7/12/63

Memorandum No. 63-33

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

At the September 1961 meeting the Commission decided that consideration of the URE privileges article would be limited by the assumption that application of the article is restricted to judicial proceedings only. The Commission decided to defer consideration of the application of each privilege to other types of proceedings until adjustments and repeals of existing privilege statutes were taken up. At the February 1963 meeting the Commission again decided to confine its consideration of the URE privileges article with the assumption that it applies only to judicial proceedings. The question of the application of these privileges to other proceedings and the necessary adjustments to be made in existing statutes was deferred because a majority vote could not be obtained on any other proposal. Some Commissioners took the view that privileges should apply to all types of proceedings. Others believed that a decision as to the applicability of the privileges could not be made in the absence of a study of the types of proceedings involved and a consideration of the nature of the competing interests in such proceedings. One commissioner believed the recognition of privileges in nonjudicial proceedings is beyond the scope of the study.

The Commission has substantially completed its work on the privileges article. The time has now come to consider what adjustments are to be made in the existing statutes. A research study (attached) relating to this problem has been prepared by the staff. Please read it prior to the meeting.

Attached to this memorandum is a study that was prepared several years ago by Professor Chadbourn in regard to incorporating Rule 7, subdivisions (b), (d) and (e) and Rules 23 to 40 in the California Codes. The matters discussed in Professor Chadbourn's study will not be repeated in this memorandum unless further revision of the URE rules by the Commission has made the study obsolete.

In order to determine what adjustments must be made in existing statutes it is, of course, necessary to determine what the existing statutes apply to. Moreover, to carry out the wish of some of the Commissioners to consider the competing interests in determining whether a particular privilege should apply in nonjudicial proceedings, it is necessary to determine the kinds of proceedings in which a question of privilege can arise.

A privilege is an exemption from the duty to give testimony when compelled to do so. Hence, potentially an occasion for the exercise of a privilege can arise in any proceeding where there is the power to compel testimony. As the process by which testimony is compelled is the subpoena, we may discover the kind of proceedings in which there exists a power to compel testimony by determining who has the power to issue subpoenas. The research study lists over 100 statutes that authorize the issuance of subpoenas by various governmental officers for a variety of purposes. Although hard and fast lines are difficult to draw because one kind of proceeding tends to shade into another, analysis of the statutes indicates that the subpoena power may be exercised in proceedings that fall roughly into three categories. These categories may in turn be divided into a number of subcategories.

The first category is adjudicatory proceedings. By "adjudicatory proceeding" is meant a proceeding in which there are parties who summon witnesses, question adverse witnesses, and present issues that are determined by a third party on the basis of the evidence presented in the proceeding. The clearest example of an adjudicatory proceeding is a lawsuit conducted by a court. Examples of nonjudicial adjudicatory proceedings are an arbitration proceeding, a civil service disciplinary proceeding, or a proceeding under the Administrative Procedure Act for the suspension or revocation of a license. Adjudicatory proceedings may be further divided into disciplinary proceedings and nondisciplinary proceedings. In judicial proceedings, the disciplinary proceedings are criminal actions and proceedings and the nondisciplinary proceedings are the civil actions and proceedings. In nonjudicial adjudicatory proceedings the disciplinary proceedings are the license suspension and revocation proceedings.

Another category of proceedings in which the subpoena power may be exercised is a legislative proceeding. By "legislative proceeding" is meant a proceeding designed to provide a law, rule, or regulation-making authority with information so that it can decide whether or not its legislative authority should be exercised. In such a proceeding, there are no parties and no one has the right to summon or question witnesses. The decisions that are made do not settle issues or determine facts and need not be based on anything produced at the proceeding. The clearest example of a legislative proceeding is, of course, a hearing by a committee of the Legislature. Another example would be a proceeding under Sections 11420 et seq. of the Government Code, which provide the procedure for holding hearings on proposed regulations of State administrative agencies.

The third category of proceedings in which testimony can be compelled to be given can be called investigative, or inquisitional, proceedings. These are proceedings conducted by a governmental officer or agency merely for the purpose of acquiring information upon which some future official action may or may not be based. Again, there are no parties and no right to summon or question witnesses. There are no issues to be decided, no facts to be found, and the scope of the inquiry is limited only by the authority of the agency conducting the investigation. Perhaps the clearest example of such a proceeding is a grand jury proceeding. Government Code Section 11181 grants the heads of the state departments the power to issue subpoenas, and this power is sometimes exercised for investigative purposes. Under such circumstances, the agency functions much as does a grand jury. The information developed from the investigation may, but need not, form the basis for the institution of an administrative disciplinary proceeding.

The basic preliminary question is whether the existing privilege statutes apply in these various proceedings. On its face, Code of Civil Procedure Section 1881 appears to apply to such proceedings. Section 1881 provides that it is the policy of the law to preserve inviolate confidences arising out of certain relationships and therefore a witness may not be questioned as to those confidences. Among the confidences specified is the newsman's privilege. This subdivision provides in specific terms that it is applicable in all proceedings. This does not necessarily imply, however, that the other subdivisions do not apply in all proceedings. Subdivision 6--the newsman's privilege--was added in 1935. The remainder of the section was enacted in 1872. Hence, little clue as to the legislative intent in 1872 is provided by the language of subdivision 6.

There is little direct authority on the question, but as the research study indicates apparently the privileges defined in Section 1881 are recognized in nonjudicial proceedings, for there appear to be a number of appellate decisions upholding a claim of privilege in nonjudicial proceedings, or at least assuming that privileges apply in nonjudicial proceedings. On the other hand, there is no decision indicating that Section 1881 does not apply to every proceeding to which its language can be applied.

The URE rules as revised by the Commission apply only to judicial proceedings. From the foregoing summary of the research study, it appears that it would be dangerous to assume that Section 1881 is superseded by the URE rules and therefore can be repealed without extending the URE rules to apply to nonjudicial proceedings.

Since there seems to be a great likelihood that the law would be drastically changed if the existing version of the URE rules were adopted and the existing law were repealed, the Commission must consider what adjustments can be made. As the research study indicates, the alternatives seem to be as follows:

(1) Retain the revised rules in the form in which they exist and amend Section 1881 to provide that it does not apply to proceedings covered by the URE rules.

This alternative seems thoroughly unsatisfactory. The existing privilege rules are obscure in meaning, technically inaccurate in many cases, and contain no reference to the many judicial interpretations of the scope of the privilege. To retain these statutes would be to create two bodies of privilege. For example, there would be no eavesdropper exception to the attorney-client privilege in a judicial proceeding, but any administrative officer with subpoena power

could obtain the privileged information. The psychotherapist-patient privilege would apply only in court. Hundreds of administrative officers and every legislative body in the State could compel a psychotherapist to testify at length. The protection purportedly furnished to a patient by Rule 27.5 would be but a sham.

(2) The existing law may be repealed and the URE rules made applicable to whatever the former law applied to.

This would avoid deciding what proceedings the Uniform Rules should apply to. It would raise a question as to the applicability of the existing privileges which apparently has never been raised before. No one would know whether or not he has a privilege in a particular proceeding until the matter is determined by the Supreme Court. A decision by that court in regard to a legislative proceeding might not be thought to be precedent in an administrative proceeding. Hence, numerous appeals to thrash out the scope of the privileges would be required.

(3) The existing statutes may be repealed and the policies underlying each privilege and the competing interests involved in each kind of proceeding may be considered so that the URE rules may be made specifically applicable to the proceedings where policy indicates that they should be applicable.

This seems to be the only reasonable solution. If this alternative is selected by the Commission, it will be necessary to consider each privilege and the existing statutes in the light of the policies involved in adjudicatory proceedings (judicial and nonjudicial, disciplinary and nondisciplinary), legislative proceedings (State and local) and investigatory proceedings. When the scope of the privileges has been determined as a policy matter, the manner of drafting the policies can be decided. But the easiest drafting solution

would seem to be to provide--as New Jersey did--that privileges are available whenever testimony can be compelled and to provide in the specific privilege rules exceptions for the proceedings where it is thought that the policy underlying the privilege does not require its recognition.

We turn then to a consideration of the specific privileges in the revised rules, the applicable statutes, and the policies which should dictate their recognition or nonrecognition in the various types of proceedings.

Rule 23.

The subject matter of Rule 23 is covered in the California Constitution in Article 1, Section 13, Penal Code Section 688, Penal Code Section 1323 and Penal Code Section 1323.5. The sections are set forth on pages 2 and 3 of Professor Chadbourn's attached study.

