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CALIFORNIA LAW REVISION COMMISSION

1/22/63
File: URE - Privileges Article

Memorandum No. 63-3

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

This memorandum deals with the scope of the Privileges Article of the Uniform Rules of Evidence. In connection with this problem, it is essential that you read pages 1-5 and pages 151-52 of the study previously sent to you. See also the attached supplemental study prepared by Professor Chadbourn.

In the light of these studies, the Commission must now decide what its overall approach will be to the scope of the privileges article. It will be necessary, of course, to decide the precise scope of each individual privilege when it is considered--whether it is to be applicable generally or only in judicial proceedings. But it is necessary to decide as a preliminary matter whether the overall approach will be (1) to make the URE privileges applicable generally except as otherwise specifically provided, (2) to make the URE privileges applicable only in judicial proceedings unless specific language is included in a particular rule extending its applicability, or (3) to spell out the applicability of each privilege with language in the rule relating to that privilege. A preliminary decision on which overall approach to take seems necessary because the drafting of each rule is dependent upon the approach.

The staff recommends that approach taken in New Jersey be adopted by the Commission. Rule 2 (1) as enacted in New Jersey provides:

> (1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and

inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

The staff believes that the privilege of attorney-client, priest-penitent, political vote, etc. should be recognized in legislative and administrative proceedings as well as in judicial. The only privilege that appears at this time likely to be limited is the physician-patient privilege. Hence, it would be easier from a drafting standpoint to draft a provision limiting the applicability of that one privilege than it would be to draft a provision extending the applicability of each of the other privileges or to specify the applicability of each of the privileges.

In any event, if the Commission decides that any particular privilege is to be limited in its application, it should decide at the same time what privilege rule is to be applicable in the area not covered by the URE rule--the existing California law relating to the privilege or no privilege at all.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

MEMO IN RE PROPOSED ADOPTION OF URE RULES 26-29 AND 36, TOGETHER WITH PROPOSED REPEAL OF SUBDIVISIONS (1)-(5) OF CCP § 1881

Purpose

The purpose of this memo is to outline the problems involved in proposing adoption of the URE Rules and repeal of the CCP subdivisions above indicated. It should be noted at the outset that the privilege against self incrimination (URE Rules 23-25) is not considered and that subdivision (6) of § 1881 involves special considerations, which are stated at the close of the memo.

Scope of the privilege

Rules 26-29 and 36, as limited by Rule 2, are applicable only in judicial proceedings. Thus, these rules provide a law of attorney-client privilege (Rule 26), physician-patient privilege (Rule 27), marital privilege (Rule 28), priest-penitent privilege (Rule 29) and informer privilege (Rule 36) for, but only for, such proceedings as civil actions, special proceedings of a civil nature, criminal actions and grand jury proceedings. As is stated in the Comment to Rule 2, the Uniform Rules "are made applicable to court proceedings and are not specifically extended to" non-judicial proceedings, and, as is also pointed out in the same Comment, "considerable modification and use of alternative language in the rules would be necessary to make them fit every fact-finding situation." Hence, it is very clear that Rules 26-29 and 36 provide only a law of privilege for judicial proceedings (hereinafter sometimes called "judicial privilege"), and they do not cover privilege in non-judicial proceedings, such as administrative, executive or legislative hearings (hereinafter sometimes called "extra-judicial privilege").

The present CCP counterparts of Rules 26-29 and 36 are the following subdivisions of § 1881: (1) marital privilege (2) attorney-client privilege (3) priest-penitent privilege (4) physician-patient privilege (5) informer privilege. § 1881 provides that a spouse, attorney, clergyman, physician, public officer "cannot be examined as a witness" as to the privileged matter.

If the subject Rules are adopted and the subject subdivisions are repealed, the question will arise as to the impact of this operation in areas of extra-judicial privilege. The resolution of this question will depend upon how the subdivisions are now construed. Two possible constructions are suggested below, and the consequences of each construction are noted.

Construction and consequences thereof that subdivisions (1) (2) (3) and (5) of § 1881 apply extra-judicially.

There is nothing in subdivisions (1)-(3) of § 1881 or in subdivision (5) which ex vi termini limits the application of these subdivisions to judicial proceedings. They may therefore be broadly construed to mean that a spouse, attorney, clergyman or public officer "cannot be examined" as to the privileged communication in any proceeding whatsoever - judicial, administrative, executive, legislative or other. On the other hand, subdivision (4) specifically provides that the physician "cannot be examined in a civil action" (emphasis supplied).

