) the personal representative of the patient if the patient is dead. [~~the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient;~~]

(c) "Patient" means a person who, for the sole purpose of securing preventive, palliative [,] or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician [,] or submits to an examination by a physician [,] .

(d) "Physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place [,] .

(2) Subject to rule 37 and except as otherwise provided [~~by paragraphs (3), (4), (5) and (6) of~~] in this rule, a person, whether or not a party, has a privilege in a civil action or proceeding [~~or in a prosecution for a misdemeanor~~] to refuse to disclose, and to prevent a witness from disclosing, a communication [,] if he claims the privilege and the judge finds that:

(a) The communication was a confidential communication between patient and physician [,] ; and

(b) The patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor [,] ; and

(c) The witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or [~~his agent or servant~~] a representative, associate or employee of the physician; and

(d) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege [~~for him~~] by the holder of the privilege or (iii) if the patient is living and no other person claims the

privilege and the privilege has not been waived under rule 37, the person who was the physician at the time of the confidential communication.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician [~~(a),~~] upon an issue of the patient's condition in:

(a) An action or proceeding to commit him or otherwise place him or his property, or both, under the control of another or others because of his alleged mental [~~incompetence~~] or physical condition. [~~, or in~~]

(b) An action or proceeding in which the patient seeks to establish his competence. [~~or in~~]

(c) An action or proceeding to recover damages on account of conduct of the patient which constitutes a felony. [~~criminal offense other than a misdemeanor, or~~]

(4) There is no privilege under this rule as to any relevant communication between the patient and his physician upon:

(a) [~~(b) upon~~] An issue as to the validity of a document as a will of the patient. [~~, or (c) upon~~]

(b) An issue between parties claiming by testate or intestate succession or intervivos transaction from a deceased patient.

[~~(4)~~] (5) There is no privilege under this rule in an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which the condition of the patient is an element or factor of the claim, or counter claim, cross-complaint or affirmative defense, of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

[~~(5)~~] (6) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office [~~,~~] unless the statute, charter, ordinance, administrative regulation or other provision requiring the report or record specifically provides that the information shall not be disclosed.

[~~(6)~~] (7) No person has a privilege under this rule if the judge finds that [~~sufficient evidence, aside from the communication has been introduced to warrant a finding that~~] the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort [~~,~~] or to escape detection or apprehension after the commission of a crime or a tort.

[~~(7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.~~]

Revised 11/10/59

9/15/59

RULE 27 (PHYSICIAN PATIENT PRIVILEGE) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 27, relating to the physician-patient privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical order.

Definition of "holder of the privilege." The definition of "holder of the privilege" contained in the Uniform Rule has been rephrased in the revised rule to conform to the similar definition in revised rule 26. Note that under this definition, a guardian of the patient is the holder of the privilege if the patient is incompetent. This differs from the Uniform Rule which makes the guardian of the person of the patient the holder of the privilege. Under the revised definition, if the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege.

An incompetent patient becomes the holder of the privilege when he becomes competent.

The personal representative of the patient is the holder of the privilege when the patient is dead. He may claim the privilege on behalf of

the deceased patient. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. If this is the existing California law, the Commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

This definition of "holder of the privilege" should be considered with reference to subparagraphs (c) and (d) of paragraph (2) of the revised rule (specifying who can claim the privilege) and rule 37 (relating to waiver of the privilege).

Definition of "patient." Two unnecessary commas have been deleted from the Uniform Rule.

The Commission approves the requirement of the Uniform Rule that the patient must consult the physician for the sole purpose of treatment or diagnosis preliminary to treatment in order to be within the privilege.

Definition of "physician." A necessary comma has been inserted after the words "person authorized." Compare with Uniform Rule 26(3)(c).

The Commission approves the provision of the Uniform Rule which defines "physician" to include a person "reasonably believed by the patient to be authorized" to practice medicine. If we are to recognize this privilege, we should be willing to protect patients from reasonable mistakes as to unlicensed practitioners.

GENERAL RULE

The substance of the "general rule" is set out in the revised rule as paragraph (2).

The following modifications of the Uniform Rule have been made in the revised rule:

(1) The "general rule" has specifically been made subject to rule 37 (waiver) and paragraph (7) of Uniform Rule 27 has been omitted as unnecessary. Making the general rule subject to rule 37 conforms to the language of rule 26 (attorney-client privilege) and makes it clear that rule 37 is applicable.

(2) The language of the introductory exception to the Uniform Rule has been revised to delete the unnecessary references to specific paragraphs of the rule.

(3) Under the revised rule, the privilege is applicable only in civil actions and proceedings. The Commission rejects that portion of the Uniform Rule that extends the privilege to a prosecution for a misdemeanor. The existing California statute restricts the privilege to a civil action or proceeding and the Commission is unaware of any criticism of the existing statute. In addition, if the privilege is applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, it would be possible for the prosecutor in some instances to prosecute for a felony in order to make the physician-patient privilege not applicable. A rule of evidence should not be a significant factor in determining whether an accused is to be prosecuted for a misdemeanor or a felony.

(4) In subparagraph (c) of paragraph (2) of the revised rule, the phrase "a representative, associate or employe of the physician" has been substituted for "his agent or servent." This change makes rule 27 conform to the phrase used in rule 26.

(5) Subparagraph (d) of paragraph (2) of the Uniform Rule has been revised to conform to Uniform Rule 26 insofar as who may claim the privilege is concerned. This revision will allow the physician to claim the privilege on behalf of patient when all of the following conditions exist: (1) the patient is alive; (2) no other person claims the privilege; and (3) the privilege has not been waived. The Commission believes that in this case the Uniform Rule is not clear but that the Uniform Rule might be construed to mean that the physician is a person "authorized to claim the privilege for" the holder of the privilege.

EXCEPTIONS

The revised rule incorporates the substance of the exceptions provided in the Uniform Rule with the following modifications and additions:

(1) The exceptions have been rephrased and tabulated to improve readability.

(2) The exception provided in paragraph (3)(a) is broader than the Uniform Rule and will cover not only committments of mentally ill persons, mentally deficient persons and other similar persons, but will also cover such cases as the appointment of a conservator under Probate Code § 1751. In these cases, the Commission believes the privilege should not apply.

(3) The provision of the Uniform Rule that there is no privilege in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor has been rephrased but not changed in substance. Although the revised rule denies the physician-patient privilege in a prosecution for a misdemeanor, the Commission does not believe that the patient should be denied his privilege in a civil action or proceeding against him for damages on account of conduct which it is

alleged constituted a misdemeanor.

(4) The Uniform Rule provides that there is no privilege upon an issue between parties claiming by testate or intestate succession from a deceased patient. The Commission has extended this exception to include also inter vivos transactions. This is consistent with Uniform Rule 26(2)(b).

