mtg.

#34(L) 12/12/63

Memorandum 63-57

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

The tentative recommendation on the Privileges Article should be approved for printing at the December meeting. We must have this tentative recommendation available in printed form as soon as possible so that we may make a broad distribution for comments.

This memorandum contains an analysis of the comments we received on this tentative recommendation and additional suggestions for changes made by the staff. The comments we received are set out in the attached exhibits:

Exhibit I
- Page 1 -- Comments of Northern Section of State Bar Committee
- Pages 2-3 -- Comments of Southern Section of State Bar Committee
- Pages 4-6 -- Special comments of Mr. Mark P. Robinson, a member of the State Bar Committee

Exhibit II -- Comments of Professor Arthur H. Sherry

Exhibit III -- Comments of Dr. Monke

Exhibit IV -- Comments of Dr. Galioni

Exhibit V -- Comments of Robert P. McNamee, Deputy County Counsel, Santa Clara County (personal comments not to be attributed to County Counsel)

Exhibit VI -- Comments of office of District Attorney, Alameda County

Exhibit VII -- Comments prepared by office of County Counsel, San Bernardino County

Exhibit VIII -- Only response obtained from office of Attorney General (indicating that office too busy to comment)

We will prepare a supplement to this memorandum to forward any comments received after this memorandum has been completed.

We enclose an additional copy of the tentative recommendation so that you can mark suggested changes in language on it prior to the meeting and

turn it in to the staff at the meeting. (We have previously sent you a copy of the tentative recommendation and suggested that you file it in your looseleaf binder entitled "Uniform Rules of Evidence as Revised to Date.") You will note that we revised the tentative recommendation to include headings and authorities after it was distributed for comments.

GENERAL OBSERVATIONS

Before undertaking a rule by rule analysis of the comments, we should mention that we sent the tentative recommendation to the following groups and requested their comments by November 1, 1963, but we had not received any comments by December 11:

Special Committee of the League of California Cities

State Division of Administrative Procedure

Office of the Attorney General

Miscellaneous others

Note that the Northern Section of the State Bar Committee is in general agreement with the tentative recommendation (Exhibit I, yellow pages, page 1). The Southern Section is in general agreement except for Rule 23.5 (privilege of spouse not to testify against other spouse) and Rule 28(2)(a) (a provision of the marital confidential communications privilege) (Exhibit I, yellow pages, pages 2-3).

We plan to make minor changes in punctuation, etc., prior to printing the tentative recommendation. We will also incorporate suggestions of Commissioners on the content of the comments into the recommendation before we send it to the printer.

RULE BY RULE ANALYSIS

The following is a rule by rule analysis of the tentative recommendation. Significant comments we received from various interested persons are noted. Some staff suggestions are also made.

Rule 22.3.

This rule (pages 6-8 of tentative recommendation) has been drafted in accordance with instructions from the Commission, but the language of the rule has not been approved by the Commission.

The staff suggests that subdivision (3) be revised to read:

> (3) "Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

None of the comments objected to this section.

Rule 22.5.

No objections were made to Rule 22.5 (pages 9-10 of tentative recommendation) making privileges applicable in all types of proceedings. Exhibit VII (second white exhibit) commends the approach taken by the Commission, and the other comments either approve the approach or do not object to it.

Rule 23.

No objections were made to Rule 23 (pages 11-12 of tentative recommendation).

The staff suggests that the words "or proceeding" be deleted from subdivisions (1) and (2) of the revised rule. The words "criminal action" is defined in Penal Code § 683. We have defined "criminal action or proceeding" in Rule 22.3. We would not want the Rule 23 privilege, for example, to apply in writ proceedings, as distinguished from a criminal action.

Rule 23.5.

The policy of this rule was approved by the Commission, but the language of the rule has not been approved.

There were a number of comments on Rule 23.5 (pages 13-17 of tentative recommendation).

The Northern Section of the State Bar Committee approved, i.e., did not object to, the section; the Southern Section, however, disapproved this section and "felt that no case was made for changing the present California law." See Exhibit I, yellow pages, page 2.