Although we have changed the rules since Professor Chadbourn prepared this study, Rule 23 appears to supersede the first clause of Section 688. Section 688 should be amended to strike out the superseded language. The amended section would read: "No person [~~can be compelled, in a criminal action, to be a witness against himself; nor can a person~~] charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

Section 1323 is superseded by revised Rule 23(1), revised Rule 25(7) and revised Rule 39(2). Section 1323 should be repealed.

Section 1323.5 is superseded, at least in part, by Rule 23. Rule 23, however, grants a privilege only to a defendant in a criminal case. Section 1323.5, however, applies "in the trial or examination upon all indictments, claims, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of

crimes or offenses . . . ." What this section does is a little obscure because no cases have interpreted it. It is difficult to know who is meant by "persons accused or charged with the commission of crimes or offenses". Does this mean a person who has been formally charged by way of complaint or indictment--or is it sufficient that a person has been arrested upon a charge? To what proceedings is the privilege applicable? The section was unknown in California law from 1872 until 1952 when People v. Talle, 111 Cal. App.2d 650, was decided. It had been assumed that the section had been repealed by the enactment of the Penal Code in 1872 until the decision in People v. Talle held that it still declared the law. The only purpose for invoking the section in People v. Talle was to hold that it was error for the prosecution to call the defendant as its first witness and to compel him to rely on his testimonial privilege. It seems likely that the same result could have been reached without relying on Section 1323.5. Rule 23 clearly specifies that the defendant in a criminal case has a privilege "not to be called as a witness," so it will codify the result in People v. Talle. The staff recommends that Section 1323.5 be repealed. If it is desirable to extend the policy of Rule 23 to other proceedings, the staff recommends that Rule 23 itself be amended to provide clearly for such an extension.

To be considered in connection with such a possible extension would be the availability of a privilege not to testify in nonjudicial adjudicatory proceedings--such as administrative disciplinary proceedings, legislative proceedings, and investigative proceedings such as grand jury proceedings.

It is the staff's recommendation that the privilege of a person accused of a crime to refuse to testify at all be limited to the case of the defendant in a criminal action or proceeding. Sufficient protection in other proceedings

is afforded by the privilege against self-incrimination found in Rule 25 and in the Constitution. The Commission's revision of Rule 39 assures that the invocation of the privilege before a grand jury or at a coroner's inquest may not be used against the person claiming the privilege at a later time. To provide a privilege to the "accused" not to testify at all in a grand jury proceeding or at a coroner's inquest would create a difficult--if not impossible--problem in attempting to apply the privilege, for there is no determination at the time the testimony is sought as to which persons, if any, are or will be "accused" of a crime.

Rules 24 and 25.

The second clause of Code of Civil Procedure Section 2065 is superseded by Rules 24 and 25. See Professor Chadbourn's study at page 4. The staff recommends that the second clause of Section 2065 be deleted. Professor Chadbourn recommends the repeal of Section 2065. The matters covered by other portions of the section are covered in Rules 7(d), 21 and 22 of the URE; hence, the entire section is superseded by various URE provisions. We will consider these other portions of Section 2065 when we consider the pertinent URE rules.

Rule 26.

Rule 26 covers the same subject matter as Section 1881 of the Code of Civil Procedure, subdivision 2. Professor Chadbourn recommends the repeal of the existing statutory statement of the privilege; but, as previously pointed out, this might drastically change existing California law unless the URE rule is broadened to provide equivalent protection in nonjudicial proceedings. The Commission should consider whether the policy underlying the privilege requires its recognition in the following kinds of nonjudicial proceedings:

(1) Adjudicatory Proceedings

a. Disciplinary proceedings

i. Disbarment proceedings

b. Nondisciplinary proceedings

(2) Legislative Proceedings Before:

a. State legislative committees

b. State administrative rule-making agencies

c. Local legislative bodies--city councils, etc.

d. Local administrative rule-making agencies

(3) Investigative Proceedings

Rule 27.

The subject matter of Rule 27 is now covered in subdivision 4, Code of Civil Procedure Section 1881. Professor Chadbourn recommends its repeal. However, repeal would likely make the privilege unavailable in many proceedings where it is available now. Hence, the Commission should consider whether the policies underlying the physician-patient privilege require its recognition in the following nonjudicial proceedings:

(1) Adjudicatory Proceedings

a. Disciplinary proceedings

i. Proceedings for the revocation or suspension of the doctor's license to practice medicine

(Comment: As the physician-patient privilege is unavailable in criminal prosecutions of any kind and in civil actions for damages caused by criminal conduct, it would seem that the privilege should also be unavailable in license suspension or revocation proceedings. Usually a license suspension or revocation proceeding is based upon some violation of the law. The enforcement agency may proceed criminally or administratively and frequently does both. If the policy underlying the privilege does not require its recognition in judicial proceedings arising out of criminal conduct, there seems to be no policy reason requiring its recognition in administrative proceedings involving the same issues.)

b. Nondisciplinary proceedings

(2) Legislative Proceedings

a. State legislative committees

b. State regulatory agencies--State Board of Medical Examiners or State Department of Public Health

c. Local governing bodies--city councils, etc.

d. Local administrative agencies

(3) Investigative Proceedings

a. Grand jury proceedings

(Comment: The nonrecognition of the privilege in criminal proceedings would seem to indicate that it should not be recognized in grand jury proceedings or at a coroner's inquest.)

b. Administrative investigatory proceedings

(Comment: If the privilege is not recognized in administrative disciplinary proceedings, it would seem appropriate to refuse recognition of the privilege at least insofar as investigations by the State Board of Medical Examiners are concerned.)

Professor Chadbourn suggests that Rules 27 (physician-patient) and 37 (waiver) be amended to provide that each is "subject to C.C.P. Section 2032 (b)(2)." Section 2032 provides for the exchange of medical reports in actions in which the mental or physical condition of a party is in controversy. Under the section a court may order a party to submit to a medical examination on motion of the other party. The party examined is entitled to obtain a copy of the report of the examination; but under subdivision (b)(2), the examined party's requesting and obtaining a copy of the examination report operates as a waiver of any privilege he may have regarding the testimony of every person who has examined him for the same condition.

Health & Safety Code Section 3197 provides that subdivisions 1 (marital privilege) and 4 (physician-patient) of C.C.P. Section 1881 do not apply in proceedings arising out of the enforcement of the venereal disease control law. Section 3197 must be amended to refer to Rules 27 and 28. Professor Chadbourn suggests amending the URE rules to provide that they are subject to Health & Safety Code Section 3197.

It seems unnecessary to put in the revised rules the cross-references suggested. Rule 40.1 will make it clear that the enactment of the revised rules will not repeal by implication any statute relating to privilege. Hence, it seems unlikely that any question would be raised concerning the continued force of these sections. There seems to be no problem or ambiguity that might be created by omission of a reference to these sections from the URE. Persons concerned with the venereal disease law should be aware of its provisions. Persons involved in litigation involving the physical or mental condition of a party will be aware of Section 2032 whether a reference to the section is included within the physician-patient privilege or not. Therefore, it is suggested that no reference to these sections be placed in Rule 27.

Rule 27.5.

Business & Professions Code Section 2904, part of the psychology certification act, provides:

> For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.

Rule 27.5 grants psychologists a privilege that is not as extensive as the privilege granted by Section 2904. However, the Commission thought in adopting

Rule 27.5 that it was granting all of the privilege that was needed to protect confidential communications to psychotherapists of any sort. Section 2904, therefore, should be repealed. But if adequate protection is to be given to confidential communications to psychotherapists, consideration should be given to extending the application of Rule 27.5 to various nonjudicial proceedings where it appears likely that Section 2904 can be invoked now. The Commission should consider the policies underlying the privilege in relation to the following kinds of nonjudicial proceedings:

(1) Adjudicatory Proceedings

a. Disciplinary proceedings

b. Nondisciplinary proceedings

(2) Legislative Proceedings

a. State legislative committees

b. State regulatory agencies

c. Local governing bodies

d. Local administrative agencies

(3) Investigative proceedings

a. Grand juries

b. Administrative investigative proceedings

Rule 28.

The present statutory statement of this privilege is in C.C.P. Section 1881, subdivision 1. This section also contains the privilege of a spouse to prevent the other from giving testimony for or against the party spouse. Somewhat similar is the privilege in Penal Code Section 1322 which provides that neither spouse is a competent witness for or against the other in a criminal action or proceeding without the consent of both.

