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Place of Meeting

Room 3189  
State Capitol

FINAL ACENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

April 26-27, 1963

The meeting will start at 9:30 a.m. on April 26 and at 9:00 a.m. on April 27.

1. Minutes of March 1963 meeting ( sent 4/2/63)
2. Oral Report of various bills in Commission's 1963 Legislative Program.
3. Study No. 34(L) - Uniform Rules of Evidence

Privileges Article

Material in loose-leaf binder (you have this)

- Memorandum No. 63-7
- Memorandum No. 63-8
- Memorandum No. 63-9
- Memorandum No. 63-10
- Memorandum No. 63-11
- Memorandum No. 63-12
- Memorandum No. 63-23
- Memorandum No. 63-25 (enclosed)
- Memorandum No. 63-26 (enclosed)

Authentication and Content of Writings

Materials in loose-leaf binder (you have this)

Memorandum No. 63-20

4. Work schedule for next 20 months
  - Memorandum No. 63-24 (sent 4/12/63)

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MINUTES OF MEETING

of

APRIL 26 and 27, 1963

SACRAMENTO

A regular meeting of the Law Revision Commission was held in Sacramento on April 26 and 27, 1963.

Present: Herman F. Selvin, Chairman  
John R. McDonough, Jr., Vice Chairman  
Richard H. Keatinge  
Sho Sato  
Thomas E. Stanton, Jr. (April 27)  
Angus C. Morrison, ex officio

Absent: Hon. James A. Cobey  
Hon. Pearce Young  
Joseph A. Ball  
James R. Edwards

Messrs. John H. DeMully, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Minutes of March Meeting.

On page 12, the following was added to the discussion of Rules 27, 27.1, 28 and 29--generally:

Commissioner Stanton opposed the proposal to conform the rules covering the communications privileges to the language of the lawyer-client privilege. He indicated that there are differing bases underlying the various privileges and, hence, it is a mistake to assume that the language of these rules may be readily conformed. Each privilege must be considered on its own merits in the light of the policies which are germane to that particular privilege. The lawyer-client privilege, too, is regarded as of much greater importance than the physician-patient privilege; therefore, it is not necessarily desirable to change the physician-patient privilege to conform to the language of the lawyer-client privilege.

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Finally, he indicated that, if the Commission is going to complete its work on the privileges article, it must stop reconsidering these rules at some time. When a rule has been approved by the Commission and has been sent to the State Bar and considered by that body, changes in the language of a rule should not be lightly made. For these reasons it is undesirable to make the many language changes in these rules that are made necessary in order to conform them to Rule 26.

On page 14, in the third line from the bottom of the page, the following sentence was added:

Commissioner Stanton indicated that the reference to the pleadings was desirable to make it clear that a person does not waive his privilege merely by defending himself.

The minutes were approved as modified.

Future Meetings of Commission.

Future meetings of the Commission were scheduled as follows:

May 17-18, 1963	Sacramento
June 21-22, 1963	Los Angeles
July 19-20, 1963	San Francisco
August 16-17, 1963	Los Angeles

The September meeting will be held in San Francisco during the State Bar Convention. The exact dates have not been set as yet.

ADMINISTRATIVE MATTERS

Study No. 34(L) - URE.

A committee of the Commission, a quorum for the purpose of taking action on the business of the Commission not being present, discussed the question of interesting the judges and groups of lawyers in the evidence study. The staff was requested to prepare letters for the signature of the Chairman soliciting the Judicial Council, the Conference of Judges, and the 9th Circuit Judicial Conference to consider the Commission's recommendations on the Uniform Rules and to provide the Commission with their comments on the Commission's proposals. Whether these organizations should appoint committees to perform this function should be left to the discretion of the organizations themselves.

Revision of Penal Code.

The Executive Secretary reported that a bill has been introduced to create a blue ribbon committee, headed by the Attorney General and including the chairmen of the Assembly Criminal Procedures and the Senate Judiciary Committees, to revise the Penal Code. At the same time a press release from the Governor's office indicates that this blue ribbon committee is to act as an adjunct of the Law Revision Commission. Apparently, the nature of the relationship is uncertain. The blue ribbon committee is to have its own staff and its own budget.

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At this time it appears that two parallel organizations--the Commission and the blue ribbon committee--are to work together in some way on this project, but there is no indication as to which is to be in charge.

