8/14/61

First Supplement to Memorandum No. 21(1961)

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

After Memorandum No. 21(1961) was prepared we received the Minutes of the June meeting of the Southern Section of the State Bar Committee. A copy of these minutes is attached as Exhibit I (green sheets).

In addition to the matters noted for Commission attention in Memorandum No. 21(1961), the following additional matters should be noted in connection with Rule 27:

1. The Southern Section objects to paragraph (c) of subdivision (3). This paragraph makes the privilege not applicable in any case where the conduct of the patient would constitute a felony. The reasons for the refusal of the Southern Section to accept this exception are stated in the attached minutes.

2. The Southern Section suggests that the words "counter claim, cross complaint, or affirmative" should be deleted from subdivision (5) of the revised rule. The reason for this suggestion is stated in the attached minutes.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

EXTRACT OF MINUTES OF

SOUTHERN SECTION OF COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

Rule 27, subdivision (3) of the Commission's draft.

The members approved clauses (a) and (b) of the Commission's draft of subdivision (3).

As to clause (c), it was noted that the Commission's draft would represent a substantial deviation from existing California law which, as the members of the Southern Section understand it, now makes the privilege applicable in all civil cases (whether or not the facts involved also would constitute a crime) but not applicable in criminal cases. The members of the Southern Section were of the opinion that if the physician-patient privilege is a good privilege, we should keep it to the same extent that we have it under existing law; that if it is a bad privilege, we should not have it at all; that there is no logic in trying to go half-way, as the Commission does, in attempting to make distinctions between facts that would constitute a misdemeanor and those that would constitute a felony. If it is the Commission's purpose to accept Prof. Chadbourn's premise that there should be no physician-patient privilege in any civil action where the acts also constitute "crimes", then logically the Commission should make no distinction between conduct that constitutes a misdemeanor and that which constitutes a felony. Prof. Chadbourn makes no such distinction, and it is not clear why the Commission makes it. Although the members of the Southern Section could see considerable force in Prof. Chadbourn's

argument, nevertheless they concluded that existing California law in this respect should not be changed; that the privilege should be applicable in all civil cases whether or not the acts involved in such cases would constitute crimes.

Rule 27, subdivision (4) of the Commission's draft.

Subdivision (4) of the Commission's draft was approved.

Rule 27, subdivision (5) of the Commission's draft.

It was noted from the Commission's comments with respect to subdivision (5) that the Commission feels that the patient should not be deprived of the privilege in every case where the patient has been sued and where the patient's condition is an element or factor in the defense of the patient; that this would make it possible for a plaintiff to deprive a defendant of his privilege by the simple act of bringing an action in which the defendant's condition is an issue.

It was the consensus of opinion among the members of the Southern Section that if the patient puts his physical condition in issue at all, he should be treated as having waived the privilege; that the particular manner in which he puts his condition in issue is not too important; that a defendant may put his physical condition in issue simply by a general denial in his answer, and without filing any counterclaim or cross-complaint or raising an affirmative defense; that the Commission's language with respect to "counter claim, cross-complaint or affirmative defense" puts too much emphasis on the form of the pleading and too little emphasis on the substantive question of whether a defendant has put his physical condition in issue in the lawsuit. The Southern Section agreed with the general approach

of the Commission that if a patient is named as a defendant he should not involuntarily be forced to waive his privilege because of what the plaintiff claims in the complaint. But it seemed to the members of the Southern Section that the URE draft [subdivision (4) in the URE draft] would prevent that very thing from occurring. The URE draft states that there is no privilege in an action in which the condition of the patient is an element or factor of the "claim or defense of the patient". The Southern Section construes this as meaning that the privilege is waived only when the patient asserts the claim or raises the defense, which is as it should be. Therefore, the Southern Section concluded that although the Commission's language with respect to actions brought under C.C.P. §376 or 377 was proper, the words "counter claim, cross complaint, or affirmative" should be deleted.

Rule 27, subdivision (6) of the Commission's draft.

Mr. Kaus stated that, after reconsideration, he had concluded that he should withdraw the objections which, in his written report on Rule 27, he had made to the Commission's draft of subdivision (6); that he had reached this conclusion because, as a practical matter, it would be almost impossible to deal satisfactorily with the problems raised by local ordinances; that if the information is public, regardless of the nature of the ordinance or statute making it public, there should be no privilege.

After further discussion, it was concluded that the Southern Section should accept the Commission's draft of subdivision (6).

Rule 27, subdivision (7) of the Commission's draft.

It was noted that the Commission's draft of subdivision (7) does

not require, as does the URE version, a finding, on the basis of evidence other than the communication itself, that the services of the physician were sought or obtained to aid the commission of a crime or a tort. After some discussion, the members of the Southern Section concluded that they would accept the Commission's suggestion that no independent foundation be required in the case of the physician-patient privilege, although the members already have gone on record as having a different view when the marital privilege [Rule 28] is involved and will go on record as having a different view when the lawyer-client privilege [Rule 26] is involved. The consensus of opinion was that, in this respect, the physician-patient privilege should not be accorded the same standing as the marital privilege and the lawyer-client privilege, both of which have an entirely different historical development and rationale from that of the physician-patient privilege.

The Commission's draft of subdivision (7) was, therefore, approved.

Special comment.

It occurs to the members of the Southern Section that this may be an appropriate time and manner in which to make a suggestion to the Commission on what appears to the Southern Section to be a serious weakness in the present law relating to physician-patient privilege. In its consideration of Rule 27, the members of the Southern Section have been struck by the fact that the physician-patient privilege as historically developed, as presently constituted, and as it will be constituted in the event the URE rules are adopted, do not lend themselves at all to one important area of physician-patient com-

munications: namely, the field of psychiatry. The problem of communications made by a patient to a psychiatrist, where disclosure of almost everything that has happened to the patient since he was born is necessary for diagnosis or treatment, is not really covered by and never was contemplated by the traditional physician-patient privilege. It seems to the Southern Section that the matter of patient-psychiatrist communications should be the subject of a separate study by the Law Revision Commission, and, perhaps, the subject of a special privilege. In this connection, it is of interest to note that a section of the Business and Professions Code enacted in 1957 makes communications between psychologist and patient privileged to the same extent as those between attorney and client [B. & P.C. §2904].