(5) The Uniform Rule provides that there is no privilege in an action in which the claim of the patient is an element or factor of the claim "or defense" of the patient. The revised rule does not extend the patient-litigant exception this far but instead provides that the privilege does not exist in an action or proceeding in which the condition of the patient is an element or factor of the claim "or counter claim, cross-complaint or affirmative defense" of the patient. The Commission's revised rule will protect the patient in the following case. Divorced husband (P) brings a proceeding against his ex-wife (D) to gain custody of child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls psychiatrist who is treating D. Under the Uniform Rule it appears that D's objection to the psychiatrist's testimony would be overruled; but the contrary is the case under the revised rule. The Commission does not believe that a plaintiff should be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action or proceeding.

(6) The revised rule provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (Wrongful Death Statute). The Uniform Rule does not contain this provision. Under the existing California statute, a person authorized to bring a wrongful death action may consent to the testimony by the physician. There is no logical

reason why the rules of evidence should be different as far as testimony by the physician is concerned in a case where the patient brings the action and the case where a wrongful death action is brought. Under the Uniform Rule and under the revised rule, if the patient brings the action, the condition of the patient is an element of the claim and no privilege exists. The revised rule makes the same rule applicable in wrongful death cases.

The revised rule provides that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

(7) The provision of the Uniform Rule providing that the privilege does not apply as to information required by statute to be reported to a public officer or recorded in a public office has been extended to include information required by "charter, ordinance, administrative regulations or other provisions." The privilege should not apply where the information is public, whether it is reported or filed pursuant to a statute or an ordinance, charter, regulation or other provision.

(8) A necessary comma has been inserted and and an unnecessary comma has been deleted from paragraph (6) of the Uniform Rule (paragraph (7) of the revised rule). The Commission approves the provision of the Uniform Rule which makes the privilege not applicable where the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort. The Commission does not

believe that this provision will impose any undue difficulty for a patient consulting with his physician. The Commission believes that the contrary is true, for example, in the case of the lawyer-client relationship. Consequently, the Commission has limited this exception to crime or fraud in rule 26 as far as the lawyer-client privilege is concerned but has adopted the Uniform Rule in the case of the physician-patient privilege.

The Uniform Rule requires that the judge must find that "sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort." The Commission has not retained this requirement that as a foundation for the admission of such evidence there must be a prima facie showing of criminal or tortious activities. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes that the foundation requirement is too stringent and prefers that the question (as to whether the services of the physician were sought or obtained to enable or aid anyone in a crime or tort) be left to the judge for determination under the provisions of Uniform Rule 8.

(9) Paragraph (7) of the Uniform Rule has been deleted. This paragraph is not necessary since the same matter is covered by rule 37. Rule 27 has been made subject to rule 37 in the revised rule by a specific provision in revised rule 27(2)

EAVESDROPPER EXCEPTION

Uniform Rule 27 does not abolish the eavesdropper exception so far as the physician-patient privilege is concerned. This exception is a traditional one and the Commission does not believe that the physician-patient privilege should be extended to provide protection against eavesdroppers.

EXHIBIT II

EXTRACT OF MINUTES OF

SOUTHERN SECTION OF COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

Rule 27: in general.

The Southern Section then considered Rule 27 (physician-patient privilege). Mr. Kaus, who prepared the report on this rule, elaborated on his report.

The following summary of the action taken by the Southern Section at the meeting relates in each case to Rule 27 in the form in which it has been revised by the Law Revision Commission.

Rule 27 (1)(a): "confidential communication" defined.

The definition of "confidential communication" was approved.

Rule 27(1)(b): "holder of the privilege" defined.

Mr. Kaus pointed out that the Commission, in changing the URE definition, apparently intended to provide that, in the case of an incompetent patient not only the guardian of the person but also the guardian of the estate is to be the holder of the privilege; that the language suggested by the Commission does not, in his opinion, clearly indicate that either of such guardians is the holder of the privilege and may waive it. He suggested that, in the clause "a guardian of the patient when the patient is incompetent", the word "a" should be changed to "any", so that the clause would begin "any guardian" etc.

The Committee adopted Mr. Kaus's recommendation.

Mr. Kaus also raised the question of whether the Commission's definition of "holder" is sufficiently broad. He pointed out that clause (iii) of subparagraph (b) of Rule 27, as re-drafted by the Commission, would give the privilege, in the case of a patient's death, only to the personal representative; that, therefore, if an action arising out of the death of a patient were brought after death by an heir, spouse, or child rather than by the personal representative, such heir, spouse, or child would not be a "holder" and would not be entitled to waive the privilege; that it would be necessary to bring in the personal representative for that purpose. To take care of this problem, Mr. Kaus suggested that the Commission's definition of "holder" be broadened by adding a new clause (iv) to Rule 27(b), which would read as follows:

> "(iv) in any proceeding brought to recover a monetary award on account of the death of the patient, excluding actions for wrongful death, any person entitled to maintain such proceeding."

Mr. Kaus also pointed out that the Commission's definition of "holder" seems to make no provision for those cases in which the patient has died and his estate has been closed and the personal representative has distributed to the deceased patient's heirs or legatees a cause of action owned by the patient. To cover this type of situation, he suggested that an additional clause (v) be added to Rule 27(b), the new clause to read as follows:

> "(v) the distributee of any cause of action from the estate of a deceased patient, if the personal representative was a holder of the privilege while the cause of action was part of such estate."

In the discussion which followed the point was raised that the proposed new clause (v) presupposes the existence of a probate estate and the distribution of a cause of action to a distributee; that the clause might leave open those situations in which there has been no probate at all and in which a deceased patient's cause of action simply has passed to a heir by operation of law. The Committee decided to defer action on Mr. Kaus's proposed new clause (v) pending further study and report on this problem by Mr. Kaus.

Rule 27(1)(c): "patient" defined.

A "patient", under the Commission's definition, is defined as a person who consults a physician or submits to an examination by a physician for the "sole purpose" of securing treatment or diagnosis "preliminary to treatment": Two objections to this definition were raised by the Committee members.

(1) It seems to the Southern Section that the words "sole purpose" are unnecessarily qualifying. The view of the Southern members is that if a person consults a physician for treatment or diagnosis, he should be considered a patient whether or not his consultation was for that "sole" purpose. Suppose, for example, a person consults a physician with dual purposes in mind: one purely social (the doctor may be a personal friend) and the other strictly professional. It can be argued, under the "sole purpose" test suggested by the Commission, that the person is not a patient. The Southern members believe that the test should be whether any purpose for the consultation was treatment or diagnosis. They concluded, therefore, that in the phrase "sole purpose" the word "sole"

should be deleted.

(2) The Southern Section's second objection to the Commission's definition of "patient" is that, under the Commission's definition, the diagnosis must be one which is "preliminary to such treatment" by the physician. The Southern members do not understand the necessity for the qualifying phrase "preliminary to such treatment", and they would eliminate that phrase. In their view, it should make no difference whether the patient whose illness is diagnosed ever is treated at all. For example, a person consults a physician. The physician makes a diagnosis. After learning what is wrong with him and what it takes to alleviate what is wrong with him, the patient may reject any treatment [it may cost too much or may be too unpleasant]. Or it may be that the physician tells the patient that the supposed illness is imaginary and that no treatment is required. The Southern Section sees no logical reason why, in either of these instances, there should not be a recognized physician - patient relationship even though there never is actual treatment.

Rule 27(1)(d): "physician" defined.