The Commission indicated that it would be willing to work with such a blue ribbon committee if it were thoroughly understood that the blue ribbon committee is to act in an advisory capacity only--in much the same manner that the State Bar Committees act upon the Commission's recommendations. It was recognized, of course, that it might be difficult for a committee constituted as the proposed committee is constituted to limit itself to an advisory capacity. The Commission was concerned, too, with the fact that the proposed blue ribbon committee seems to be politically oriented and does not seem designed to provide the Law Revision Commission with expert advice in regard to a wide variety of matters where advice is needed. For example, it would seem desirable for an advisory committee to have among its members not only attorneys with prosecution and defense experience, but also criminologists, penologists, psychiatrists, probation officers and judges. There may be others whose professional advice would be desirable; but the proposed blue ribbon committee does not appear designed to provide the Law Revision Commission with advice from all of these sources. The Commission indicated that it would not be interested in undertaking the revision of the Penal Code unless it could undertake the project in the same manner in which it has undertaken its other projects and have sole responsibility for the recommendations that are to be made. The Commission would want to probe deeply into and reconsider the underlying

bases and purposes of the criminal law.

A motion was approved requesting the Chairman and the Executive Secretary to confer with the Governor, Senator Regan, and anyone else who is necessary, and to communicate the Commission's views to them. It was suggested that a conference might be arranged with the Governor, Senator Regan and Senator Cobey with the Chairman and the Executive Secretary and other persons who are concerned with the methods to be used in the Penal Code revision to discuss these matters.

Work Schedule of the Commission.

In connection with the sovereign immunity study, the Commission instructed the Executive Secretary to direct Professor Van Alstyne to prepare a study on only one topic--the topic in which a substantial amount of time may already have been invested. The remaining two topics would be abandoned temporarily and, if no substantial time is invested in the third, it would be abandoned also. The Commission will have little time to consider these studies and, if they are prepared before the Commission can give them thorough consideration, they are apt to become obsolete before they are used. [The staff has discussed this matter with Professor Van Alstyne and learned that no substantial time has been invested in any of the topics. He desires to abandon all three studies at this time but would be delighted to undertake such studies when the Commission again considers the sovereign immunity field.]

Stanford Research Contract.

A motion was approved to authorize the Executive Secretary to

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reneogiate the research contract with Stanford University to lower the amount which the Commission is authorized to expend under that contract. This will unencumber the amount called for in the contract so that the funds may be used for other purposes.

Number of Commissioners Needed for Quorum.

The Commission approved a motion to make four voting members of the Commission a quorum for the transaction of business. But, four affirmative votes will still be necessary to take any action. Because of the difficulty in proceeding when unanimous votes are needed, meetings are to be cancelled when it appears that only four members can attend. When, because of last-minute changes in plans, only four members appear when more had been counted on, however, the four present will be able to proceed by unanimous action.

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1963 LEGISLATIVE PROGRAM

Sovereign Immunity.

The Executive Secretary reported that Senate Bill 42 has been passed by the Senate with the amendment proposed by the Attorney General, relating to prisoners and mental patients, restored through action of the Senate Finance Committee. He reported that Senator Cobey believes that an effort should be made to delete the amendment in the Assembly or, if that attempt fails, to grant the employees immunity where the entity is immune.

Senate Bill 43 has also passed the Senate with the provision for late filing if the entity is not prejudiced deleted and a provision for late filing upon an estoppel principle substituted upon action by the Senate Finance Committee. Senate Bills No. 44 (insurance) and No. 45 (defense) have also passed the Senate. Senate Bill No. 47 (workmen's compensation) has been reported out by the Senate Finance Committee with an amendment defining fire suppression activities. The amendment does not substantially change the bill.

Senate Bill No. 46 (motor vehicle liability) has been held up in the Senate Finance Committee. The Committee is concerned with the number of state cars that are permitted to be used by state employees outside the scope of their employment. The Executive Secretary reported that Senator Cobey believes it advantageous to accept the bill in any form in which the Committee will report it out; if undesirable amendments



are placed in the bill (one proposal was to restore the governmental-proprietary distinction), they may be removed in the Assembly.

Senate Bills 483, 484 and 499 (the adjusting amendments) have passed the Senate without substantial amendment. A proposal will likely be made to amend Senate Bill No. 484 (relating to the agricultural commodity boards and commissions) to grant the members of various commodity boards and commissions personal immunity from contract liability. If such an amendment is proposed it will not be resisted.

Discovery in Eminent Domain.

The Executive Secretary reported that two State Bar Committees recommended against the Commission's discovery bill, S.B. No. 71. The Board of Governors has not taken a position on the bill as yet. The Executive Secretary appeared before the Board of Governors on April 25, 1963, in an effort to persuade the Board to take no position on the Commission's bill.

STUDY NO 34(L) - UNIFORM RULES OF EVIDENCE (Privileges Article)

The Commission considered Memoranda 63-23 (comparing Rules 26-29) and 63-7 (Rule 27.1). The following actions were taken:

Rule 27.1.