Mr. Mark P. Robinson, a member of the Southern Section of the State Bar Committee, wrote a separate comment on Rule 23.5 (Exhibit I, yellow pages, pages 4-5). He suggests, first, that the privilege be given to both spouses subject to the exceptions listed in subdivision (1) of Rule 23.5; and, second, that the testifying spouse (only) have the privilege where there has been a crime against the child of either. "The reason for this suggestion is that there may be instances, especially in minor crimes, where the witness spouse may wish to overlook offenses against him, or her, in order to preserve the marital relationship. At the very least, the word 'crime' should be changed to apply only to felony cases. Under the present proposal the prosecution could require the witness spouse to testify against the defendant spouse on any silly little misdemeanor committed against a third person while in the course of committing a 'technical crime' against the witness spouse."

Mr. Robert P. McNamee (Exhibit V, first white pages, pages 3-5) seems to believe that both spouses should have the privilege under Rule 23.5.

The County Counsel of San Bernardino County points out, correctly, that if the rule is that only the holder of the privilege can secure a reversal if a privilege is incorrectly disallowed (although this is not explicit since Rule 40 so providing was deleted), then the defendant in a criminal case has no remedy if Rule 23.5 is violated since the testifying spouse is the holder of the privilege. (Exhibit VII, second white pages,

page 5.) The following policy questions are presented in connection with Rule 23.5:

(1) Should the privilege belong only to the testifying spouse? The staff recommends that this feature of Rule 23.5 be retained. The reasons given in the tentative recommendation do make a case for this feature of the Rule.

(2) If the testifying spouse is to be the privilege holder, it is suggested that Rule 40 be reconsidered and approved in the following form:

> A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Rule 23.5.

The underlined exception gives the party spouse assurance that he can obtain the benefits of Rule 23.5 when the testifying spouse claims the privilege. Rule 23.5 is designed for protection of both spouses, even though only the testifying spouse is the holder of the privilege.

(3) It is suggested that paragraph (c) be revised to broaden the scope of protection provided by Rule 23.5 if the privilege is to be held only by the testifying spouse. The revised paragraph would read (with changes from the paragraph as set out in the tentative recommendation shown):

> (c) A criminal action or proceeding in which one of the spouses is charged with (i) a crime against the person or property [of-the-other-spouse-or] of a child of either spouse, whether committed before or after marriage, or (ii) [a-crime-against-the-person or-property-of-a-third-person-committed-in-the-course-of-committing a-crime-against-the-other-spouse,-whether-before-or-after-marriage, or-(iii)] bigamy or adultery, or [(iv)] (iii) a crime defined by Section 270 or 270a of the Penal Code.

It is suggested that the language in strikeout be deleted because under Rule 23.5 the testifying spouse should be permitted to determine not to testify against his spouse even though his spouse is charged with a crime against the testifying spouse or against a third person while committing

a crime against the testifying spouse. This will permit the testifying spouse either to determine that he wishes to testify or to determine that he wishes to preserve the marriage relationship in a case that might involv. merely a technical crime.

(4) If the revision suggested in (3), above, is not approved, the words "the person or property of" should be added in subdivision (1)(c)(ii) before "the other spouse" to eliminate an ambiguity.

(5) Should subdivision (2) be retained? How does the prosecution determine whether a spouse is waiving his privilege not to be called? How would a party determine this in a civil case? Is Rule 39 not adequate to deal with this probelem?

(6) Please note the waiver provisions in subdivisions (3) and (4). Should subdivision (3) be revised to read:

> (3) Unless wrongfully compelled to do so, a person who testifies in a particular proceeding does not have a privilege under this rule in that proceeding.

The language set out above seems more appropriate for the privilege contained in Rule 23.5. The language set out above is intended to make clear that once the married person begins to testify, the privilege under Rule 23.5 is gone. The privilege not to disclose confidential communications would, of course, remain. The language of subdivision (3) as contained in the tentative reccmmendation might give the impression that a spouse could testify concerning a particular matter, but then refuse under Rule 23.5 to testify concerning another matter at issue in the same proceeding.

Rule 24.

There were no objections to Rule 24 (pages 18-19 of tentative recommendation).

Rule 25.

There were no objections to Rule 25 (pages 20-25a of tentative recommendation).

One writer suggested, however, that the privilege might be extended to include matters which would violate regulations of an administrative agency and which could result in punitive action by that agency. See Exhibit V, first series of white sheets, page 3. There seems to be no justification for such an extension of the traditional self-incrimination privilege and to so extend the privilege might unduly hamper administrative regulation.

Rule 26.

There were no objections to Rule 26 (pages 26-42 of tentative recommendation).