The Commission's definition of "physician" was approved.

Rule 27(2): introductory paragraph setting forth the privilege.

The Commission's introductory paragraph setting forth the privilege in general terms was approved. The Southern members agree that the privilege should be limited to civil actions only and should not be extended to misdemeanor prosecutions. The Commission's argument that any attempt to draw a distinction between misdemeanors

and felonies may result in prosecutors pressing for felonies instead of misdemeanors seems irrefutable.

Rule 27(2)(a).

Subparagraph (a) of subdivision (2) of Rule 27 was approved.

Rule 27(2)(b).

Subparagraph (b) of subdivision (2) of Rule 27 was approved.

Rule 27(2)(c).

Subparagraph (c) of subdivision (2) of Rule 27 was approved.

Rule 27(2)(d).

Except as stated below, the Southern Section approved the Commission's draft of subparagraph (d) of subdivision (2) of Rule 27. The exception relates to clause (iii), which permits the physician to claim the privilege if the plaintiff is living and if no other person claims the privilege and it has not been waived by the holder. The consensus of opinion of the members of the Section was that the physician should be able to claim the privilege whenever the holder of the privilege is not in a position to claim it or waive it. However, the members had reservations about the logic which permits the physician to claim the privilege only when the patient is alive. The members agreed with the argument, set forth in Mr. Kaus's report on Rule 27, that if the physician - patient privilege survives the death of the patient (as it clearly does under the definition of "holder" in subdivision (1)(b) of Rule 27), then it is illogical to say that the physician can't claim the privilege once the patient is dead. The Committee agreed that although a persuasive argument can be made that the physician - patient privilege should not survive

at all after death (a view, incidentally, which a minority of the members believe is correct), once we accept the proposition that the privilege does survive death it is difficult to see any logical reason why it should make any difference whether the patient is alive or dead. For these reasons, the Committee approved a motion by Mr. Kaus that Rule 27(2)(d)(iii) be amended by deleting therefrom the words "the patient is living and".

EXHIBIT III

EXTRACT OF MINUTES

OF

NORTHERN SECTION OF
COMMITTEE TO CONSIDER
UNIFORM RULES OF EVIDENCE

Rule 27

Mr. Bennett pointed out that the Law Revision Commission had made no changes in the definition of "Confidential Communication" between physician and patient and that Mr. Otto M. Kaus of the Southern Section had approved this in his report. Thereupon the Committee approved this definition.

Mr. Bennett then pointed out that the Law Revision Commission had changed the definition of "Holder of the Privilege" to provide that in the case of an incompetent patient not only the guardian of the person but also the guardian of the estate is the holder of the privilege. This was accomplished by the addition of the words "a guardian of the patient when the patient is incompetent".

Mr. Bennett stated that he agreed with Mr. Kaus that the elimination of the word "a" before guardian and the substitution of the word "any" would clarify the intent to include both the guardian of the estate and the guardian of the person. Thereupon the Committee approved the substitution of the word "any" for the word "a".

Mr. Bennett then pointed out that Mr. Kaus argues that the definition of the word "holder" is not broad enough in that

an heir in an action which is not commenced by the personal representative or by the heirs or a spouse, child or other heir in any type of action arising out of the death of the decedent which need not be brought by the personal representative is not a "holder". Mr. Kaus feels that there may be situations where the personal representative who has the right to waive the privilege might not agree. After discussion the Committee agreed with Chadbourn that as a practical matter the conflict is not likely to occur.

The Committee therefore approved the definition of the "Holder of the Privilege", as amended by the Law Revision Commission with the substitution of the word "any" for the word "a".

With respect to the definition of the word "Patient" Mr. Bennett stated that the Law Revision Commission had adopted the definition as originally proposed in the Uniform Rules but that Mr. Kaus had objected to the use of the word "sole" in connection with the purpose for which the patient might consult the physician, pointing out a person might consult a physician and combine his visit with reasons other than those of a medical nature. Mr. Bennett agreed with Mr. Kaus' suggestions that the word "principal" should be substituted for "sole".

Thereupon the Committee approved this substitution.

Mr. Bennett also pointed out that Mr. Kaus had objected to the use of the words "preliminary to such treatment", pointing out that a person may well decide that he does not want any treatment

for the condition, but that he should nevertheless have the protection of the privilege. The Committee agreed with this proposed deletion.

Mr. Bennett then pointed out that the Law Revision Commission had adopted the definition of "Physician", as originally proposed, and that this would extend the privilege to cases where the physician is not licensed but reasonably believed by the patient to be so, thus broadening the rule in California. Mr. Bennett recommended approval of the definition and it was thereupon approved by the Committee.

Turning to subdivision (2) of the Rule, the Committee agreed with the Law Revision Commission's elimination of the reference to paragraphs (3), (4), (5) and (6) of the rule and the substitution of language simplifying this reference, together with additional language making the subdivision subject to Rule 37. The Committee also agreed with the substitution by the Law Revision Commission of the words "or proceeding" after the words "civil action".

Mr. Bennett then pointed out that the rule originally made the proceeding applicable in a prosecution for a misdemeanor and that the Law Revision Commission had eliminated this. The present law of California does not recognize the privilege in any criminal proceeding.

It was the consensus of the Committee that the privilege should not be extended and the action of the Law Revision Commission was therefore approved.

The Committee also approved the action of the Law Revision Commission in replacing "his agent or servant" with "a representative, associate or employee of the physician" for the purpose of making Rule 27 conform to the same phrase used in Rule 26.

The Committee then took up the question of the action of the Law Revision Commission in broadening subdivision (2) (d) to permit the physician to claim the privilege if the patient is living, if no other person claims the privilege and it has not been waived by the holder of the privilege. Mr. Bennett pointed out that Mr. Kaus has argued in favor of the broadening language but would not limit it to the case where the patient is living. Mr. Erskine expressed himself as being in favor of the Law Revision Commission's proposal. Other members of the Committee expressed doubt and at that point the meeting was adjourned with further discussion of this proposal to be had at the next meeting.

INTRODUCTION

This memo is a study of Rule 27 on Physician-Patient Privilege and of Rule 37 insofar as that Rule relates to Physician-Patient Privilege. The text of these Rules is as follows:

> "Rule 27. . . .
> (1) As used on this rule, (a) 'patient' means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) 'physician' means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place; (c) 'holder of the privilege' means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) 'confidential communication between physician and patient' means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.
> (2) Except as provided by paragraph (3), (4), (5) and (6) of this rule, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was

made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(4) There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(5) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(6) No person has a privilege under this rule if the judge finds that insufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any

matter of which the physician or his agent or servant gained knowledge through the communication."

"Rule 37. . . . A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

Rule 27 consists of three parts as follows: 1. Definitions; 2. General Rule; 3. Exceptions to the General Rule.[1] In the first division of this memo we consider the general rule as set forth in 27 (1) and (2), comparing such general rule with the California rule, namely, C.C.P. § 1881 (4) and the judicial construction thereof. In the second division of the memo we consider the exceptions stated in 27 (3), (4), (5), (6), and (7), comparing such exceptions with the California exceptions.

