

mtg

3/27/63

Memorandum No. 63-23

Subject: Study No. 34(L) - URE (Comparison of Rules 26, 27, 27.1,
28 and 29)

Rules 26, 27, 27.1, 28 and 29 protect communications made in the course of certain relationships. In accordance with the Commission's instructions, they have been revised to use the same language and structure where it appears feasible to do so. The revision points up certain substantive differences between the rules. The Commission should review the language of the comparable provisions in order to be sure that these substantive differences are intended.

Attached to this memorandum as Exhibit I (blue pages) is a chart by which you can compare the various rules. In many cases, of course, a provision in one rule would be meaningless in another rule. But in some instances it may be that a provision has been omitted because not considered or because a policy that seemed desirable at one time did not seem so desirable at another time when another rule was considered. Bear in mind that both Rules 27 and 27.1 are applicable when a person consults a medical doctor in regard to a mental condition.

Respectfully submitted,

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Assistant Executive Secretary

COMPARISON OF RULES 26, 27, 27.1, 28 and 29, THE COMMUNICATION PRIVILEGES
 ("x" means the rule has the same provision as is described on its left;
 "consultant" means a lawyer, physician, psychotherapist or priest
 consulted in professional capacity.)

Rule 26 (Lawyer-client)	Rule 27 (Physician-patient)	Rule 27.1 (Psycho-therapist-patient)	Rule 28 (Husband-wife)	Rule 29 (Priest-penitent)
(1) DEFINITIONS	(1) x	(1) x	Not provided	(1) Provided
(1)(a) "Client" includes one who consults through representative, guardian or conservator	Not provided	Not provided	Not provided	Not provided
Not provided	(1)(c) "Patient" includes one seeking diagnosis	(1)(c) "Patient" does not include one seeking diagnosis	Not provided	Not provided
(1)(b) "Communication" includes advice from consultant	(1)(a) Not provided	(1)(a) Not provided	Not provided	Not provided
(1)(c) "Holder" includes representative of incompetent or deceased	(1)(b) x	(1)(b) x	(1) "Holder" includes representative of incompetent only	Not provided
(1)(d) Consultant means one "reasonably believed" to have authority to practice anywhere.	(1)(d) x	(1)(d) Provided for medical doctor; but psychologist must be licensed	Not provided	(1)(c) Priest must have authority
(2) GENERAL RULE	(2) x	(2) x	(1) x	(2)
(2) Privilege lasts for life plus existence of administrator	(2) x	(2) x	(1) Privilege lasts for life of surviving spouse	(2) Privilege lasts for life of survivor of the priest or penitent
(2) Privilege may be claimed by holder, person authorized by holder, or consultant	(2) x	(2) x	(1) Privilege may be claimed by spouse, his guardian or conservator	(2)(c) Privilege may be claimed by penitent or priest

Rule 26	Rule 27	Rule 27 1	Rule 28	Rule 29
(2) Privilege may be exercised against anyone	(2) x	(2) x	(1) Privilege may be exercised against other spouse only, not eavesdroppers	(2)(b) Privilege may be exercised against priest only
(2) Privilege applicable in all judicial proceedings	(2) Privilege applicable in civil proceedings only	(2) Privilege applicable in all judicial proceedings	(1) x	(2) x
(3) Consultant is required to claim privilege	(3) x	(3) x	Not provided	Not provided
(4)(5) EXCEPTIONS	(4) x	(4) x	(2) x	No exceptions
(4)(a) Exception for planning crime or fraud	(4)(a) Exception for planning <u>or concealing</u> crime <u>or tort</u> .	(4)(a) x	(2)(a) Exception for planning crime or fraud	Not provided
(4) (b) Exception for parties claiming through owner of privilege	(4)(b) x	(4)(b) Exception for parties claiming through owner of privilege if he is deceased	No provision	_____
(4)(d) Exception when issue is breach of duty by consultant	No provision	No provision	No provision	No provision
Exception (4)(d) when consultant is attesting witness or (4)(e) when issue is intent of deceased privilege owner with respect to dispositive instrument	(4)(c) Exception when issue is validity of will of the privilege owner	(4)(c) x	No provision	No provision
No provision	(4)(d) Exception for commitment, guardianship or conservatorship proceedings	No provision	(2)(b) Exception for commitment, guardianship or conservatorship proceedings	No provision