One writer suggested, however, that the attorney's work product privilege be clarified and that a separate provision might be included specifically setting out the right of the governing bodies of public entities to confer with their attorney on legal matters. See Exhibit V, first series of white sheets, page 5. These do not appear to be desirable additions to Rule 26.

Law enforcement officers may object to the elimination of the eavesdropper exception in this rule and the other rules. See Exhibit VII, second series of white sheets, page 11.

The staff suggests the following matters for Commission consideration in connection with Rule 26:

(1) The last portion of the introductory clause of subdivision (2) should be revised to read (changes in approved language shown):

> if [~~he-claims-the-privilege,~~] the communication was a confidential communication between client and lawyer [~~,~~] and the [~~person-claiming-the-privilege-is~~] privilege is claimed by:

The rule is simplified by the change which eliminates unnecessary language.

(2) If the above suggestion is approved, a similar change should be made in other rules that take the same form as Rule 26.

Rule 27.

There were no objections to Rule 27 (pages 43-56a of tentative recommendation). If page 56a is missing from your copy, this page reads:

> is public, whether it is reported or filed pursuant to a statute or an ordinance, charter, regulation, or other provision. There is no comparable exception in existing California law; it is a desirable exception, however, because no valid purpose is served by preventing the evidentiary use of relevant information that is required to be reported and made public.

Rule 27.5.

There were a number of comments on Rule 27.5 (pages 57-64 of tentative recommendation). These comments present the following policy questions:

(1) Who should be included in the definition of "psychotherapist"? Professor Sherry (Exhibit II, blue page) suggests that the privilege as far as psychologists are concerned be limited to cases when he is examining or treating a patient

while under the direction of a psychiatrist. Dr. Monke (Exhibit III, pink page 2) makes the same suggestion. This suggestion should receive serious Commission consideration.

Professor Sherry (Exhibit II, blue page) suggests that it is unwise to embrace within the meaning of "psychotherapist" any practitioner of medicine; he believes that the definition ought to be limited to those doctors of medicine who are certified to practice psychiatry. We were unable to find any California statute pursuant to which a doctor of medicine is "certified to practice psychiatry." The Governor's commission defined a psychiatrist as follows:

> "psychiatrist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified.

The definition of the Governor's commission would seem to satisfy Professor Sherry's objection and would appear to create no serious problems in determining who is a "psychiatrist" for the purposes of the statute.

(2) Professor Sherry (Exhibit II, blue sheet) suggests that the psychotherapist privilege should not apply in any criminal action or proceeding in which the defendant has raised any issue concerning his mental capacity or mental condition. If this exception were included in the privilege, it would meet the objections of the office of the District Attorney of Alameda County (Exhibit VI, green pages). Such an exception should not undermine the privilege to any great

extent, yet it would make it possible to obtain psychiatric testimony on the issue of "legal insanity" or ability to have specific criminal intent. The patient would still be protected in criminal cases unless he raises the issue of his mental condition. Protection against prosecution for criminal conduct disclosed to the psychiatrist would still be provided, for the exception would not permit this conduct to be disclosed in a prosecution unless the issue of mental condition is raised by the defendant. A careful reading of Exhibit VI is suggested in connection with this matter. [It should be noted, however, that the objections of the Alameda County District Attorney are apparently based on the assumption that a psychiatric examination by a psychotherapist retained by the county would fall within the privilege--a doubtful assumption since such an examination probably would not be considered to be a confidential communication unless the situation is misrepresented to the defendant by the county and he mistakenly believes that the psychotherapist will hold the disclosures in confidence.]

The objection of the Alameda County District Attorney that the privilege as contained in the tentative recommendation will permit the defendant to shop around to find a favorable psychotherapist seems to be well taken. This objection would be met by the exception suggested by Professor Sherry.

(3) It is suggested by the staff that subdivision (4)(h) be revised to read:

(h) If the psychotherapist is appointed to [~~act-as-psychotherapist-for~~] examine or treat the patient by order of a court.

The language of the tentative recommendation might be more restrictive than the language suggested above. It might not include a psychotherapist appointed for the sole purpose of examining the defendant. The suggested language is believed to carry out the Commission's intent.