G E N E R A L R U L E

For convenience of discussion we regard the following portions of 27 (1) and (2) as the U.R.E. general rule of physician-patient privilege:

". . . a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful

to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him." (27 (2))

"'[H]older of the privilege' means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient." (27 (1) (c))

The California general rule is partially legislative and partially decisional. The legislation is C.C.P. § 1881 (4) providing in part as follows:

". . . A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; . . ."[2]

Under the ensuing italicized subtitles we compare the U.R.E. and California general rules as respects the matters indicated by each subtitle.

Communication and Information.

C.C.P. § 1881 (4) refers to "information". Rule 27 (2) refers to "communication". However, 27 (1) (d) defines "communication" as including "information". Both our statute and the U.R.E. thus extend the privilege to "information".

Confidentiality.

Under 27 (2) (a) the privilege attaches only if the judge finds that the communication was "a confidential communication". On the other hand, C.C.P. § 1881 (4) refers to "any information . . ." [Italics added.] However, this expression has been construed to mean confidential information.[3]

Purpose of communication: diagnosis - prescription - treatment.

Under 27 (2) (b) the privilege attaches only if the judge finds that "the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor." Under C.C.P. § 1881 (4) a comparable condition is stated in the following terms:

> ". . . information acquired in attending the patient, which was necessary to enable [the physician or surgeon] to prescribe or act for the patient."

Note that 27 (2) explicitly mentions diagnosis, prescription and treatment. The comparable expression in 1881 (4) is "to prescribe or act". In this context "prescribe" is the correlative of "physician"; "act" is the correlative of "surgeon". Hence the meaning of 1881 (4) is: information necessary to enable the physician to prescribe or to enable the surgeon to act.[4] The process of the physician's "prescribing" in the 1881 (4) sense doubtless includes diagnosis and treatment and the process of the surgeon's "acting" includes diagnosis, prescription and treatment. Hence, it seems, the California and Rule 27 privileges are alike in respect to the diagnosis - prescription - treatment feature

of each.[5]

Is there a difference, however, as respects the necessity factor? Must the information have been in fact necessary to the medical service or is reasonable belief that it was sufficient? 27 (2) (b) explicitly adopts the latter alternative. Literally 1881 (4) adopts the former alternative but, as pointed out in the appended footnote, the meaning is probably the same as is stated in 27 (2) (b).[6]

The privilege is the patient's only.

Under 27 (1) (c) the "holder" of the privilege is the patient.[7] The same is true under C.C.P. § 1881 (4).[8]

Coerced disclosure by patient.

Let us suppose a patient consults a physician professionally and confidentially tells the physician symptoms of his illness. Under both 27 (2) and 1881 (4) the patient may prevent the physician as witness from making disclosure. Suppose, however, the patient is the witness and is asked what he told the physician. 27 (2) (c) (i) is explicit to the point that the patient may resist such disclosure when he is the witness. 1881 (4) is silent on this aspect of privilege but presumably this aspect would be imported into it by construction.[9]

Actions in which applicable.

The C.C.P. § 1881 (4) privilege is applicable only in civil actions.[10] On the other hand, the Rule 27 privilege is applicable

both in civil actions and in misdemeanor prosecutions.

This, of course, is an important substantive difference. Our judgment here is in favor of the 1881 (4) limitation. In view of the questionable basis of the privilege,[11] we oppose any broadening of the present scope of the privilege. Therefore, we recommend striking the following language from 27 (2):

". . . or in a prosecution for a misdemeanor . . ."

Who is a physician?

Rule 27 (1) (b) defines physician as follows for purposes of physician-patient privilege:

> ". . . (b) 'physician' means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place; . . ."

On the other hand the reference in 1881 (4) is to a "licensed physician or surgeon". Assuming this means what it literally states,[12] the U.R.E. concept seems preferable. If we are to recognize physician-patient privilege at all, it would seem that we should be willing to protect patients from reasonable mistakes as to unlicensed practitioners.

Procedure in ruling on privilege claim.

The Rule 27 (2) privilege is applicable only "if the judge finds" the several matters there specified as requisites of the privilege. Rule 8 provides in part as follows: "When . . . the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue the issue is to be determined by the judge, and he shall indicate

to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises . . . "

The California practice seems to be similar.[13] Probably the privilege-claimant possesses the burdens to establish privilege.[14]

Guardian and ward.

Under 27 (1) (c) "The guardian of the person of an incompetent patient" is "holder of the privilege".[15] In this respect 21 (1) (c) may be declaratory of existing California practice. We have found no authority on the point.

Power of judge to exclude privileged matter on own motion.

On the basis of what was said under this head in our memo on Lawyer-Client privilege,[16] and in view of the parallels between that privilege and Physician-Patient privilege, our opinion is that under both California practice and the U.R.E. the judge either on his own motion or on motion of a party may protect the physician-patient privilege of an absentee holder of such privilege who has not waived the same.

The Physician's nurse, stenographer or clerk.

Let us suppose a patient consults a Doctor. During the consultation the Doctor calls in his stenographer to take down a shorthand report of the consultation. This situation raises two questions as follows: 1. May the patient prevent the Doctor from testifying? 2. May the patient prevent the stenographer from testifying?

Under Rule 27 the answer to the first question is "Yes".[17] Under 27 (1) (d) the communication was confidential despite the presence of the stenographer. Under 27 (2) (c) (ii) the patient may prevent the physician from disclosing the communication.

Under Rule 27 the answer to the second question is likewise "Yes".[18] Again the communication is confidential under 27 (1) (d). Under 27 (2) (c) (ii) the patient may prevent from disclosing "a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted." The stenographer in our case seems to be such a person.

C.C.P. § 1881 (4) contains no explicit provisions respecting the physician's assistants.[19] Nevertheless the problems posed above have been considered in California. The present state of the law seems to be this: 1. Under California law the answer to question one above is "Yes". 2. In California question two above has been discussed but has been left open.[20]

Manifestly the adoption of Rule 27 would provide the answer for the second question. That answer, we submit, is sound, since it would seem to be senseless to put the Doctor under a ban of silence without also extending the ban to the stenographer.

Patient's posthumous privilege.

It is axiomatic that a person possessed of a privilege has the option to claim or to waive the privilege. It has never been doubted, therefore, that under C.C.P. § 1881 (4) the patient could himself waive the privilege. However, we have had in this State and to some extent we may still have an odd situation in cases

arising after the death of the patient. This situation stems from a nineteenth century doctrine which California borrowed from New York decisions of that era. That doctrine is that the patient's privilege survives his death and nobody can waive the privilege in behalf of the decedent.