These statutes present two problems:

(1) Should the testimonial "for or against" privilege for spouses be continued for judicial proceedings? In 1956 the Commission recommended that the privilege be retained but suggested that it be revised so that the witness spouse only has a privilege to refuse to testify against the other. Please refer to the printed recommendation and study relating to the marital "for and against" testimonial privilege published in November of 1956. Copies of this report are again being sent to you with this memorandum. The report on pages F-7 and F-8 contains the text of subdivision 1 of Section 1881 (except that "or in a hearing held to determine the mental competency or condition of either husband or wife" has since been added to the exceptions stated in this subdivision) and of Penal Code Section 1322. The question now is whether Penal Code Section 1322 and Code of Civil Procedure Section 1881, subdivision 1, should be repealed or should be retained and revised insofar as the testimonial privilege is concerned.

(2) What adjustments need to be made because of the approval of the marital communication privilege in Rule 28? Repeal of Section 1881, subdivision 1, raises a question whether the marital communication privilege should be applicable in:

(1) Nonjudicial Adjudicatory Proceedings

   a. Disciplinary proceedings

   b. Nondisciplinary proceedings

(2) Legislative Proceedings

   a. State

   b. Local

(3) Investigative Proceedings

a. Grand jury

b. Administrative

Penal Code Section 266h (discussed at pages 9 and 10 of Professor Chadbourn's study) creates an exception to the "for and against" testimonial privilege in prosecutions for pimping. Penal Code Section 266i is a similar provision relating to prosecutions for pandering. The adjustments to be made in these sections depend on what the Commission does with Penal Code Section 1322 and the testimonial privilege in C.C.P. Section 1881. These sections also provide that the marital communication privilege is inapplicable. No substantive revision is necessary insofar as the communication privilege is involved, but the sections obviously need to be redrafted in the light of whatever action the Commission takes in regard to the testimonial privilege.

Penal Code Section 270e provides that in prosecutions for nonsupport of a wife or child "any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife shall not apply". The word "existing" should be eliminated from Section 270e to avoid the possible construction that it refers to provisions existing at the time of the enactment of Section 270e. Professor Chadbourn suggests a cross-reference in Rule 28 to Penal Code Section 270e, but it seems desirable to omit the cross-reference if Section 270e makes clear that it prevails over Rule 28.

Civil Code Section 250 (part of the Uniform Civil Liability For Support Act) and Code of Civil Procedure Section 1688 (part of the Uniform Reciprocal Enforcement of Support Act) provide that the marital communication privilege and the marital testimonial privilege are inapplicable to proceedings under the acts. It seems likely that the provisions of these sections relating to marital communications are superseded by the exception in Rule 28 that permits a party

spouse to introduce such evidence. Nonetheless, it seems desirable to leave the Uniform Acts as they are. Professor Chadbourn suggests that Rule 28 be made subject to these sections. Again, the staff recommends that the cross-reference be omitted as unnecessary.

Health & Safety Code Section 3197 makes the marital privileges inapplicable in proceedings or prosecutions under the Venereal Disease Control Law. The comments made above in regard to the physician-patient privilege are germane here. The section must be amended to refer to the appropriate rule instead of Code of Civil Procedure Section 1881. But the staff recommends that no cross-reference to the section be included in Rule 28.

Rule 29.

The present statutory statement of the privilege is subdivision 3 of Code of Civil Procedure Section 1881. This subdivision should be repealed. However, it appears likely that repeal would cause a drastic change in the law insofar as nonjudicial proceedings are concerned unless the URE rule is made applicable to such proceedings. The Commission should consider the policy underlying the privilege in regard to the following types of nonjudicial proceedings:

(1) Adjudicatory Proceedings

(2) Legislative Proceedings

(3) Investigative Proceedings

The policy reason given by the Commission for approving this privilege is that the State should not send clergymen to jail for following the tenets of their religion which require them to keep confidential communications secret. If this is the policy underlying the privilege, the policy would require the

recognition of the privilege wherever testimony can be compelled to be given.

Rule 31.

We know of no statutes relating to this privilege. Existing California case law is based upon the secrecy of the ballot provisions of the California Constitution. Since this is so, it appears likely that the California privilege is recognized in all proceedings by virtue of the Constitution itself.

Rule 32.

There are no statutes granting a trade secrets privilege, although Section 2019 of the Code of Civil Procedure gives an indirect recognition of the privilege by permitting the court to make protective orders prohibiting inquiry into secret processes, development or research. No adjustment appears necessary in Section 2019. The Commission should consider whether this privilege should be applicable in the following kinds of proceedings:

(1) Adjudicatory Proceedings

(2) Legislative Proceedings

  a. State legislative proceedings

  b. State administrative proceedings

  c. Local governing body proceedings

  d. Local administrative proceedings

(3) Investigative Proceedings

  a. Grand jury proceedings

  b. Administrative investigations

Rule 33.

Under the proposed draft, Rule 33 pertains only to secrets of the federal government. There are no statutes in California which bear on this subject. Since it is a federal privilege, however, it would seem proper to recognize the privilege in every proceeding.

Rule 34, Rule 36.

The official information privilege is recognized under existing law in subdivision 5 of the Code of Civil Procedure. In addition, there are many code sections which designate a wide variety of records and files as confidential. Pages 15 to 18 of Professor Chadbourn's study contain a tabulation of such sections.

Rule 40.1 would assure continued validity of the many sections dealing with specific records. Hence, no adjustment of Rule 34 is necessary so far as these statutes are concerned. However, C.C.P. § 1747 should be amended to substitute for the present reference to § 1881 (5) a reference to Rule 34. Equivalent protection should be provided in the revised rules to the extent that the policy underlying the privilege requires its recognition in nonjudicial proceedings. The Commission should consider how this privilege should apply in the following kinds of nonjudicial proceedings:

(1) Adjudicatory Proceedings

a. Disciplinary proceedings

(Comment: Should subdivision (3), which forces the government to choose between its case and the privilege, be made applicable in administrative disciplinary proceedings?)

b. Nondisciplinary proceedings

(2) Legislative Proceedings

a. State legislative proceedings

(Comment: The attorney general has opined that the privilege may not be asserted as against a legislative committee but that the legislative committee cannot publish information it has received if it would otherwise be protected by this privilege. It does seem improper that a governmental official should have power to withhold from the representatives of the people official information. Perhaps, the legislature itself should determine in each case whether it will keep the information confidential or will reveal it. If such a decision were made, the privilege would not be applicable in State legislative proceedings.)

b. State administrative proceedings

c. Local governing body proceedings

d. Local administrative proceedings

(3) Investigative Proceedings

a. Grand jury proceedings

b. Administrative investigations

Rules 36.5--39.

These rules do not create privileges. No statutory counterparts are known to exist (except for the Penal Code sections permitting comment on the failure of the defendant to explain or deny the evidence against him).

Privileges Not Recognized in the Revised Rules.

Newsman's Privilege. Code of Civil Procedure Section 1881, subdivision 6, now provides newsmen with a privilege to conceal their news sources in any kind of proceeding. The Commission decided at the last meeting to repeal this section insofar as judicial proceedings are concerned. The existing statute, however, makes this privilege applicable in all proceedings. Hence, the Commission must decide what should be done with the privilege insofar as nonjudicial proceedings are concerned. The Commission should consider the following kinds of proceedings:

(1) Adjudicatory Proceedings

a. Disciplinary proceedings

b. Nondiciplinary proceedings

(Comment: If the privilege is not to be recognized in judicial proceedings, it would seem appropriate to refuse recognition of the privilege in administrative adjudicatory proceedings. The interests the newsman's privilege is apparently designed to protect seem to require the recognition of the privilege in investigatory or legislative proceedings, since those proceedings have no parties, no issues and there is almost no limit to the extent to which the agency conducting the proceeding can pry. Adjudicatory proceedings, on the other hand, are strictly confined by rules of relevancy and the issues involved. The rights of individual citizens are at stake. Hence, it does seem that a distinction may validly be drawn between adjudicatory proceedings and other types of proceedings where testimony can be compelled.)

(2) Legislative Proceedings

(Comment: If there is a policy to be served by recognition of the privilege, it would seem that it should be recognized at least in legislative proceedings. Probably one reason for the existence of the privilege is so that newsmen can obtain information and can report on public affairs--including actions taken by various legislative bodies. The privilege prohibits the legislative body, or members thereof, from retaliating against the persons supplying the information to the newsmen.