Moreover, if subdivisions (1)-(3) and (5) are broadly construed in the above manner, the repeal of these subdivisions, coincident with the adoption of Rules 26, 28, 29 and 36, would, it seems, operate to abrogate extra-judicial spouse, attorney-client

priest-penitent, and informer privileges in areas in which such privileges had been heretofore effective. There would, however, be no abrogation of extra-judicial physician-patient privilege by adopting Rule 27 and repealing subdivision (4), since the latter now applies in terms only "in a civil action."

Construction and consequences thereof that subdivisions (1)(2)(3) and (5) of § 1881 apply only judicially.

If subdivisions (1)(2)(3) and (5) are construed to mean only that spouse, attorney, priest, public officer "cannot be examined" in a civil or criminal action, special proceeding of a civil nature, or a grand jury proceeding, then these subdivisions do not now ex proprio vigore create extra-judicial privilege, and their repeal, therefore, would not operate to abrogate such privilege.

Second construction is preferable.

There is very little authority[1] anywhere on the question of extrajudicial privilege, and there is believed to be a total dearth of local authority on the general question of whether the subdivisions (1)-(3) and (5) of § 1881 apply to nonjudicial proceedings (Cf Gov. Code § 11513(c) discussed infra). However, the following considerations are submitted in support of the proposition that the preferable view is that they do not so apply.

It is of primary significance that the subdivisions are part of a section which appears in the Code of Civil Procedure. This Code is structured as a code of rules for judicial proceedings only. The broad outlines of the structure are the four parts described in the opening section of the Code; namely, I Courts, II Civil Actions, III Special Proceedings, IV Evidence. (C.C.P. §1).

Here we have the overall design for a scheme of rules and regulations for judicial proceedings, and there should be, at least a presumption that when a given rule is placed by the Legislature within this framework, the legislative intent is that the rule is one for judicial proceedings only. It is significant, too, that § 1881 is located in Part IV of the CCP, because the very first section of this Part (§ 1823) speaks of "judicial evidence" in a "judicial proceeding" and the final section (§ 2103) treats the entire Part as having dealt with the law of evidence at a "trial". It is also significant that § 1881, subdivs. (1)-(5) are derived from §§ 395-399 of the Practice Act of 1851, which Act was entitled "An Act to Regulate Proceedings in Civil Cases in Courts of Justice of this State" (Stat. 1851, Chap. V, p. 51). Thus, since subdivisions (1)-(5) of § 1881 are part of the Code of Civil Procedure and since the general purpose and plan of this Code are to regulate judicial proceedings, it is reasonable to conclude that, in enacting these subdivisions in 1872 as part of this Code, the Legislature intended only to provide the law of privilege for judicial proceedings.[2]

This conclusion is substantiated by the fact that, in at least two instances subsequent to 1872, the Legislature has treated §1881 as not automatically applicable to nonjudicial proceedings. The first instance is the enactment as part of the Government Code of § 11513(c) of the Administrative Procedure Act, making the § 1881 privileges applicable to administrative proceedings within the Act, a provision which would have been entirely unnecessary if § 1881 had beem applicable in the first place. The second instance is the amendment adding subdivision (6) to § 1881 and providing explicitly that it applies in nonjudicial proceedings, an explicit provision

which would have been unnecessary if § 1881 were in general applicable to nonjudicial proceedings.

The problem of extra-judicial privilege

A possible solution of the problem of the extra-judicial scope of a privilege is, of course, to equate extra-judicial with judicial privilege. (This is the present solution, if the first of the two above possible constructions of § 1881 is adopted. It is also the solution which is adopted in New Jersey.)[3] Nevertheless, it is submitted that this is not the best solution. The assessment of competing interests which leads us to recognize privilege for purposes of litigation may well prove to be a pretty poor assessment when, as in a legislative hearing, both the competing interests and the purposes may be radically different. Recognition of judicial privilege results from a balancing of the need of society for adjudication based on full information against the need to protect particular relationships. What is a wise balancing when these are the competing needs is not necessarily also wise when the interest opposed to the protection of the particular relationship is the public interest which is involved in the legislative process. Conceivably, the public need may be so imperative and insistent that, in a legislative hearing, this need should override the interest of the private citizen in maintaining secrecy. In other words, the problem of extra-judicial privilege possesses dimensions different from the problem of judicial privilege. The dimensions of the problem being thus different, the solution should, it is submitted, be different.

No attempt is made here to state precisely what the solution should be. It is contended, however, that the problem

is so multi-faceted and so sensitive that it merits full-scale investigation directed toward the search for some more discriminating and less mechanical solution than treating extra-judicial as a fortiori to judicial privilege.