Thus let us suppose a California civil action in 1897. The action is by an administrator for the wrongful death of his intestate. The administrator calls intestate's attending physician. Defendant's objection is sustained upon the following grounds:

> "Under the principles announced in the Estate of Flint, 100 Cal. 391, the evidence should have been excluded. While the precise question here presented--whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone--was not there directly decided, it was, nevertheless, fully considered and discussed, and the meaning of the statute in that regard very clearly indicated in the following language: 'The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York, section 836, provides that the privilege is present unless "expressly waived by the patient." The California provision contains the words "without the consent of his patient." It will thus be seen that the provisions are in effect the same."
>
> 'The Courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed.' [Citations omitted]. . .
>
> This construction is not unreasonable in view of the peculiar terms of our statute, and is undoubtedly fully supported by the New York authorities referred to in the case just cited; and, since our statute seems to be framed closely after that of New York, the construction given

the latter by the courts of that state should have great weight with us in interpreting the meaning of our own."21

In 1911 and again in 1917 the Legislature partially abrogated this doctrine by adding a proviso to C.C.P. § 1881 (4). That proviso, as it reads today, is as follows:

> ". . . provided . . . , that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give . . . consent [to the Doctor's testimony] in any action or proceeding brought to recover damages on account of the death of the patient; . . ."22

Possibly the no-waiver doctrine is still in effect in actions other than those "to recover damages on account of the death of the patient" (unless, of course, the action is covered by other provisos in C.C.P. § 1881 (4).) To illustrate: the widow-administratrix of a deceased policeman sues a Pension Board for the award of a pension. The widow calls her deceased husband's doctor. Defendant objects. Arguably, the objection should be sustained. Prior to the 1911 and 1917 amendment, it was so held on the basis of the no-waiver doctrine.[23] Possibly it might be so held today on the ground that the widow's action is not to "recover damages" in the sense of the 1911 and 1917 amendment and the rule of no-waiver therefore applies in such action.

Now Rule 27 (1) (c) defines "holder of the privilege" in part as follows: "'holder' of the privilege' means . . . the personal representative of a deceased patient". If we adopted this (together with Rule 37 whereby the privilege-holder may waive his privilege), we would, it seems, sweep away all vestiges of the doctrine that the personal representative may not waive the

privilege. (The widow-administratrix in our pension case, being holder of the privilege, could, as such, elect to waive the privilege and could thus succeed in having the doctor testify.) At the same time we would narrow somewhat the scope of the 1911-1917 amendment. To illustrate the latter point, let us suppose a death action by the spouse of the decedent. Plaintiff calls decedent's doctor. The administrator is present in court and objects. Under the amendment the administrator's objection should be overruled, since the amendment provides that the spouse may consent to the doctor's testimony. Under 27 (1) (c), however, the personal representative is the privilege-holder and as such he may claim the privilege though not a party (26 (2)). There would be, therefore, a valid claim of privilege by the privilege-holder and the waiver-attempt by the spouse would be ineffective.

However, we doubt whether such a conflict between spouse and representative or between heirs and representative would often arise. Therefore, in our opinion 27 (1) (c) is a satisfactory substitute for the proviso of C.C.P. § 1881 (4) introduced by the 1911-1917 amendment and is an improvement over that proviso in that, by 27 (1) (c) (plus Rule 37), the possibility of waiver is clearly guaranteed in all posthumous actions.

E X C E P T I O N S

Rule 27, subdivisions (3), (4), (5), (6), and (7) set up several exceptions to the general rule of privilege stated in subdivisions (2) and (3) of the Rule.

Below we note the terms of each of these exceptions and the extent to which it prevails in California today.

Exception 27 (3) (a), first part.

Under this exception the privilege is inapplicable "upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence or in an action in which the patient seeks to establish his competence."

We have found no authority recognizing this exception in California. We are impressed, however, with the reasonableness of the exception. Here the need for the physician's testimony is acute. In such situation this need (we think) should override the patient's interest in preserving secrecy.

Exception 27 (3) (a), second part.

Under this exception, the privilege is inapplicable "in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor."

Evidently, the thought here is that if the action were criminal there would be no privilege under 27 (2) (because the privilege does not apply in felony prosecutions) and, by analogy, there should be no privilege where the action is civil.

We do not find this exception in California. If, however, we are to accept the rationale for such exception (which is hereby recommended) we should, it seems, eliminate the restriction respecting conduct amounting to misdemeanor. Since we do not recognize the privilege in misdemeanor prosecutions,[24] if we

are to fashion an exception in civil actions for criminal conduct analogous to the rule of no-privilege in criminal actions, we should go the whole way and have our civil exception cover actions for damages for any criminal conduct.

Therefore we recommend striking the following language from exception 27 (3) (a), second part:

". . . other than a misdemeanor . . ."

Exception 27 (3) (b).

Under this exception the privilege is inapplicable "upon an issue as to the validity of a document as a will of the patient".

The first proviso of C.C.P. § 1881 (4) recognizes the principle of this exception. Such proviso is in part as follows:

> ". . . provided . . . that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, . . . such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; . . ."[25]

Exception 27 (3) (c).

Under this exception the privilege is inapplicable "upon an issue between parties claiming by testate or intestate succession from a deceased patient".

Exception 27 (3) (b) provides that the privilege is inapplicable upon an issue of the validity of a document as the will of the patient. Exception 27 (3) (c) provides for such inapplicability in "probate issues" other than will validity, such as petitions to construe a concededly valid, but ambiguous, will; petitions

to determine heirships, and any other proceeding where all the parties claim by testate or intestate succession.

What is the situation when some or all of the parties claim by inter vivos transaction? (For example, action by plaintiff heir to have a grant deed from decedent to defendant declared a mortgage.) In our memo on Lawyer-Client privilege we took note of the exception to that privilege (Rule 26 (2) (b)) which is comparable to the 27 (3) (c) exception presently under consideration and we there observed that 26 (2) (b) embraces the inter vivos feature.[26] Possibly the thought in including this feature in the lawyer-client exception and in excluding it here is that whereas decedent's lawyer will frequently be possessed of information relevant to inter vivos transactions decedent's physician will seldom be so possessed. If this be the underlying thought, our answer is that in the occasional case where the physician is possessed of the vital information (for example, a psychiatrist to whom the patient now deceased has revealed all of his affairs - business and otherwise) there is the same reason for disclosure by the physician as there is for disclosure by the attorney. Accordingly, we recommend amending 27 (3) (c) to read as follows (new matter in italics):

> (c) upon an issue between parties claiming by testate or intestate succession *or by inter vivos transaction* from a deceased patient.

The first proviso of C.C.P. § 1881 (4) is somewhat comparable to exception 27 (3) (b) but is more limited in scope. The proviso is as follows:

are to fashion an exception in civil actions for criminal conduct analogous to the rule of no-privilege in criminal actions, we should go the whole way and have our civil exception cover actions for damages for any criminal conduct.

Therefore we recommend striking the following language from exception 27 (3) (a), second part:

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Exception 27 (3) (c).

Under this exception the privilege is inapplicable "upon an issue between parties claiming by testate or intestate succession from a deceased patient".

Exception 27 (3) (b) provides that the privilege is inapplicable upon an issue of the validity of a document as the will of the patient. Exception 27 (3) (c) provides for such inapplicability in "probate issues" other than will validity, such as petitions to construe a concededly valid, but ambiguous, will; petitions

to determine heirships, and any other proceeding where all the parties claim by testate or intestate succession.