Perhaps, the privilege should not be absolute. There are undoubtedly times when the public interest requires the revelation of news sources. If so, the privilege so far as legislative proceedings are concerned could be made a qualified privilege--requiring a judge to determine that the information is needed in the public interest before the information can be compelled to be revealed.)

(3) Investigative Proceedings

a. Grand jury proceedings

b. Administrative investigations

(Comment: Here, too, perhaps a privilege should be recognized similar to that suggested in regard to legislative proceedings. The considerations are the same.)

Dead Man Statute. The Commission reported to the 1957 Session of the Legislature that the Dead Man Statute should be repealed and that, instead, hearsay statements of the decedent should be admitted. The proposed statute was rejected by the Legislature at that time and the proposed statute, sponsored by the State Bar, was again rejected by the 1963 Session of the Legislature. A copy of the recommendation and study on the Dead Man Statute is being sent to you for consideration in connection with this matter. Should another attempt be made to repeal subdivision 3 of Section 1880 of the Code of Civil Procedure? That subdivision provides that a party to an action against an executor or administrator upon a claim or demand against the estate cannot testify as to any matter or fact occurring before the death of the decedent. The cases indicate that this is a rule of privilege in that it may be waived by the executor or administrator. (See Witkin, California Evidence, p. 443.)

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

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#34(L) 7/11/63

A SUPPLEMENTAL STUDY

relating to

The Privileges Article of the

UNIFORM RULES OF EVIDENCE

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

Supplemental Study

relating to

The Privileges Article

of the

Uniform Rules of Evidence

July 1963

California Law Revision Commission
School of Law
Stanford University
Stanford, California

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WHAT IS PRIVILEGE?

The word "privilege" is used to refer to exemptions which are granted by law from the general duty of all persons to give evidence when required to do so. A privilege may take the form of (1) an exemption from the duty to testify--as in the case of the defendant's privilege in a criminal proceeding,[1] or (2) an exemption from the duty to testify about certain specific matters--as in the case of the privilege of anyone to refuse to testify about incriminating matters,[2] or (3) a right to keep another person from testifying concerning certain matters--such as the privilege of a client to prevent his lawyer from revealing the client's confidences.[3]

A privilege permits a person to refuse to reveal, or to prevent another person from revealing, reliable and relevant--and perhaps essential--evidence. Thus, the rules of privilege, unlike most other exclusionary rules of evidence (such as the hearsay rule), are not designed to exclude unreliable testimony. Instead, they are intended to provide protection in circumstances where the courts and the Legislature have determined from time to time that it is so important to keep information confidential that the needs of justice may be sacrificed in a given case to protect that needed secrecy.

TYPES OF PROCEEDINGS IN WHICH A CLAIM OF PRIVILEGE MAY BE MADE

For more than three centuries, it has been recognized as a fundamental maxim of the law that every person has a duty to bear knowledgeable testimony to the end that facts in issue may be ascertained with certainty.[1] In any particular proceeding, the testimonial duty arises by reason of a subpoena--the process by which a person may be compelled to appear and testify.[2] As privileges are exceptions to the general duty of all persons to give evidence when required by law to do so, the possibility of a claim of privilege exists whenever a person may be compelled to give evidence, whether it be in a judicial, administrative or legislative proceeding.

Without attempting to exhaust all statutory authority for the issuance of subpoenas, there appears to be in excess of 100 separate California statutes authorizing a variety of agencies, commissions, departments and persons to compel attendance and testimony by subpoena. Some of these are as follows:

Agricultural Code § 1155	Director of Agriculture may issue subpoena for investigations concerning products held in common and cold storage.
Agricultural Code § 1267) Agricultural Code § 1268.1)	Director of Agriculture may issue subpoena in connection with regulation of produce dealers.
Agricultural Code § 1300.3	Director of Agriculture may issue subpoena for investigation of processor's failure to pay supplier for farm products, or for hearing on such matter.
Agricultural Code § 1300.22	Processor or distributor subject to marketing order may be subpoenaed by Director of Agriculture.
Agricultural Code § 4175	Director of Agriculture may issue subpoena for investigation or hearing regarding marketing dairy products.
Agricultural Code § 5654	Table Grape Commission may apply to the court for subpoena to compel compliance with investigative rights in regard to enforcement and collection activities.
Business and Professions Code § 6049(c)	State Bar Board of Governors.
Business and Professions Code § 6052	Any member of the Board, or any committee, unit or section thereof.
Business and Professions Code § 6068 (Rule 1)	State Bar Committee.
Business and Professions Code § 6085	Person complained against in State Bar investigation has a right to issuance of subpoena.
Business and Professions Code § 8008(e)	Certified Shorthand Reporters Board.
Business and Professions Code § 18627	State Athletic Commission may issue subpoena "in all matters . . . connected with the administration of the affairs of the Commission."
Business and Professions Code § 19436	California Horse Racing Board may issue subpoena "whenever, in the judgment of the board, it may be necessary to do so for the effectual discharge of its duties."

Civil Code § 1201	Officers authorized to take proof of instruments.
Corporations Code § 25352	Commissioner of Corporations may issue subpoena for "any examination, audit, or investigation made or hearing conducted by him . . . ."
Corporations Code § 25355	Commissioner of Corporations may delegate the power vested in him by Section 25352 to anyone in the Division of Corporations.
Education Code § 155	State Board of Education.
Education Code § 13203	State Board of Education.
Education Code § 13425	Referees and parties may have subpoenas issued for hearing on dismissal of a teacher held by the State Board of Education.
Education Code § 13749	Personnel Commissioners of certain school districts.
Education Code § 13862	Teachers Retirement Board
Education Code § 23614	Trustees of the California State Colleges.
Elections Code § 18409	Election Boards.
Elections Code § 18465	Election Boards.
Elections Code § 20082	Court clerk may issue subpoena in election contest.
Financial Code § 1908	Superintendent of Banks.
Financial Code § 5253	Savings and Loan Commissioner.
Financial Code § 9008	Savings and Loan Commissioner may issue subpoena for investigation or examination in connection with liquidation or conservatorship.
Financial Code § 17610	Commissioner of Corporations may issue subpoena in investigation regarding the revocation or suspension of an escrow agent's license.

Government Code § 9401	Senate, Assembly, or committee may issue subpoena.
Government Code § 11181	Head of each department of state government may issue subpoena.
Government Code § 11510	Agencies subject to Administrative Procedure Act may issue subpoenas.
Government Code § 12550	Attorney General has power of district attorney to issue subpoenas re investigations and prosecutions.
Government Code § 12560	Attorney General, in connection with supervisory activities of sheriffs, may issue subpoenas regarding investigation or detection of crimes.
Government Code § 12589	Attorney General may compel attendance and testimony with force of subpoena in regard to investigation of transactions and relationships of certain corporations and trustees.
Government Code § 13910	Secretary of State Board of Control.
Government Code § 13911	Examiners of State Board of Control.
Government Code § 15613	State Board of Equalization.
Government Code § 18671	State Personnel Board.
Government Code § 19581	Employee subject of State Personnel Board hearing may have subpoenas issued in his behalf.
Government Code § 23442	Appointive Commission may issue subpoena as "is required in the performance of [its] duties."
Government Code § 25170	County Boards of Supervisors.
Government Code § 27498	Coroners.
Government Code § 37104	Legislative bodies of cities (city councils) may issue subpoenas.
Government Code § 38085	Referees appointed under Park and Playground Act of 1909 may have subpoenas issued in their behalf by court clerk.
Government Code § 68750	Commission on Judicial Qualifications.

Harbors and Navigation Code § 1155	Board of Pilot Commissioners for Bays of San Francisco, San Pablo and Suisun may issue subpoenas "in regard to any matter properly before" them.
Harbors and Navigation Code § 1254	Board of Commissioners for Humboldt Bay has same power as vested by Section 1155.
Harbors and Navigation Code § 1354	Board of Commissioners for San Diego Bay has same power as vested by Section 1155.
Health and Safety Code § 102	State Board of Public Health.
Health and Safety Code § 1704(d)	Department of Public Health.
Health and Safety Code § 24315	Air Pollution Control Districts and hearing boards.
Health and Safety Code § 24341	Air Pollution Control Districts.
Health and Safety Code § 34318	Division of Housing.
Insurance Code § 1042	Insurance Commissioner may issue subpoena in matters relating to insolvency and delinquency.
Insurance Code § 12924	Insurance Commissioner "may issue subpoenas for witnesses to attend and testify before him on any subject touching insurance business, or in aid of his duties."
Labor Code § 74	Chief of the Division of Industrial Welfare may issue subpoena in matters relating to the enforcement of a commission order or of the Labor Code.
Labor Code § 92	Commissioner of Labor
Labor Code § 130	Industrial Accident Commission.
Labor Code § 151	Chief of the Division of Labor Statistics and Resources.
Labor Code § 1419(g)	State Fair Employment Practice Commission.
Labor Code § 1485	Division of Housing may issue subpoena in matters relating to the "settlement of controversies."