Rule 26	Rule 27	Rule 27.1	Rule 28	Rule 29
No provision	(4)(e) Exception for proceedings to establish competence	(4)(d) x	(2)(c) x	No provision
No provision	(4)(f) Exception for proceedings to recover damages for criminal acts of holder	No provision	No provision	No provision
No provision	(4)(g) Exception where holder tenders issue of condition	(4)(e) x	No provision	No provision
No provision	No provision	(4)(f) Exception for consultants appointed by court	_____	_____
No provision	(4)(h) Exception for information required to be reported	[(4)(g)] Undecided	No provision	No provision
(5) Exception as between joint holders	No provision	No provision	(2)(d) Exception in actions between holders	No provision
No provision	(2) Not applicable in criminal proceedings	No provision	(2)(e) Exception for criminal proceedings against holder for crime against person, property or child of other	No provision
No provision. Rule 37 provides that consent to partial disclosure waives privilege	x	x	(2)(f) Exception for criminal proceedings where accused holder offers evidence of privileged communication	No provision. Rule 37 provides that consent to partial disclosure waives privilege

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3/11/63
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Note: This is Uniform Rule 26 as revised by the Law Revision Commission. 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 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

(a) "Client" means a person, ~~[a]~~ corporation, ~~[or-ether]~~ association or other organization (including this State and any other public entity) that, directly or through an authorized representative, consults a lawyer ~~[or-the-lawyer's-representative]~~ for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity and includes an incompetent (i) who himself so consults the lawyer or (ii) whose guardian or conservator so consults the lawyer ~~[or-the-lawyer's representative]~~ in behalf of the incompetent. ~~[;]~~

(b) "Confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client 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, and includes advice given by the lawyer in the course of that relationship. ~~[representing the-client-and-includes-disclosures-of-the-client-to-a-representative, associate-or-employee-of-the-lawyer-incidental-to-the-professional relationship,]~~

(c) "Holder of the privilege" means (i) the client when he is competent, (ii) a guardian or conservator of the client when the client is incompetent, (iii) the personal representative of the client if the client is dead and (iv) a successor, assign or trustee in dissolution of a corporation, partnership, association or other organization if dissolved.

(d) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation [the-law-of-which-recognizes-a-privilege-against-disclosure-of-confidential-communications-between-client-and-lawyer].

(2) Subject to Rule 37 and except as otherwise provided [by-Paragraph-2-of] in this rule, [communications-found-by-the-judge-to-have-been-between-lawyer-and-his-client-in-the-course-of-that-relationship-and-in-professional-confidence,-are-privileged,-and-a-client] a person, whether or not a party, has a privilege [(a)--if-he-is-the-witness] to refuse to disclose, and to prevent another from disclosing, a [any-such] communication [,-and-(b)-to-prevent-his-lawyer-from-disclosing-it,-and-(c)-to-prevent-any-other-witness-from-disclosing-such-communication-if-it-came-to-the-knowledge-of-such-witness-(i)-in-the-course-of-its-transmittal-between-the-client-and-the-lawyer,-or-(ii)-in-a-manner-not-reasonably-to-be-anticipated-by-the-client,-or-(iii)-as-a-result-of-a-breach-of-the-lawyer-client-relationship---The-privilege-may-be-claimed-by-the-client-in-person-or-by-his-lawyer,-or-if-incompetent,-by-his-guardian,-or-if-deceased,-by-his-personal-representative---The-privilege-available-to-a-corporation-or-association-terminates-upon-dissolution.] if he claims the privilege and

the judge finds that the communication was a confidential communication between client and lawyer and that the person claiming the privilege is:

(a) The holder of the privilege, or

(b) A person who is authorized to claim the privilege by the holder of the privilege, or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The lawyer who received or made a communication subject to the privilege under this rule shall claim the privilege for the client whenever

(a) he is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) [~~Such privileges shall not extend~~] There is no privilege under this rule:

(a) [~~to a communication~~] If the judge finds [~~that sufficient~~] from evidence [~~, aside~~] apart from the communication [~~, has been introduced to warrant a finding that the legal service was~~] itself that there is reasonable grounds to believe the services of the lawyer were sought or obtained [~~in order~~] to enable or aid [~~the client~~] anyone to commit or plan to commit a crime or [~~a tort, or~~] to perpetrate or plan to perpetrate a fraud.