What is the situation when some or all of the parties claim by inter vivos transaction? (For example, action by plaintiff heir to have a grant deed from decedent to defendant declared a mortgage.) In our memo on Lawyer-Client privilege we took note of the exception to that privilege (Rule 26 (2) (b)) which is comparable to the 27 (3) (c) exception presently under consideration and we there observed that 26 (2) (b) embraces the inter vivos feature.[26] Possibly the thought in including this feature in the lawyer-client exception and in excluding it here is that whereas decedent's lawyer will frequently be possessed of information relevant to inter vivos transactions decedent's physician will seldom be so possessed. If this be the underlying thought, our answer is that in the occasional case where the physician is possessed of the vital information (for example, a psychiatrist to whom the patient now deceased has revealed all of his affairs - business and otherwise) there is the same reason for disclosure by the physician as there is for disclosure by the attorney. Accordingly, we recommend amending 27 (3) (c) to read as follows (new matter in italics):

> (c) upon an issue between parties claiming by testate or intestate succession *or by inter vivos transaction* from a deceased patient.

The first proviso of C.C.P. § 1881 (4) is somewhat comparable to exception 27 (3) (b) but is more limited in scope. The proviso is as follows:

reluctantly) recommend striking from 27 (4) the following language:

"or defense of the patient"

We recommend 27 (4) as so amended for we are convinced of the merit of giving full scope to the patient-litigant idea when the patient (or his representative) is plaintiff (and we take it that "claim" as used in 27 (4) would be construed to mean claim as plaintiff).

Exception 27 (5).

to determine heirships, and any other proceeding where all the parties claim by testate or intestate succession.

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> (c) upon an issue between parties claiming by testate or intestate succession *or by inter vivos transaction* from a deceased patient.

The first proviso of C.C.P. § 1881 (4) is somewhat comparable to exception 27 (3) (b) but is more limited in scope. The proviso is as follows:

> ". . . provided . . . that . . . after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased . . ."[27]

It would seem that the following proceedings would be included under the 27 (3) (b) exception (amended as suggested above) but would not be embraced by the proviso: petition to determine heirship; petition to construe ambiguous will; actions involving the meaning (but not the validity) of instruments of conveyance by patient and possibly others.

As stated above, we advocate that the scope of the testate - intestate - inter vivos exception to physician-patient privilege be as broad as the comparable exception to attorney-client privilege. It follows that we regard 27 (3) (c) (amended as suggested above) as a desirable substitute for the portion of the proviso of C.C.P. § 1881 (4), quoted above at the top of this page.

Exception 27 (4).

This exception provides as follows:

> "There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party."

This is the type of exception which in California parlance we call the "patient-litigant exception".[28] C.C.P. § 1881 (4) contains two such exceptions, namely, provisos three and four as follows:

". . . provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator or his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased. . ."29

The philosophy underlying these exceptions is stated as follows by Justice Traynor:

"The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too."30

27 (4) would carry this rationale through to its logical conclusion thereby extending the rule of no-privilege well beyond the present limited anda of injury and death actions. For example, as we construe 27 (4) and C.C.P. § 1881 (4), under 27 (4) the privilege would be inapplicable in the following actions in which today it is applicable:

1. Action by patient to recover disability benefits under insurance policy.
2. Action by patient by guardian to set aside deed by patient or to cancel contract for want of capacity of patient to execute the instrument.

3. Action by beneficiary of policy insuring patient's life. Defense: fraud of patient in application for policy in answering health questions:

> (Here we think the patient's condition is "an element or factor of the claim" of the plaintiff beneficiary in the sense of 27 (4), even though plaintiff need not plead such element. That is, we do not think "claim" means such claim as is required to be pleaded by the patient or the one now standing in the shoes of the patient.)

We do not suggest that the enumeration is in any sense exhaustive. Furthermore, we do not overlook the fact that under today's view that the privilege is applicable in such actions it may well be that the patient (or plaintiff in patient's shoes) in the course of making a prima facie case will have to waive the privilege.[31] We do emphasize, however, that such actions are within Justice Traynor's rationale and that 27 (4) would remove them from the ban of privilege without the necessity of discovering any waiver of privilege by plaintiff.

The situation is radically different, we think, when the patient's position in the action is <u>not</u> that of plaintiff. For example, divorced husband (P) brings a proceeding against ex-wife (D) to gain custody of child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls psychiatrist who is treating

D. As we read 27 (4) it requires that D's objection be overruled, because this is "an action in which the condition of the patient [D] is an element or factor of the . . . defense of the patient".

Should a plaintiff be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action? Here Justice Traynor's rationale is inapropo, for here the patient does not take the initiative in instituting the proceeding. In fact, the very argument in behalf of 27 (4) which the A.L.I. commentary urges (U.R.E. 27 (4) copies A.L.I. Rule 23 (3)) seems inapplicable to this aspect of 27 (4). The argument is that the object of the rule is "the prevention of the use of the privilege to suppress persuasive evidence after the legitimate purpose of the privilege has been frustrated by the conduct of the patient or his representative".[32] This argument, while most compelling when the patient is plaintiff, seems to us wholly without force when the patient is defendant.

This brings us to the point of confessing that we cannot find any logical basis in support of the defense-of-the-patient portion of 27 (4). If this portion be accepted the privilege as we view it would as a practical matter protect only non-parties (as, for example, if P's claim in our hypo above were that D's new husband is a homosexual and P offered the new husband's doctor and the privilege was claimed in behalf of the new husband).[33] We cannot advocate protecting such non-party and at the same time withholding protection from him who is the unwilling party to the action.[34] Therefore, we must (somewhat

reluctantly) recommend striking from 27 (4) the following language:

"or defense of the patient"

We recommend 27 (4) as so amended for we are convinced of the merit of giving full scope to the patient-litigant idea when the patient (or his representative) is plaintiff (and we take it that "claim" as used in 27 (4) would be construed to mean claim as plaintiff).

Exception 27 (5).

(5) provides as follows:

> "There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed."

The theory here seems to be that it is idle to protect the patient from in-court disclosure when out-of-court disclosure is required. To us this exception seems common-sensible. We find no local authority respecting it.[34a]

Exception 27 (6).

(6) provides as follows:

> "No person has a privilege under this rule if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort."

We have found no recognition of this exception in California. We recommend it, however, and cite in behalf of the recommendation the following commentary on the comparable A.L.I. Rule (Rule 222):

> "The policy supporting the privilege cannot prevail where the consultation was for the purpose of enabling anyone to commit a crime or a civil wrong, or to avoid the consequences of such conduct. It may be important to provide medical aid to wrongdoers, but not at the price of encouraging illegal conduct."

Exception 27 (7).

We discuss this exception hereinafter in connection with our discussion of Rule 37.

The Eavesdropper Doctrine.

Let us suppose a patient sends his physician a confidential letter which is intercepted or makes by phone a confidential statement which is overheard by an intermeddler. As we read Rule 27 (2) (c), which describes the persons whom the patient is privileged to silence, interceptor, intermeddler and eavesdropper are not included. In our opinion, therefore, Rule 27 carries forward the traditional eavesdropper doctrine of no-privilege.[35]

We have seen, however, that Rule 26 on Lawyer-Client privilege abrogates the eavesdropper doctrine with reference to that privilege.[36] Can we as lawyers justly claim more in this respect for our privilege than we are willing to give our professional medical brethern? Arguably we may. The client who consults a lawyer is, it seems, in much greater danger of

eavesdropping, bugging, and other such forms of foul play than is the patient who consults a physician. The client usually is or may be embattled in a litigous situation; the patient is usually in peaceful pursuit of health. Eavesdropping, therefore, is a real and proximate menace to clients. To patients it is a remote menace, if any at all. On this basis we believe that the difference in the scope of the two privileges as respects eavesdroppens is defensible and should be defended.