Military and Veterans Code § 460	Military court has power of superior court to subpoena witnesses "both civilian and military."
Penal Code § 864	Magistrate.
Penal Code § 939.2) Penal Code § 939.7)	District Attorney or grand jury through courts may subpoena for appearance before grand jury.
Penal Code § 1326	Court, clerk, district attorney and others.
Public Resources Code § 3324	State Oil and Gas Supervisor may issue subpoena for hearings regarding plans of utilization.
Public Utilities Code § 311	Public Utilities Commission may issue subpoena for "any inquiry, investigation, hearing, or proceeding in any part of the State."
Public Utilities Code § 4633	Public Utilities Commission may issue subpoena for proceedings relating to for-hire vessels.
Public Utilities Code § 21692	Division of Aeronautics.
Public Utilities Code § 28773	San Francisco Bay Area Rapid Transit District.
Revenue and Taxation Code § 454	County Assessor.
Revenue and Taxation Code § 1609	County Boards of Equalization.
Revenue and Taxation Code § 14503) Revenue and Taxation Code § 14533) Revenue and Taxation Code § 14534)	Inheritance Tax Appraisers.
Revenue and Taxation Code § 16533	Controller may issue subpoena for the determination of gift tax.
Revenue and Taxation Code § 19254) Revenue and Taxation Code § 26423)	Franchise Tax Board "may issue subpenas or subpenas duces tecum, which subpenas must be signed by any member of the Franchise Tax Board and may be served on any person for any purpose."

Streets and Highways Code § 4201	Referee appointed under Street Opening Act may cause clerk of court to issue subpoena.
Streets and Highways Code § 7170	Board of Public Works or certain public officials or "any three competent and disinterested persons appointed by the legislative body" may estimate and assess damage and costs upon benefitted property and issue subpoena to carry out such function.
Unemployment Insurance Code § 1953	Appeals Board, referee or designee may issue subpoena "in any proceeding, hearing, investigation or in the discharge of any duties imposed under this division . . . ."
Water Code § 1080	Department of Water Resources may issue subpoena "in any proceeding in any part of the State."
Water Code § 70232	Levee District Boards, meeting as equalization boards, may issue subpoena.
Welfare and Institutions Code § 529	Juvenile Justice Commission may have subpoena issued by judge of juvenile court for investigations.
Welfare and Institutions Code § 664	Juvenile Court shall issue a subpoena at the request of a probation officer, or may issue a subpoena on its own motion.

Some of the statutes pertaining to specific agencies appear to be unnecessarily broad in scope. For example, Revenue and Taxation Code Sections 19254 (pertaining to income taxes) and 26423 (pertaining to bank and corporation taxes) each provide that "The Franchise Tax Board may issue subpenas or subpenas duces tecum, which subpenas . . . may be served on any person for any purpose." (Emphasis added.) Other statutes are more restrictive in regard to the purposes for which subpoenas may be issued. Thus, for example, Sections 18409 and 18465 of the Elections Code pertain to the issuance of subpoenas by election boards (or by certain specified persons performing identical functions) to members of precinct boards in regard to canvassing of returns. In addition to many statutes which, in the enumeration of other powers of the office, authorize an officeholder[3] to issue subpoenas, there are several specific statutes susceptible to the broad interpretation that the purpose for which subpoenas may be issued is coextensive with the power of the issuing authority. For example, Business and Professions Code Section 18627 authorizes the State Athletic Commission to issue subpoenas "in all matters . . . connected with the administration of the affairs of the commission." The California Horse Racing Board is authorized to issue subpoenas "whenever, in the judgment of the board, it may be necessary to do so for the effectual discharge of its duties."[4] The Insurance Commissioner is authorized to issue subpoenas in regard to "any subject touching insurance business, or in aid of his duties."[5] The Public Utilities Commission may issue subpoenas "in any inquiry, investigation, hearing,

or proceeding in any part of the State."[6] A review of these statutes at once reveals the broad scope of power vested in numerous agencies, departments and commissions--a power to compel attendance and testimony within the ambit of their operation at least as broad as the power of a court in the exercise of its jurisdiction.

Some of the purposes for which subpoenas may be issued pursuant to these statutes lend themselves to easy classification on the basis of the somewhat limited function performed by the authority having the power to issue the subpoenas.[7] Because of their broad scope of operation, however, not all of the authorities mentioned in these examples are susceptible to such easy categorization. Thus, for example, Government Code Section 11181 vests the subpoena power in the head of each department in the state government, and Section 11182 permits broad delegation of that power to subordinates. Departments which perform adjudicatory, regulatory and enforcement functions are in one stroke granted a subpoena power at least equivalent to that exercised by the judiciary, the Legislature, and investigative bodies such as the grand jury. Because the statement of the subpoena power usually is not limited in terms of the specific function to be performed, extended classification by reference to the power alone is not feasible. Nonetheless, examples of materially different purposes may be illustrated by reference to the exercise of the subpoena power in specified situations. Thus, the types of proceedings in which the subpoena power is granted by statute in California may be roughly divided into three main categories: adjudicatory proceedings,

legislative proceedings, and investigative or inquisitional proceedings. Each of these primary types of proceedings may be conveniently divided into several classes for the purpose of discussion.

Adjudicatory Proceedings

As used here, "adjudicatory proceedings" refer to proceedings conducted by a tribunal convened for the purpose of deciding specific issues and resolving particular difficulties between adverse parties on the basis of the evidence presented by such parties. Generally, these are adversary proceedings conducted under rules of the particular tribunal governing specific rights and duties respecting the admissibility of evidence, the examination and cross-examination of witnesses,[1] and the like.

The most obvious and traditional type of adjudicatory proceeding is that conducted by the courts. That a court can compel the attendance and testimony of witnesses in all actions and proceedings before it is inherent in the nature of the judicial process. Several California statutes specifically declare the courts' subpoena power in all civil[2] and criminal[3] cases, as well as such special proceedings as those conducted under the Juvenile Court Law[4] and those relating to the commitment of mentally irresponsible persons.[5] Similarly, the courts are vested with broad powers to compel compliance with its process by means of contempt, both civil[6] and criminal.[7]

Moving away from the strictly judicial setting, similar adjudicatory power is vested in numerous governmental agencies, both state and local.[8] The wide range of licensing activity is but an

example of this function. At the state level, the licensing activity ranges from accreditation of persons in regard to certain vocations--as widely divergent, for example, as teachers[9] and certified shorthand reporters[10] --through regulation of specific activities, such as the sale of corporate securities,[11] to control over large segments of industry, such as public utilities.[12] An elementary example of licensing at the local level is the burning permit issued under the authority of the various county air pollution control districts.[13]

Examples of the exercise of the subpoena power in adjudicatory proceedings conducted by governmental agencies are as numerous as the activities of the agencies are varied. Thus, every hearing involving license revocation or suspension involves an adjudicatory process wherein substantive rights are determined just as in court proceedings. Disciplinary proceedings conducted by agencies or quasi-governmental authorities[14] charged with professional licensing responsibilities are in substance not unlike criminal proceedings conducted by a court.[15] A particularly isolated but interesting example of the adjudicatory function is the authority of the Division of Housing to issue subpoenas and hold hearings "for the purpose of reaching an amicable settlement of controversies"[16] arising in connection with the Division's broad investigative powers.

Arbitration is but another example of a type of adjudicatory proceeding. In this case, the occasion for the exercise of adjudicatory activities is created by agreement between private parties. Even here, however, California law authorizes the issuance of a subpoena. Thus, the Code of Civil Procedure Section 1982.6 provides authority for a

neutral arbitrator in any arbitration proceeding to issue a subpoena to compel the attendance and testimony of witnesses.