Subdivision (1)(a). The staff was directed to add language indicating that a communication is nonetheless confidential even though made in the presence of another who is consulting the psychotherapist on a matter of joint or common concern. A similar addition is to be made to Rules 26 and 27. In Rules 27 and 27.1, a provision should be added--similar to that in Rule 26--indicating that the privilege does not exist between joint holders of the privilege.

Third party's statements concerning self only. The staff was asked to add to the psychotherapist-patient privilege a provision that would give a person who communicates information concerning himself to a psychotherapist in order to enable the psychotherapist to treat some other person a privilege to keep the psychotherapist from revealing the information. This provision was placed in the rule because it was recognized that it is frequently necessary for psychotherapists to consult others concerning their conditions in order to prescribe properly for a patient. In order to encourage others to make communications under these circumstances they should be given a privilege to prevent the revelation of such information.

The Commission then voted to add a similar privilege for a third party communicator to the physician-patient privilege. Here, too, a third party does not have the incentive of seeking a cure for himself to encourage the communication. Therefore, to encourage the communication it is desirable to give a privilege to such a person when his communications are necessary for the physician to treat another person who is the patient.

Third party's statements concerning others. The Commission then instructed the staff to include in the psychotherapist-patient privilege a provision which would grant a privilege for statements made by third parties to enable the psychotherapist to treat the patient but which do not relate only to the declarant's condition. This privilege would be jointly held by the declarant and the patient. The Commission then instructed the staff to put a similar provision in the physician-patient privilege. It was recognized that it would be extremely difficult to distinguish between statements relating only to the declarant and statements which relate to the patient or both to the patient and declarant. Yet, the courts will be forced to make the distinction in determining who is entitled to exercise or to waive the privilege. Some indicated that it was necessary to make both the patient and the declarant holders of the privilege because the declarant might not be present at some time to exercise the privilege. However, the psychiatrist is always required to exercise the privilege on behalf of the absent holder, so this problem would arise only if the declarant were dead or if the

declarant had waived his privilege. Others indicated that the privilege should be joint so that the doctor would be in a position to assure the patient that whatever he learned could be held in confidence unless the patient consented. Commissioner Stanton voted against the motion and indicated that he would have voted for it had the privilege been extended only to the declarant.

Communications from psychotherapist. The staff was directed to modify the definition of confidential communication in subdivision (1)(a) to include advice given by the psychotherapist in the course of the patient-psychotherapist relationship. A similar addition is to be made in the physician-patient privilege.

A question was raised whether the language in subdivision (1)(a) which indicates that a confidential communication includes information disclosed to third persons when such disclosure is reasonably necessary for "the accomplishment of the purpose for which it is transmitted" is adequate to protect communications from the psychotherapist to other persons when this is done in order to obtain information or to give directions or in some other way to obtain assistance in diagnosing and prescribing for the patient. The staff was directed to revise the language, "for the accomplishment of the purpose for which it is transmitted", in order to make clear that such communications from the psychotherapist are covered by the privilege. The Commission recognized that in order to carry out the policy agreed upon, it may

be necessary from a drafting standpoint to leave subdivision (1)(a) of Rule 27.1 unchanged and to make an appropriate adjustment in Rule 37, which relates to waiver. Rule 37 provides that an authorized disclosure waives the privilege. Hence, it may be necessary to provide in Rule 37 that an authorized disclosure under some circumstances does not waive the privilege. Similar changes are to be made in Rules 26 and 27.

Subdivision (1)(c). The definition of "patient" was broadened to include those persons who go to a psychotherapist for the purpose of securing a diagnosis as well as those persons who go for the purpose of treatment.

Subdivision (1)(d). The words, "when the consultation takes place in this state", were deleted immediately following "(ii)" and the words, "when the consultation takes place in another state or jurisdiction", were deleted immediately following "(iii)". This change means that a communication to any properly certified psychologist is within the privilege no matter where the communication takes place. However, the psychologist must actually be certified. A motion to make privileged communications to persons "reasonably believed" to be certified failed.

Subdivision (2). The Commission considered whether the psychotherapist-patient privilege should be applicable in criminal proceedings. It was concluded that the privilege should be generally applicable in all judicial proceedings. A motion was approved, however, to make an exception to the privilege if the evidence to which the privilege would otherwise apply is sought to be introduced by the defendant in a criminal case. It was felt that the need for doing justice to the defendant in a criminal case outweighs whatever benefit would accrue to society by making such evidence inadmissible when a defendant seeks to introduce it.

Subdivision (4)(a). The Commission considered whether to modify the exception to one relating to communications concerning a "crime or fraud" instead of a "crime or tort" but after discussion the subdivision was left unchanged.