R U L E 37

Let us suppose a patient possessed of C.C.P. § 1881 (4) privilege takes the witness stand and testifies concerning the facts, the nature, and the extent of his ailments or, suppose, such patient calls another witness who gives like testimony. In either event the patient waives his privilege and consequently his physician may then be required to testify. As the court says in Moreno v. New Guadalupe Mining Co.:

> ". . . the privilege . . . is waived by the patient taking the witness-stand and voluntarily testifying in detail concerning the facts, the nature, and the extent of his ailments, or by calling other persons as witnesses in his behalf and requiring them to testify to the same facts. [Citations omitted]. . . . This is so because 'it is only the secrets of the sick room or of the consultation . . . that the physician is forbidden to reveal, and what is made public by pleadings and evidence in a court of justice can by no possibility be privileged to benefit the party who thus gives it such wide publicity.' . . .
>
> We are aware that there are to be found authorities dealing with the doctrine of waiver which declare a rule contrary to the rule declared in the authorities here cited and relied upon, but in our opinion the latter rule is more in consonance with the spirit and purpose of the

> privilege, and certainly more in accord with the exact administration of justice, for clearly a patient should not be permitted to describe 'at length to the jury in a crowded courtroom the details of his supposed ailment and then neatly suppress the available proof of his falsities by wielding a weapon, nominally termed a privilege.' (4 Wigmore, sec. 2389, p. 3360.) Any other construction and application of the privilege would, as is aptly illustrated by the author last cited, permit a patient suing for damages for personal injuries to make and sustain a claim obviously unfair somewhat as follows: 'One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B and C, who will openly prove the severe nature of my injury. But stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim. I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury and I can keep it secure if the court will forbid his testimony.' (4 Wigmore, 2389, p. 3359."37

A like result would obtain under Rule 37 (b) which provides in part as follows:

> "A person [the patient] who would otherwise have a privilege . . . to prevent another [the physician] from disclosing a specified matter [patient's condition] has no privilege with respect to that matter if the judge finds that he . . . without coercion and with knowledge of his privilege, made disclosures of any part of the matter [as, for example, by volunteering his testimony] or consented to such disclosure made by any one [as, for example, consented by calling witness to make such disclosure]."

The privilege is also waived if the patient himself calls the physician or omits to object when his adversary calls the physician. As the court states in Lissak v. Crocker Estate Company:

> "The privilege given by the statute is personal to the patient, and may be waived by him. It is waived when he calls the physician himself as a witness, or when he permits him to give his testimony without making any objection thereto.

If the patient once consents to his testifying, he cannot, after the testimony has been given, revoke the consent and ask to have it excluded. Such consent may be either implied or express, and there was in the present instance an implied consent when the plaintiff permitted the witness to be examined in full by the defendant without any objection. The testimony of the witness was not received through any mistake or inadvertence on the part of the plaintiff, or through any ignorance on his part that he was being interrogated respecting his treatment, or of the nature of what his testimony would be. The plaintiff in his own testimony had stated that he visited the doctor's office, and had been treated by him, and when the doctor was called as a witness by the defendant the plaintiff not only knew that he was to be examined in reference to the same matters, but before the witness had given his testimony the plaintiff's counsel requested and was granted permission to make a preliminary examination and to question the witness with reference to his examination of the plaintiff. It was the duty of the plaintiff, if he intended or desired to object to any further examination, to make his objection at that time, and not to wait until he had learned whether the testimony was favorable or unfavorable, and then ask to have it excluded. 'The contestant could not sit by during the examination of the physicians and after their evidence had been elicited by examination and cross-examination, upon finding it injurious to her case, claim as a legal right to have it stricken out. There are bounds to the enforcement of the statutory provisions which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the code provisions by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed, and the proposed evidence must be seasonably objected to. The rule of evidence which excludes the communications between physician and patient must be invoked by an objection at the time the evidence of the witness is given. It is too late after the examination has been insisted upon, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out.'" 38

The same result would obtain under Rule 37 (b) because the patient is a "person who would otherwise have a privilege" which privilege he has lost by consenting to a disclosure "made by any one", such as the physician.

27 (7) is directed to the situation in which the patient calls the physician and provides as follows:

> "A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication."

We do not perceive the need for 27 (7). The termination of privilege there provided for seems adequately covered by Rule 37 (b). Therefore, upon the assumption that 37 (b) will eventually be approved, we recommend striking 27 (7) as superfluous.

37 (a).

Let us suppose an applicant for insurance states as follows in his application:

> "I hereby authorize any doctor at any time to give to [insurer] any information he or she may have regarding me."[39]

The insurance is issued. Thereafter in an action between insured and another (not the insurer) the insured's physician is called to testify against insured. Under 37 (a) objection by insured should be overruled.

In our memo on Lawyer-Client privilege we point out that 37 (a) probably exceeds present doctrines of waiver. For reasons there stated we, however, endorse 37 (a).[40]

RECOMMENDATION

We recommend as follows: 1. That Rule 27 be amended as advised above on pages 7, 14, 15, and 20. 2. That Rule 27, as so amended, be approved.

We do not at this time make any recommendation respecting Rule 37.

SUMMARY

Acceptance of the above recommendations would have the following effects on present California law:

1. The question of who is a physician for purpose of the privilege would be clarified. (See p. 7 above.)
2. The privilege as respects the physician's assistants would be clarified. (See pp. 8 and 9 above.)
3. The posthumous privilege would in all cases be vested in the deceased patient's personal representative who in all cases could waive such privilege. (See pp. 9 - 12 above.)
4. The privilege would be inapplicable in proceedings to place the patient under guardianship or to remove him therefrom. (See p. 13 above.)

5. The privilege would be inapplicable in civil actions against the patient for damages for his criminal conduct. (See p. 13 above.)

6. The privilege would be inapplicable in controversies between parties all of whom claim through a deceased patient. (See pp. 14 - 16 above.)

7. The patient-litigant exception would be expanded in scope. (See pp. 16 - 20 above.)

8. The privilege would be inapplicable as to information of which the physician is required to make official report. (See p. 20 above.)

9. Communications in aid of the future commission of crime or tort or in avoidance of detection of past crime or tort would not be privileged. (See pp. 20 - 21 above.)

Respectfully submitted,

James H. Chadbourn

FOOTNOTES

1. The official comment on the Rule is, in part, as follows:

> "The common law recognized no privilege for communications between physician and patient. . . . At the 1950 meeting of the National Conference of Commissioners on Uniform State Laws it was voted that the physician-patient privilege should not be recognized. . . . Nevertheless, at the 1953 meeting the Conference reversed its previous action and by a close vote decided to include the privilege and adopted the Rules of the Model Code of Evidence on that subject. Rule 27 incorporates the provisions of Model Code Rules 220 to 223."