Possibly a full-scale investigation of the problem would develop some formula for assigning relative values to the privileges, for classifying non-judicial proceedings and for enforcing or relaxing the privileges according to such evaluations and classifications. For example, it might be determined that priest-penitent privilege is more important than attorney-client and that, in turn, is more important than spouse privilege. On this basis, it might be provided that in nonjudicial proceedings priest-penitent privilege should always apply; that attorney-client should apply, except in extraordinary circumstances; that spouse privilege should never apply. It is not contended that this is the best specific answer. It is contended, however, that this is the best general approach.[4]

Summary and Recommendation

If subdivisions (1) - (5) of CCP § 1881 are construed as it is contended herein that they should be construed, it follows that the privileges therein provided for now apply only (a) in judicial proceedings and (b) in those administrative proceedings to which they are made applicable by Government Code § 11513(c).[5]

On the other hand, if the construction herein advocated is wrong, it follows that the § 1881 privileges now apply not only as above but, in addition, apply in all official proceedings, just as they apply in the court-room. If perchance this is the law (which is seriously doubted) it is nevertheless believed to be (for reasons stated above) unsound law which deserves to be eliminated.[6]

The specific recommendation is that the Commission propose adoption of the subject rules and repeal of the subject subdivisions. The proposal is believed to be sound either as a revision of judicial privilege (plus non-judicial to the extent of Government Code § 11513(c)) or as a revision, beyond this, of privilege law in other non-judicial areas. The former is believed to be the true scope of the proposal. Nevertheless, even if this is otherwise, the proposal is believed to be meritorious.

Self-incrimination and Subdivision 6 of § 1881.

In what has been said above the privilege against self-incrimination has not been under consideration. That privilege is not a part of the problem under discussion, inasmuch as it is a constitutional privilege which is now applicable in both judicial and nonjudicial proceedings. Nor has subdivision 6, of CCP § 1881, been fully discussed. This subdivision is unique, in that by its explicit terms it does apply to legislative and administrative hearings. In deciding whether to advocate repeal or modification of this subdivision it will, of course, be necessary for the Commission to "make a judgment" on this particular point of extra-judicial privilege.

Respectfully submitted,

James H. Chadbourn

NOTES

1. 1 Wigmore § 4c (p.95) (states it is certain that incrimination privilege applies in administrative proceedings and that it has been assumed that other privileges are applicable); 2 Davis § 14.08 (pp. 286-287) (states that "some kinds of privileged evidence" are "probably" exceptions to the APA provision that any evidence may be received); 54 Harv.L.Rev. 1214, 1218-1219 ("probable that disclosure of privileged communications. . . may not be compelled in an administrative investigation"); 76 Harv.L.Rev. 275, 286 ("Agencies and perhaps even legislatures" must respect privileges). See also note 2 infra.

   For a collection of committee rules and statements of policy, see 45 Calif.L.Rev. 347, 353-57.

2. But see N Y. City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940) (physician-patient privilege held applicable in Councilmanic investigation of City hospital, rejecting argument that because provision is in Civil Practice Act it is limited to judicial proceedings); Lanza v. N.Y. State Joint Legislative Committee, 3 N.Y.2d 92, 143 N.E.2d 772 (1957)(seems to assume attorney-client privilege applicable in proceedings before legislative Committee).

3. N.J. Stat Ann. § 2A : 84A-16(1) (privileges apply to "all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government . . .")

4. Wigmore, speaking of rules of evidence (including privileges) before administrative bodies suggests that "no uniform rule need be established, and that the demands of fairness will depend upon the nature of the particular investigation and report." 1 Wigmore § 4c (p. 95). Davis suggests that "the unqualified provision of the APA that any evidence may be received offers opportunity for the administrative process to experiment with a system which differs from that followed by courts". 2 Davis § 14.08 (p. 287). Cf. 54 Harv.L.Rev. 1214, 1219, arguing that privileges have as much justification in administrative proceedings as they have in judicial, since facts disclosed in the former might be used in the latter. Cf also 45 Calif L.Rev. 347, arguing for rules of privilege in Congressional investigations and proposing implementing legislation.

5. It is, of course, both possible and likely that to some extent due process requires recognition of some privileges (such as attorney-client privilege. See Lanza case supra note 2). Thus, though the CCP privileges do not apply extra-judicially, something roughly approximating them (or some of them) may be operative extra-judicially as elements of due process.

6. This would not, of course, affect such extra-judicial privilege as may be an element of due process. See note 5 supra.