Legislative Proceedings

For the purpose of classification, "legislative proceedings" as used here refer to proceedings conducted for the purpose of advising a lawmaking body of matters upon which its legislative or quasi-legislative act may be based, whether it be the enactment of statutes, the adoption of rules, or the promulgation of regulations. There are no "parties" to the proceeding; witnesses are summoned and examined only by the lawmaking body itself; there are no rules assuring the reliability of information disclosed; no decisions need be rendered. Indeed, unlike an adjudicatory body, a lawmaking body is not required to act; even when it acts, it settles no issues in dispute between particular persons and its decision reflected in such action need not be based upon any evidence produced at the hearing.

Some types of proceedings are easily categorized as "legislative proceedings"--for example, hearings on a bill by a state legislative committee; but others shade into quasi-adjudicatory proceedings--such as zoning variance hearings. In all such proceedings, however, investigative activities are required, for factfinding is an integral part of the legislative process. Whether conducted by the governing body itself or by an administrative agency pursuant to delegated authority, these activities inherent in the nature of the legislative process are carried out at both the state and local levels of Government. In aid of their legislative or quasi-legislative duties, these factfinding bodies of government uniformly are authorized to issue subpoenas requiring the attendance and testimony of witnesses.

At the state level of government, the Senate, the Assembly, and their various committees are authorized to issue subpoenas.[1] Between legislative sessions, compliance with a committee subpoena may be compelled only by appeal to the courts.[2] When the Legislature is in session, however, compliance with its process may be compelled without the aid of the judiciary since commitment for contempt may be accomplished by resolution.[3]

Numerous state administrative agencies also are empowered to issue subpoenas. As noted previously, the authority for the issuance of subpoenas seldom distinguishes between the nature of the function--whether quasi-judicial or quasi-legislative--to be performed by the agency.[4] However, the exercise of the subpoena power for a quasi-legislative function may, for the purpose of discussion, logically be separated from adjudicatory activities. Whenever, for example, the subpoena power is exercised in aid of an agency's rulemaking authority, a quasi-legislative rather than adjudicatory power is exercised. The State Franchise Tax Board, for example, exercises broad rulemaking authority it its administration of the state tax laws.[5] Its adoption of rules and regulations regarding classifications for taxing purposes is an example of such quasi-legislative activity.[6]

As indicated, the legislative process is not confined to the state level of government. County boards of supervisors[7] and city councils[8] are authorized to issue subpoenas, as are local election boards,[9] air pollution control distircts,[10] local housing authorities,[11] county boards of equalization,[12] and the like.[13] The governing body of any city, for example, "may issue subpenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any

action or proceeding pending before it."[14]

Investigative and Inquisitional Proceedings

"Investigative proceedings" as used in this discussion are the most difficult to categorize. Legislative bodies investigate facts to determine the need for legislation and, in a sense, courts investigate the facts of the causes before them. What is meant here, though, is a proceeding conducted by a governmental officer or agency for the purpose of determining whether further official action in regard to any matter discovered in the course of the proceeding is warranted. There are no issues and no parties. No findings of fact or legislative act is contemplated. Generally, there are no boundaries to the scope of the proceeding other than the authority of the body conducting the investigation.

Perhaps the clearest example of investigative or inquisitional proceeding is a grand jury proceeding. A grand jury is, of course, an integral part of the judicial system. But it does not perform an adjudicatory function. It is not bound by ordinary rules of court nor specific rules of procedure; there is no right to present evidence in defense; there is no right to cross-examine witnesses.

Thus, a grand jury is "inherently a body of inquisition empowered to make full and diligent inquiry into public offenses . . . ."[1] In aid of this investigative duty, the grand jury is extended the subpoena power through the superior courts to compel attendance and testimony of witnesses.[2]

Another example of the investigative or inquisitional activity not closely related to either adjudicatory or legislative functions is the coroner's inquest. Government Code Section 27498 authorizes the coroner to issue subpoenas for the examination of any witness "who in his opinion or that of any of the jury has any knowledge of the facts." Failure without reasonable excuse to attend and testify is a misdemeanor.[3]

Civil Code Section 1201 provides officers authorized to take proof of instruments with authority for the issuance of subpoenas for the examination of witnesses. The same section vests such officers with contempt power to compel compliance.

A final example of investigative activities may be had by reference to the numerous authorizing statutes in regard to investigative functions of administrative agencies. Unlike grand jury proceedings and coroners' inquests, however, many of these investigative activities are conducted by agencies charged with enforcement or regulative duties;[4] investigative activities conducted by these agencies may be only incidental to the performance of adjudicatory or legislative functions by the investigating authority. For example, the Director of Agriculture is authorized to issue subpoenas in regard to his investigation of the failure of a processor

to make payment for farm products within the time specified in any contract of sale.[5] The same chapter of the Agricultural Code containing this authorization also details the licensing authority of the Director over processors.[6]

Summary

From the foregoing, which is by way of example only and does not purport by any means to exhaust all statutory subpoena authority, it is apparent that the duty to testify in response to a subpoena can arise in a variety of ways and in numerous types of proceedings and forums. It ranges from the courtroom situation in a civil or criminal case conducted by a court, through pretrial and special proceedings incident to the judicial process, through the full range of legislative action by state and local governments, through a maze of administrative agencies, boards, commissions, and the like, to the local tax assessors and beyond. In every situation in which there arises a duty to testify, there arises an equivalent potential claim of privilege.

TYPES OF PROCEEDINGS IN WHICH PRIVILEGES WILL BE RECOGNIZED UNDER EXISTING CALIFORNIA LAW

Section 13 of Article 1 of the California Constitution provides that "No person shall be . . . compelled, in any criminal case, to be a witness against himself . . . ." This constitutional provision gives rise in practice to two distinct privileges. First, the defendant in a criminal case has a privilege not to be called as a witness and not to testify. Second, every person, whether or not accused of a crime, has a privilege when testifying to refuse to give information that might tend to incriminate him.

Though not specifically codified in such terms, the privilege against self-incrimination clearly applies in any type of proceeding, whether adjudicatory, legislative or investigative, for the constitutional guarantee precludes compelling a person to give self-incriminatory testimony in any proceeding where testimony can be compelled.[1]

Several statutes indicate the scope of the privilege of a person accused or charged with the commission of a crime or offense not to testify at all. Thus, Penal Code Sections 688, 1323 and 1323.5 provide:

> §688. NO PERSON TO BE A WITNESS AGAINST HIMSELF IN A CRIMINAL ACTION, OR TO BE UNNECESSARILY RESTRAINED. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.
>
> §1323. A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

§ 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

This section shall not be construed as compelling any such person to testify.

Section 688 applies to "criminal actions," a term that is defined in Penal Code Section 683 as "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment." Section 1323, likewise, is limited to criminal actions.[2] The scope of the similar privilege provided by Section 1323.5[3] is uncertain, but apparently is broader, although the section would appear to be limited by the definitions of "crime" and "public offense" in Penal Code Section 15, which reads:

"CRIME" AND "PUBLIC OFFENSE" DEFINED. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

The principal statutory recognition of other privileges in California is Section 1881 of the Code of Civil Procedure, which provides for the attorney-client privilege, the physician-patient privilege, the marital communication privilege, the priest-penitent privilege and the governmental secrets privileges. In addition, Section 1881(6) grants newsmen a privilege in regard to their news sources, and Business and Professions Code Section 2904 creates a psychologist-patient privilege equivalent to the lawyer-client

privilege.[4] Except for the newsmen's privilege, these statutes contain no provision indicating the type of proceeding in which they may be applicable. Code of Civil Procedure Section 1881 provides simply that it is the policy of the law to encourage confidence in certain relationships and, therefore, a person cannot be examined in regard to the privileged matters listed in the section. Subdivision 6 of Section 1881, relating to the newsmen's privilege, however, is made applicable by specific language to judicial, legislative and administrative proceedings. From this, it could be argued that the omission of similar language from the other subdivisions indicates that they do not apply in all types of proceedings. But the other subdivisions were enacted in 1872; subdivision 6 was enacted in 1935. Little implication as to the intent of the Legislature in 1872 can be derived from the inclusion of more explicit language some 63 years later.

One might also argue that if it is the policy of the law to preserve confidences inviolate in regard to certain relationships, that policy requires the preservation of the confidences not only in court, but also when the confidential information is sought under any of the more than 100 statutes authorizing boards, officers, commissions, committees and other agencies to compel testimony.