(4) Professor Sherry (Exhibit II, blue sheet) suggests the deletion of paragraph (j) of subdivision (4). However, it appears that he did not fully appreciate the effect of this paragraph. San Bernardino County (Exhibit VII, second white sheets, pages 14-15) suggests the deletion of this paragraph and, in so doing, indicates a full appreciation of the effect of the paragraph. It would appear that this objection would be met if the suggestion earlier made--that the privilege does not apply where the defendant raises the issue of his mental condition--were adopted. Then the proposed rule would be fair both to the prosecution and the defendant.

The staff recommends that paragraph (j) be retained for the reasons stated in the comment in the tentative recommendation.

(5) Dr. Monke (Exhibit III, pink pages, page 1) is concerned about hospital records. See Exhibit III. It does not appear to the staff that any revision of the tentative recommendation is needed.

(6) Dr. Galioni (Exhibit IV, gold pages, page 2) suggests that the psychotherapist be permitted to refuse to disclose

even though the patient has consented to disclosure. The staff suggests that the recommendation not be changed.

(7) Dr. Galioni also suggests that a problem might arise where, as a condition of probation, an individual is required to undergo psychotherapy. The staff does not believe any problem would arise--the privilege will be applicable unless the psychotherapist is appointed by court order.

(8) The letter of transmittal to psychotherapists pointed out that the privilege would protect the patient in cases where it is sought to commit him for mental illness. No one who responded objected to the lack of an exception in this case. We have written to various psychotherapists to determine whether they have an opinion as to whether such an exception would be desirable.

Various other comments on Rule 27.5 are contained in Exhibit V, first white sheets, at pages 6-7, but we do not believe that the comments merit Commission attention.

Rule 28.

There were a number of comments on Rule 28 (pages 65-71 of the tentative recommendation).

The following policy decisions are presented for Commission consideration:

(1) Although the Northern Section of the State Bar Committee did not object to subdivision (2)(a), the Southern Section was in considerable disagreement concerning this subdivision. Some members believed that the subdivision

should be deleted entirely; another would restrict it to crimes; one would approve it as is. The exception is not found in existing California law. See Exhibit I, yellow pages, pages 2 and 6.

(2) The Northern Section (Exhibit I, yellow pages, page 1) notes that subdivision (2)(h) is inconsistent with subdivision (2) of Rule 37. Subdivision (2)(h) provides that there is no privilege if the person from whom disclosure of the communication is sought obtained his knowledge of the communication with the knowledge or consent of one of the spouses. Subdivision (2) of Rule 37 deals with waiver where there are joint holders of a privilege and provides that waiver by one is not waiver for the other. The staff does not believe that any adjustment is necessary. Paragraph (h) is merely intended to restrict the eavesdropper protection provided by the statute to cases where the information was wrongfully obtained. Thus, paragraph (h) is not concerned with waiver. As pointed out by Exhibit VII (second series of white pages, pages 17-18), neither spouse is permitted to testify merely because of paragraph (h). The hearsay objection will keep out testimony by the third person in most <u>judicial</u> proceedings (but not necessarily in other types of proceedings).

(3) Subdivision (2)(c)(ii) should be revised to read:

> (ii) a crime against the person or property of a third person committed in the course of committing a crime against <u>the person or property</u> of the other, or

This revision will eliminate an ambiguity that exists in the

URE language. Note that Rule 23.5 would (if revised as previously suggested) permit a spouse to refuse to testify in a case covered by subdivision (2)(c)(ii) of Rule 28; but if the spouse testifies, the communication will come in because of the Rule 28 exception.

(4) Subdivision (2)(c)(iv) should be revised to read:

> (iv) [~~desertion-of-the-other-or-of-a-child-of either~~] <u>a crime defined by Section 270 or 270a of the Penal Code</u>.

The suggested language is taken from Penal Code Section 1322. The sections referred to are the sections relating to failure to provide support for a child (Section 270) or wife (Section 270a). The revision would substitute language for the California equivalent of the crimes described in subdivision (2)(c)(iv) of the URE.

(5) One writer suggested (Exhibit VII, page 17) that subdivision (2)(g) is undesirable from a policy standpoint.

<u>Rule 28.5.</u>

This rule (pages 72-73 of the tentative recommendation) was approved by the only writer who commented on it. See Exhibit VII (second series white sheets) page 18.

Should this rule be revised to read:

> Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not intended to be confidential.

Rule 29.

No one objected to this rule (pages 73-75 of tentative recommendation).

Rule 30.

There was no objection to the deletion of this rule (page 76 of tentative recommendation).