(b) As to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction. [~~, or~~]

(c) As to a communication relevant to an issue of breach of duty by the lawyer to his client [7] or by the client to his lawyer. [7-er]

(d) As to a communication relevant to an issue concerning the intention or competence of a client executing an attested document, or concerning the execution or attestation of such a document, of which the lawyer is an attesting witness. [7-er]

(e) As to a communication relevant to an issue concerning the intention of a deceased client with respect to a deed of conveyance, will or other writing, executed by the client, purporting to affect an interest in property

(5) ~~[to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer when they have retained in common when offered in an action between any of such clients.]~~ Where two or more clients have retained a lawyer to act for them in common, none of them may claim a privilege under this rule as against the others as to communications made in the course of that relationship.

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Note: This is Uniform Rule 27 as revised by the Law Revision Commission. 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 [7] :

(a) "Confidential communication between patient and physician [~~and patient~~]" means [~~such~~] information transmitted between a patient and his physician [~~and-patient~~], including information obtained by an examination of the patient, [~~as-is-transmitted~~] in the course of that relationship and 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 or conservator 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 [7] consults a physician or submits to an examination by a physician for the [~~sole~~] purpose of securing a diagnosis or preventive, palliative [7] 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] any state or [jurisdiction-in-which-the-consultation-or-examination-takes-place;] nation.

(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] another 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] that the person claiming the privilege is:

(a) The holder of the privilege, or

(b) A person who is authorized to claim the privilege [for him] by the holder of the privilege, or

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no

holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The physician who received a communication subject to the privilege under this rule shall claim the privilege for the patient whenever (a) he is authorized to claim the privilege under paragraph (a) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

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

(a) [~~(6) No person has a privilege under this rule~~] If the judge finds [~~that sufficient~~] from evidence [,] apart from the communication itself [~~has been introduced to warrant a finding that~~] that there is reasonable grounds to believe 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:

(b) [~~(c) upon an issue between parties claiming by~~] As to a communication relevant to an issue between parties all of whom claim through the patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction. [~~from a deceased patient.~~]

(c) [~~(b)~~] As to a communication relevant to [~~upon~~] an issue as to the validity of a document as a will of the patient.

(d) [~~upon an issue of the patient's condition~~] In an action or proceeding to commit [~~him~~] the patient 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~~]

(e) In an action or proceeding in which the patient seeks to establish his competence. [~~er~~]

(f) In an action or proceeding to recover damages on account of conduct of the patient which constitutes a criminal offense. [~~either-than a-misdemeanor,-er~~]

(g) [~~(4)-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 an issue concerning the condition of the patient [is-an-element-or-factor-of-the-claim-or-defense-of] has been tendered by the patient or [~~er~~] by 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.

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

[~~(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.~~]

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3/27/63

Note: This is a rule that does not appear in the Uniform Rules of Evidence as recommended by the Commissioners on Uniform State Laws. The Law Revision Commission at its October, 1961, meeting decided to include the following rule among the URE privilege rules.

RULE 27.1 PSYCHOTHERAPIST-PATIENT PRIVILEGE

(1) As used in this rule:

(a) "Confidential communication between patient and psychotherapist" means information transmitted between a patient and his psychotherapist, including information obtained by an examination of the patient, in the course of that relationship and in confidence 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 or conservator of the patient when the patient is incompetent and (iii) the personal representative of the patient if the patient is dead.

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

(d) "Psychotherapist" means (i) a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation, (ii) when the consultation takes place in this state, a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code, or (iii) when the consultation

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takes place in another state or jurisdiction, a person licensed or certified as a psychologist in such state or jurisdiction if the requirements for obtaining a license or certificate in such state or jurisdiction are substantially the same as under Article 4 (commencing with Section 2940) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(2) Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the judge finds that the communication was a confidential communication between patient and psychotherapist and that the person claiming the privilege is:

(a) The holder of the privilege, or

(b) A person who is authorized to claim the privilege by the holder of the privilege, or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The psychotherapist who received a communication subject to the privilege under this rule shall claim the privilege for the patient whenever (a) he is authorized to claim the privilege under paragraph (a) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe the services of the

psychotherapist 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.