No direct authority on these statutory privileges being applicable in nonjudicial proceedings can be found in California. That they do apply in such proceedings apparently has never been questioned. The appellate reports contain a number of cases in which the applicability of various privileges in nonjudicial proceedings is assumed, and either a privilege is applied or the information sought is held to be outside the protection of the claimed privilege. Thus, the Supreme Court in In re McDonough[6] held that an attorney was properly entitled to rely on the attorney-client privilege in a grand jury proceeding

to justify his refusal to disclose the identity of his client. In a later case,[7] the attorney-client privilege was recognized as being available in grand jury proceedings, but the communication itself was not privileged.

A recent federal case[8] applying the California law of privilege held that the identity of a client could be concealed under the attorney-client privilege in an investigative hearing held by a special agent of the Internal Revenue Service to determine the identity of a person who might be liable for the payment of taxes.

Other California cases have involved legislative proceedings,[9] administrative proceedings,[10] and local bar association disciplinary proceedings,[11] where various privileges--such as the marital communication privilege and the attorney-client privilege--apparently were assumed to be applicable, but the information sought was held unprivileged.

In other states, there is also little direct authority. A leading New York case[12] held explicitly that the physician-patient privilege applies in legislative proceedings. Authorities in other states are split as to the availability of the physician-patient privilege in such proceedings as workmen's compensation cases[13] and lunacy hearings;[14] however, in these kinds of proceedings, the patient's physical or mental condition is the ultimate issue and the substantive privilege may be inoperative even in judicial proceedings.

The rules of the House Committee on Un-American Activities recognize the availability of the marital privilege[15] and other judicially recognized privileges also are generally respected in congressional committee proceedings.[16]

In some nonjudicial proceedings in California, specific statutes incorporate the privileges recognized in judicial proceedings. For example, Penal Code Section 939.6 requires a grand jury to base an indictment upon "legal evidence." Government Code Section 11513(c) requires the recognition of privileges

applicable in civil cases in all administrative adjudicatory proceedings conducted under the Administrative Procedure Act. Since the Administrative Procedure Act applies only to certain state agencies, and inasmuch as Section 11513 applies only to license application or disciplinary proceedings, this act supplies no clue as to the applicabiity of privileges in investigative or quasi-legislative proceedings conducted by administrative agencies, adjudicatory proceedings conducted by local administrative bodies, or any proceedings conducted by state agencies not subject to the act.

From the foregoing, it appears that no one can state with confidence that the privileges provided by Section 1881 do not apply to nonjudicial proceedings. In fact, it is as logical to assume its applicability in nonjudicial proceedings as it is to accept its applicability in judicial proceedings, since the section in terms is not made specifically applicable to any type of proceeding.

TYPES OF PROCEEDINGS IN WHICH PRIVILEGES WILL BE RECOGNIZED UNDER THE UNIFORM RULES OF EVIDENCE

Although it is not surprising that the ordinary exclusionary rules of evidence (such as the hearsay rule) are rarely applied in nonjudicial proceedings,[1] and are sometimes "relaxed"[2] in certain types of judicial proceedings,[3] one would expect that privileges would be recognized in all types of proceedings. In fact, as the preceding discussion suggests,[4] the practice in California appears to be to recognize privileges in administrative and legislative proceedings as well as in judicial proceedings.

Nonetheless, with one exception,[5] the privileges under the Uniform Rules of Evidence apply only in proceedings "both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."[6] The rules are not made specifically applicable, for example, to administrative proceedings; in the absence of some other statute, they would not apply to such proceedings.[7]

The fact that the Uniform Rules are limited to judicial proceedings does not mean that the Uniform Commissioners took the position that privileges should not be recognized in other proceedings. The Commissioners drafted a set of rules for judicial proceedings and did not intend to change the law applicable to the procedures followed in other types of proceedings.[8]

THE PROBLEM CREATED BY THE DIFFERENCE IN THE SCOPE OF PRIVILEGES PROVIDED BY THE UNIFORM RULES AND UNDER EXISTING CALIFORNIA LAW

In considering the Uniform Rules of Evidence for enactment in California, it is necessary, of course, to consider what disposition should be made of the existing privilege statutes. The Uniform Rules are limited to civil and criminal proceedings conducted by or under the supervision of a court;[1] but the existing California privileges, generally speaking, appear to be applicable in all types of proceedings--judicial, administrative and legislative.[2] This difference in the scope of the privileges presents a difficult problem.

It would be possible to limit the revised Uniform Rules on privilege to judicial proceedings and to retain the existing statutes, amending them to provide that they do not apply to proceedings covered by the Uniform Rules. This course of action would result in a dual set of statutes that would prove burdensome and unworkable, for the existing statutes are defective and uncertain, and on their face do not reflect the judicially created rules that implement them. On the other hand, to enact new rules of privilege that would apply only in judicial proceedings and to repeal the existing privilege statutes would eliminate the privileges that probably are now available in many types of nonjudicial proceedings.

There appear to be but two reasonable methods of dealing with this problem. One possible solution would be to provide that the revised URE counterpart of an existing privilege statute applies to nonjudicial proceedings to the extent that the existing statute (to be repealed) formerly applied. This solution would merely create uncertainty and in effect would require the courts, without any reliable guide, to determine the

scope of the new privileges. It would seem a better solution to provide in the statute the rules for determining the scope of the privileges. Otherwise, years will pass before the scope of each of the privileges can be determined by the courts. Cases must be tried and processed through the appellate courts. Litigants must expend their money to determine what the Legislature will have neglected to specify. And, in the meantime, while the scope of the various privileges is unknown, whether a particular privilege will be allowed in a particular nonjudicial proceeding will depend to a large extent on the weight given by the person conducting the hearing to the public policy that justifies that privilege.

Thus, there appears to be only one reasonable method of dealing with the problem created by the differences in the scope of the privileges provided by the Uniform Rules and those provided by existing California law. It is necessary to determine the types of proceedings in which each privilege is to apply. This determination can be made only after a consideration of the scope of protection provided by existing law, the types of nonjudicial proceedings where testimony can be compelled, and whether the public policy underlying the particular privilege requires recognition of the privilege in the various types of nonjudicial proceedings. In subsequent portions of this study, each of the privileges is discussed in some detail. As a part of the discussion of each privilege, the considerations relevant to a determination of the types of proceedings in which the privilege should be available will be mentioned and suggestions will be made as to the desirable scope of the privilege.

Once the scope of each privilege has been determined, the form that the various privilege provisions should take can then be determined. For

example, it may be determined that a particular privilege--such as the attorney-client privilege--should be made generally applicable to all types of proceedings, with desired exceptions stated in the form of exceptions. If the statute proves to be too broad in the scope of its protection, appropriate exceptions may be added from time to time as justified. On the other hand, other privileges--such as the right of a defendant in a criminal action not to testify at all--may be limited to criminal actions and not be generally applicable to all types of proceedings.

A possible solution to the problem of the form of the statute is illustrated by the experience of New Jersey, a state which has adopted a revised version of the Privileges Article of the Uniform Rules. New Jersey concluded that as a general rule the privileges should apply in all types of proceedings, and revised Uniform Rule 2 to read as follows:

> (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.
>
> (2) All other rules contained in this act, or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.
>
> (3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.
>
> (4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication.[3]

FOOTNOTES

1. Cal. Const., Art. I, § 13. See also, Cal. Penal Code §§ 688, 1323, 1323.5. People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952).

2. Cal. Const., Art. I, § 13. See also Cal. Code Civ. Proc. § 2065.

3. Cal. Code Civ. Proc. § 1881(2).

1. 8 Wigmore, Evidence § 2192 (McN. ed. 1961).

2. Cal. Code Civ. Proc. § 1985; Cal. Penal Code § 1326.

3. See, e.g., Cal. Govt. Code § 11181, and the several statutes listed in the text.

4. Cal. Bus. & Prof. Code § 19436.

5. Cal. Ins. Code § 12924.

6. Cal. Pub. Util. Code § 311.

7. For example, Cal. Elec. Code §§ 18409 and 18465 authorize local election boards to issue subpoenas only to local precinct boards in connection with the canvassing of returns.

1. See, e.g., Cal. Govt. Code § 11500 et seq. regarding procedures for adjudication proceedings conducted by administrative agencies subject to the Administrative Procedure Act.

2. Cal. Code Civ. Proc. §§ 1985, 1986.

3. Cal. Penal Code § 1326.

4. Cal. Welf. & Inst. Code § 664.

5. See, e.g., Welf. & Inst. Code §§ 5053 (mentally ill persons), 5257 (mentally deficient persons), 5510 (sexual psychopaths), 7057 (psychopathic delinquents).