Subdivision (4)(b). The Commission considered the fact that the exception stated in subdivision (4)(b)--communications relevant to an issue between parties claiming through the patient--is narrower than the similar exception provided in Rule 26 relating to the lawyer-client privilege. In the psychotherapist-patient privilege, the patient must be deceased before the exception applies whereas in the lawyer-client privilege the exception applies even though the client is still living and asserting the privilege. After discussion, the Commission decided to leave the rules without change. It was felt that to broaden the exception in the psychotherapist-patient privilege would unduly inhibit communications from the patient to the psychotherapist, and there was no disposition on the

part of the Commission to change the lawyer-client privilege in this regard.

Breach of duty exception. The Commission instructed the staff to add a new exception to Rule 27.1, and to add a similar exception to Rule 27, which would create an exception to the privilege when the communication is relevant to an issue involving the breach of duty by the psychotherapist to the patient or by the patient to the psychotherapist. This exception would permit the psychotherapist to use the patient's communication in his defense in a proceeding involving the revocation or suspension of his license because of alleged breach of duty to the patient. A similar exception already appears in the lawyer-client privilege.

Subdivision (4)(c); dispositive instruments exception. The staff was directed to add an exception to the psychotherapist-patient privilege which would remove from the privilege communications "relevant to an issue concerning the intention or competency of a deceased client with respect to, or the validity of, a deed of conveyance, will or other writing, executed by the client, purporting to affect an interest in property." This exception would replace the exception stated in subdivision (4)(c) which covered communications relevant to the validity of the patient's will only. The staff was instructed to modify subdivision (4)(e) of Rule 26-- the lawyer-client privilege--to conform to the language approved for the psychotherapist-patient privilege.

Subdivision (4)(d). The words, "brought by or on behalf of the patient", were inserted immediately after the word "proceeding". This change was

made in order to make clear that the exception in subdivision (4)(d) relates only to restoration to capacity proceedings, it does not relate to commitment proceedings where the patient is seeking to establish his competence as a matter of defense.

Commitment proceedings exception. The Commission considered but decided not to include a provision in the psychotherapist-patient privilege which would except commitment, guardianship and conservatorship proceedings from the operation of the privilege. Such an exception appears in Rule 27, the physician-patient privilege, in subdivision (4)(a). During the discussion it was suggested that the psychotherapist might protect the public and the patient where it is necessary to do so by reporting the patient's condition to the appropriate authorities; but to permit the psychotherapist to be forced to testify against the patient in commitment proceedings would unduly inhibit and restrict the privilege.

Procedure for determining existence of privilege.

Commissioner McDonough presented the suggestion that a judge, when called upon to rule upon a claim of privilege, may require a secret disclosure of the claimed privileged matter to him so that he may determine whether the claim of privilege is bona fide. The matters communicated to the judge in chambers would not be permitted to be disclosed to anyone else under any circumstances. Commissioner McDonough presented the following proposed rule to carry out his suggestion:

Whenever a question of fact arises in the course of determining whether a witness has a privilege not to testify concerning a communication, the judge shall first endeavor



to determine the question in open court and from evidence apart from the communication itself and apart from other evidence which, if given, would tend to reveal what the communication was. If the judge is unable to decide the question in such a fashion he shall then retire to his chambers with the witness and such other persons as the witness desires or is willing to have present. The judge shall then continue his inquiry into the question of privilege and may require the production of any relevant evidence, including the communication itself if the question cannot be determined without its disclosure. If the judge determines that the communication was privileged, neither the judge nor any other person present except the witness may ever disclose under any circumstances what was said relating to the question of privilege in the course of the discussion in chambers. A person who makes a disclosure prohibited by this section is guilty of a misdemeanor. Neither a disclosure prohibited by this section nor other evidence obtained as a result of such disclosure is admissible in any action or proceeding.

The reason for the proposal is that, under existing law, the judge is virtually forced to rely upon the witness's claim of privilege alone. The judge can ask questions skirting around the edge of the matter in order to determine whether the claim is bona fide or not, but in many cases he cannot know for sure because he cannot get to the matter itself until he has overruled the claim of privilege. By that time, of course, it is too late if he is wrong. Under existing procedure it is extremely difficult for the judge to perform his duty with any degree of accuracy in regard to those privileges where he is supposed to weigh the necessity for secrecy against the need for information. Then, too, since the judge is almost forced to rely upon the claim of privilege, fraudulent claims of the privilege--that is, claims of privilege where no privilege exists or where an exception to the privilege exists--frequently must be upheld because there is no practical way to attack them.

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No action was taken on the proposal. It was presented merely in order to focus the Commission's thinking upon the problem of fraudulent assertion of privilege and what can be done about it.