Similarly, there was much difference of opinion in the debateson the Model Code as to whether the privilege should be included therein. See XIX, A.L.I. Proceedings, 183-217.

2. Enacted in 1872 and derived from § 398 of the Practice Act which read as follows:

> "A licensed Physician, or Surgeon, shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe, or act, for the patient; provided, however, in any suit, or prosecution, against a Physician, or Surgeon, for malpractice, if the patient, or party, suing, or prosecuting, shall give such consent, and any such witness shall give testimony, then such Physician, or Surgeon, defendant, may call any other Physicians, or Surgeons, as witnesses, on behalf of defendant, without the consent of such patient, or party, suing, or prosecuting."

See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note.

Good general law review notes are: 9 S.C.L. Rev. 149 (1936); 20 Calif. L. Rev. 302 (1932).

3. Horowitz v. Sacks, 89 C.A. 336, 344 (1928) (". . . communications of the patient were not confidential and therefore were not privileged.") See also People v. Dutton, 62 C.A.2d 862, 864 (1944).

4. City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951).

5. The decisions seem to assume that the statute covers diagnosis, prescription, and treatment. See, for example, McRae v. Erickson, 1 C.A. 326, 332-3 (1905) (". . . the intention of the statute is to include all statements made by a patient to his physician while attending him in that capacity <u>for the purpose of determining his condition.</u>" [Italics added.]; Kramer v. Policy Holders Life Ins. Assn., 5 C.A.2d 380, 390 (1935) (". . . the examination . . . was indispensible to the <u>treatment</u> received . . ." [Italics added.])

Examination for the purpose of reporting to the patient's attorney in aid of the patient's lawsuit is not "prescribing or acting" for the patient in the sense of C.C.P. § 1881 (4). City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951). Presumably, such examination would not be regarded as meeting the condition stated in 27 (2) (b).

6. In McRae v. Erickson, 1 C.A. 326, 332 (1905), the reasonable belief standard of necessity (27 (2) (b)) seems to be approved by the California court in quoting the following passage from a Wisconsin case:

> ". . . it has been held that the word 'necessary' should not be so restricted as to permit testimony of statements or information in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain information, so that it was not strictly necessary."

In the McRae case the patient was injured by a falling rock in a tunnel and the doctor asked the patient how the rock fell and whence it came. The patient's answer was held to be privileged. The court (after quoting the above extract) states that "Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge." Here the court is obviously thinking of questions asked by the doctor. The passage should not therefore be read as negating privilege for statements volunteered by the patient who reasonably thinks them necessary.

McRae is cited and quoted with approval in Kramer v. Policy Holders Life Ins. Assn., 5 C.A.2d 380 (1935).

7. Except in cases of guardianship and death. See, infra, p. 8.

8. City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951). Thus if the patient waives the privilege the physician must testify. Valensin v. Valensin, 73 C. 106 (1887).

9. As has been done in the case of lawyer-client privilege. See memo on that privilege, p. 5.

Of course, the patient must testify to relevant facts even though he has made such facts the subject-matter of his communications to the physician. It is only the communication that he is privileged not to reveal.

10. People v. Lane, 101 C. 513 (1894); People v. West, 106 C. 89 (1895); People v. Griffith, 146 C. 338 (1905); People v. Dutton, 62 C.A.2d 862 (1944).

11. See the critical literature collected by McCormick, p. 221, note 1.

12. We cannot determine whether this assumption is sound.

In Estate of Mossman, 119 C.A. 404 (1931) a Christian Science practitioner was held not to be a licensed physician or surgeon in the C.C.P. § 1884 (4) sense. Presumably the patient knew the status of the practitioner. In Frederick v. Fed. Life Ins. Co., 13 C.A.2d 585 (1936), the statement was made by a hospital patient to an intern who was a senior medical student. Privilege was denied on the basis that the intern was not prescribing or acting for the patient but was only taking the patient's history for the hospital records.

13. In re Redfield, 116 C. 637 (1897); Estate of Casarutti, 184 C. 73 (1920).

14. As in the case of lawyer-client privilege. See memo on that privilege, p. 8.

15. The terms "guardian" and "incompetent" are defined as follows by Rule 1 (9):

> "(9) 'Guardian' means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a sui juris person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law."

16. See memo on lawyer-client privilege, pp. 12 - 13.

17. This assumes, of course, that only the general rule is applicable to this case, i.e., that no exception is applicable.

18. See note 17, supra.

19. Compare the provision of § 1881 (2) with reference to the attorney's secretary, stenographer, or clerk.

20. Kramer v. Policy Holders Life Ins. Assn., 5 C.A.2d 380 (1935).

21. Harrison v. Sutter St. Ry., 116 C. 156, 167-8 (1897).

22. The 1911 amendment referred to an action "on account of the death of the patient, caused by the negligent or wrongful act of another". This was changed by the 1917 amendment to read: "on account of the death of the patient."

See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note.

23. Murphy v. Board of Police, etc. Commrs., 2 C.A. 468 (1905).

24. See note 10, supra.

25. Added by 1927 amendment. See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note.

26. See memo on lawyer-client privilege, pp. 17 - 22.

27. Added by 1927 amendment. See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note.

28. City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951).

29. Added by 1917 amendment. See West's Anno. Calif. Codes, C.C.P. § 1881, Historical Note. For applications see Phillips v. Powell, 210 C. 39 (1930); Ballard v. Pac. Greyhound Lines, 28 C.2d 357 (1946); City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951).

30. City and Co. of S.F. v. Superior Court, 37 C.2d 227 (1951).

31. See, infra, pp. 22 - 25.

32. A.L.I. Commentary on A.L.I. Rule 223 (3) (which U.R.E. 27 (4) copies).

33. As in Newell v. Newell, 146 C.A.2d 166 (1956).

34. 27 (3) (a), does, it is true, withhold the privilege from parties defendant under the circumstances there stated. It is also true that we have taken a

position in favor of that exception. We feel, however, that it is defensible to advocate the limited exception stated in 27 (3) (a) and yet oppose (so far as defendant patients are concerned) the much broader principle of 27 (4).

34a. Compare the following section of the H. & S. Code respecting venereal disease:

> "21377. Witnesses. In any prosecution for a violation of any provision of this part, or any rule or regulation of the board made pursuant to this part, or in any quarantine proceeding authorized by this part, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, or any person by whom such habeas corpus or other proceeding was instituted, and the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be applicable to or in any such prosecution or proceeding. . . ."

35. See McCormick, § 79.

36. See memo on lawyer-client privilege, pp. 25 - 26.

37. 35 C.A. 744, 754-5 (1917). See also Estate of Visaxis, 95 C.A. 617 (1928).

38. 119 C. 442, 445 (1897). See also Estate of Huston, 163 C. 166 (1912). Cf. Hirschberg v. Sou. Pac. Co., 180 C. 774 (1919).

39. As is Turner v. Redwood Mutual Life Assn., 13 C.A.2d 573 (1936).

40. See memo on lawyer-client privilege, pp. 30 - 31.