6. Cal. Code Civ. Proc. §§ 1991. See also Cal. Code Civ. Proc. § 1992 (forfeiture of $100 to party aggrieved for disobeying a subpeona, as well as damages suffered).

7. Cal. Penal Code § 1331.

8. See, e.g., the agencies listed in Government Code Section 11501(b) as being subject to administrative adjudication procedure contained in the Administrative Procedure Act.

9. Cal. Govt. Code § 13101 et seq.

10. Cal. Bus.& Prof. Code § 8000 et seq.

11. Cal. Corp. Code § 25000 et seq.

12. Cal. Pub. Util. Code § 301 et seq.

13. Cal. Health & Saf. Code § 24198 et seq.

14. For example, the State Bar Association.

15. In such proceedings, of course, substantive rights are determined and the penalty for violation of obligations imposed by the enforcement agency is not unlike a criminal penalty, to which in many cases the violator also may be subject since violations or infractions of professional responsibilities often constitute crimes as well.

16. Cal. Labor Code § 1485.

1. Cal. Govt. Code § 9401.

2. Cal. Govt. Code § 9408.

3. Cal. Govt. Code §§ 9406, 9407, 9409.

4. See, e.g., Cal. Rev. & Tax Code §§ 19254, 26423, providing that "The Franchise Tax Board may issue subpenas or subpenas duces tecum, which . . . may be served on any person for any purpose." The Board, of course, has broad powers involving adjudicatory (see, e.g., Cal. Rev. & Tax Code § 18592), quasi-legislative (see, e.g., Cal. Rev. & Tax Code § 19253), and investigative activities (see, e.g., Cal. Rev. & Tax Code § 19254).

5. See, e.g., General Electric Co. v. State Bd. of Equalization, 111 Cal. App. 2d 180, 244 P.2d 427 (1952).

6. Ibid.

7. Cal. Govt. Code § 25170.

8. Cal. Govt. Code § 37104.

9. Cal. Elections Code §§ 18409, 18465.

10. Cal. Health & Saf. Code §§ 24315, 24341, 24367.5.

11. Cal. Health & Saf. Code § 34318.

12. Cal. Rev. & Tax Code § 1609.

13. See, e.g., Sts. & Hwys. Code § 7170, which authorizes issuance of subpoena by a local board of public works, certain officials functioning as such board, or "any three competent and disinterested persons appointed by the legislative body" in connection with estimate and assessment of damages under the street imporvement act of 1913.

14. Cal. Govt. Code § 37104.

1. Irwin v. Murphy, 129 Cal. App. 713, 716, 19 P.2d 292, 293 (1933).

2. Cal. Penal Code § 939.2.

3. Cal. Govt. Code § 27500.

4. For example, Government Code Section 11181 grants the subpoena power to the head of each department in the state government in connection with investigations and prosecutions of "(a) All matters relating to the business activities and subjects under the jurisdiction of the department," "(b) Violations of any law or rule or order of the department," "(c) Such other matters as may be provided by law." Cal. Govt. Code § 11180. "The diminishing practical effect of judicial limitation on the scope of records which can be required by administrative subpoena becomes apparent when it is recalled that many agencies with subpoena powers are authorized to conduct general or statistical investigations as well as investigations for law enforcement purposes. It would seem that such an agency could justify virtually any subpoena on the ground that it was gathering general information under congressional authorization. Nor would this necessarily be a fiction, since general investigations normally will center in the very fields where violations most commonly occur." Note, 34 Cal. L. Rev. 428, 429-430 (1946).

5. Cal. Agric. Code § 1300.3.

6. See Cal. Agric. Code, Div. 6, Ch. 9 (commencing with § 1299.18).

1. Cal. Const., Art. I, § 13.

2. The section applies to a defendant in a "criminal action or proceeding." Penal Code § 685 states: "The party prosecuted in a criminal action is designated in this Code as the defendant."

3. This section was unknown in California law from 1872 until 1952, when People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952), was decided. It had been assumed that the section had been repealed by the enactment of the Penal Code in 1872, until the decision in People v. Talle held that it still declared the law. The only purpose for invoking the section in People v. Talle was to hold it was error for the prosecution to call the defendant as its witness and to compel him to rely on this privilege. It seems likely that the same result could have been reached without relying on Section 1323.5.

4. These sections provide:

Cal. Code Civ. Proc. § 1881(6)

> Newsmen. A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.
>
> Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

Cal. Bus. & Prof. Code § 2904

> Confidential relationship between psychologist and client; privileged communications. For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.

5. See representative statutes listed in the text, supra at 3-8.

6. 170 Cal. 230, 149 Pac. 566 (1915). Cf. People ex rel. Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 363 (Sup. Ct. 1934) (attorney-client privilege recognized as available in grand jury proceedings, but that privilege does not extend to protection of a client's identity).

7. In re Bruns, 15 Cal.App.2d 1, 58 P.2d 1318 (1936). Accord In re Selser, 15 N.J. 393, 105 A.2d 395 (1954) (attorney-client privilege recognized as available in grand jury proceeding, but privilege does not attach to communications in furtherance of crime).

8. Baird v. Koerner, 279 F.2d 625 (9th Cir. 1960).

9. See Board of Educ. v. Wilkinson, 125 Cal.App.2d 100 (1954).

10. See 11 Ops.Cal.Atty.Gen. 116.

11. McKnew v. Superior Court, 23 Cal.2d 58, 142 P.2d 1 (1943).

12. New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940).

13. See, e.g., cases collected in Annot., 133 A.L.R. 732 (1941). Cf. Case of Chernick, 286 Mass. 168, 189 N.E. 800 (1934) (marital privilege recognized in workmen's compensation case).

14. See, e.g., In re Fleming, 196 Iowa 639, 195 N.W. 242 (1923), and In re Harmsen, 167 N.W. 618 (Iowa 1918). Cf. In re Gates, 170 App. Div. 921, 154 N.Y.S. 782 (1915).

15. Rule XII, Committee on Un-American Activities, Rules of Procedure 7 (1953).

16. See, e.g., 45 Cal. L. Rev. 347 (1957).

1. Govt. Code § 11513(c), part of the Administrative Procedure Act, states in part: "The hearing need not be conducted according to technical rules of evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." See also, for example, Labor Code § 5708. On the other hand, the Administrative Procedure Act also states in Govt. Code § 11513(c): "The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions. . . ."

2. Uniform Rule 2 provides that the Uniform Rules apply in judicial proceedings "except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation." (Emphasis added.)

3. E.g., Code Civ. Proc. §§ 117 (judge of small claims court may make informal investigation either in or out of court), 956a (Judicial Council may prescribe rules for taking evidence by appellate court), 988i (like § 956a), 1768 (hearing of conciliation proceeding to be conducted informally), 2016b (not ground of objection to testimony sought from deponent that such testimony inadmissible at trial, provided it is reasonably calculated to lead to discovery of admissible evidence) and Penal Code § 190.1 (on issue of penalty, evidence may be presented of circumstances surrounding crime and of defendant's background and history).

4. See discussion in the text beginning on page 18.

5. Uniform Rule 25, the privilege against self-incrimination, by its terms gives a privilege to refuse to disclose incriminating matter "in an action or to a public official of this state or any governmental agency or division thereof." The official comment to the rule does not indicate why this one rule was made applicable to nonjudicial proceedings. Perhaps the reason is found in the constitutional basis of the privilege. Yet, the Uniform Rule apparently is not broad enough to provide protection, for example, in arbitration proceedings.

6. Uniform Rule 2.

7. The comment to Rule 2 reads:

> These rules are made applicable to court proceedings and are not specifically extended to administrative tribunals with fact-finding or semi-judicial power. This is true partly because the rules are designed for adoption by courts under their rule-making power as well as by legislation and there would exist the question of the extent to which the courts could impose the rules upon other tribunals. Also considerable modification and use of alternative language in the rules would be necessary to make them fit every fact-finding situation. However, there is no good reason why the same rules should not be employed in one type of tribunal as well as in another. In fact the hope of uniformity not merely among courts, but between courts and administrative agencies is one of the major factors of justification for these rules. They can be very readily adapted to fit any situation and it is hoped that they may provide the pattern for all inquiries where evidence is introduced. It is not intended that these rules should modify any other procedural rules under which the rules of evidence are relaxed for specified purposes.

8. See comment to Rule 2, note 7 supra.

1. Uniform Rule 2. See discussion of this rule in the text, supra at 23.

2. See discussion in the text, supra at 18-22.

3. N.J. REV. STAT. § 2A:84A-16.