(b) As to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(c) As to a communication relevant to an issue as to the validity of a document as a will of the patient.

(d) In an action or proceeding in which the patient seeks to establish his competence.

(e) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the mental or emotional condition of the patient has been tendered by the patient or by 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.

(f) If the psychotherapist is appointed to act as psychotherapist for the patient by order of a court.

[(g) As to information which the psychotherapist or 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.]

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Note: This is Uniform Rule 28 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 28. MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS.

(1) Subject to Rule 37 and except as otherwise provided in [~~para-~~~~graphs-(2)-and-(3)-of~~] this rule, a spouse (or his guardian or conservator when he is incompetent) [~~who-transmitted-to-the-other-the-information which-constituted-the-communication~~], whether or not a party, has a privilege during the marital relationship and afterwards [~~which-he-may-claim-whether or-not-he-is-a-party-to-the-action;~~] to refuse to disclose and to prevent the other spouse from disclosing a communication [~~s-found-by~~] if he claims the privilege and the judge finds that the communication was [~~to-have-been had-or~~] made in confidence between them while husband and wife. [~~The other-spouse-or-the-guardian-of-an-incompetent-spouse-may-claim-the-privilege on-behalf-of-the-spouse-having-the-privilege.~~]

(2) [~~Neither-spouse-may-claim-such-privilege~~] There is no privilege under this rule:

(a) If the judge finds [~~that-sufficient~~] from evidence [~~,-aside~~] apart from the communication [~~,-has-been-introduced-to-warrant-a-finding-that~~] itself that there is reasonable grounds to believe the communication was made, in whole or in part, to enable or aid anyone to commit or plan to

commit a crime or ~~[a-text]~~ to perpetrate or plan to perpetrate a fraud.

(b) In an action or proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another or others because of his alleged mental or physical condition.

(c) In an action or proceeding in which either spouse seeks to establish his competence.

(d) In an action or proceeding by one spouse against the other spouse.
~~[or-(b)-in-an-action-for-damages-for-the-alienation-of-the-affections-of the-other,-or-for-criminal-conversation-with-the-other,-or]~~

(e) In a criminal action or proceeding in which one of them is charged with (i) a crime against the person or property of the other or of a child of either, or (ii) a crime against the person or property of a third person committed in the course of committing a crime against the other, or (iii) bigamy or adultery, or (iv) desertion of the other or of a child of either. ~~[or-(d)]~~

(f) In a criminal action or proceeding in which the accused offers evidence of a communication between him and his spouse.

~~[(3)-A-spouse-who-would-otherwise-have-a-privilege-under-this-rule has-no-such-privilege-if-the-judge-finds-that-he-or-the-other-spouse-while the-holder-of-the-privilege-testified-or-caused-another-to-testify-in-any action-to-any-communication-between-the-spouses-upon-the-same-subject-matter.]~~

Revised 12/1/59, 8/14/61

Note: This is Uniform Rule 29 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 29. PRIEST-PENITENT PRIVILEGE.

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

(a) "Penitent" means a person [~~member-of-a-church-or-religious denomination-or-organization~~] who has made a penitential communication to a priest. [~~thereof;~~]

(b) "Penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the [~~penitent~~] priest is a member, whether or not the penitent is a member of the priest's church, denomination or organization.

(c) "Priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made to him. [~~by-members-of-his-church,-denomination-or-organization;~~]

(2) Subject to rule 37, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent [~~a-witness~~] another ~~from~~ disclosing, a communication if he claims the privilege and the judge finds that:

(a) The communication was a penitential communication; [~~and~~]

(b) The [~~witness~~] person from whom disclosure is sought is the penitent or the priest; [~~;~~] and

(c) The [~~claimant~~] person claiming the privilege is the penitent [~~;~~] or is the priest making the claim on behalf of an absent or deceased or incompetent penitent.