Rule 31.

There was no objection to this rule (page 77 of tentative recommendation).

Rule 32.

There was no objection to this rule (pages 78-79 of tentative recommendation).

Rule 33.

There was no objection to the deletion of this rule (page 80 of tentative recommendation).

Rule 34.

We received comments objecting to this rule (pages 81-85 of the tentative recommendation).

Exhibit VII, second series of white pages, pages 20-22, objects to permitting an adverse order in a criminal case or in a disciplinary proceeding where disclosure is forbidden by state or federal statute. The objection seems to be well taken in the case of a federal statute and the staff suggests that "an Act of the Congress of the United States or" be deleted from subdivision (2)(a). This deletion is consistent with the policy contained in subdivision (3) which prevents making an adverse order where the federal government refuses to disclose information. People v. Parham, 60 Cal.2d , 34 Cal. Rptr. , 385 P.2d (1963) (prior statements of prosecution witnesses withheld by Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Where the statute involved is a state statute, however, the staff believes that an adverse order is appropriate, for it is the state that is prosecuting and the state that is withholding the information from the defendant.

See also the Comments of the District Attorney of Alameda County objecting to Rules 34 and 36 (Exhibit VI, green pages, pages 4-5).

In the discussion of Rule 36, a recommendation is made for the addition of another subdivision to Rule 34.

Rule 35.

There were no objections to the deletion of Rule 35 (pages 86-88 of the tentative recommendation).

Rule 36.

The County Counsel of San Bernardino County did not object to this rule (pages 89-91 of the tentative recommendation). See his comments on Rule 34, however.

The District Attorney of Alameda County objected to the Rule. See Exhibit VI, green pages, pages 4-5. He points out that the rule is contrary to the holding in People v. Keener, 55 C.2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961) which held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it."

The following changes should be made in Rule 36 to correct typographical errors: The reference to "subdivision (3) in the fourth line of subdivision (1) should be a reference to "subdivision (2)"; subdivisions (3) and (4) on page 89 should be redesignated as subdivisions (2) and (3).

The staff suggests a new subdivision (4) be added to Rule 36 to read:

> (4) Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

The reference to subdivision (3) is to the subdivision formerly designated as subdivision (4). The following quotation from People v. Keener justifies this addition:

> We stated in the Priestly case (50 Cal.2d at p. 818) that, if the testimony as to the communications of the informant is necessary to establish the legality of the search, the defendant must be permitted to ascertain the identity of the informant in order to have a fair opportunity to rebut the testimony, that otherwise the officer giving the testimony would become the sole and unimpeachable judge of what is probable cause to make the search, and that such a holding would destroy the exclusionary rule of People v. Cahan, 44 Cal.2d 434, 445 [282 P.2d 905, 50 A.L.R.2d 513]. In the Cahan case we held that evidence obtained by officers illegally entering a house should be excluded because, notwithstanding the serious disadvantages of excluding probative evidence of the commission of a crime, a court should not lend its aid to illegal methods of obtaining evidence. In the words of the United States Supreme Court in the recent decision of Elkins v. United States (1960), 364 U.S. 206, 217 [80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669, 1677], the purpose of such an exclusionary rule "is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it."
>
> If a search is made pursuant to a warrant valid on its face and the only objection is that it was based on information given to a police officer by an unnamed informant, there is substantial protection against unlawful search and the necessity of applying the exclusionary rule in order to remove the incentive to engage in unlawful searches is not present. The warrant, of course, is issued by a magistrate, not by a police officer, and will be issued only when the magistrate is satisfied by the supporting affidavit that there is probable cause. He may, if he sees fit, require disclosure of the identity of the informant before issuing the warrant or require that the informant be brought to him. The requirement that an affidavit be presented to the magistrate and his control over the issuance of the warrant diminish the danger of illegal action, and it does not appear that there has been frequent abuse of the search warrant procedure. One of the purposes of the adoption of the exclusionary rule was to further

the use of warrants, and it obviously is not desirable to place unnecessary burdens upon their use. The additional protection which would result from application of the Priestly rule in situations such as the one involved here would not offset the disadvantages of excluding probative evidence of crime and obstructing the flow of information to police. It follows from what we have said that where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

There is, of course, nothing novel in the view that law enforcement officials may be in a more favorable position where a warrant is obtained than where action is taken without a warrant. For example, decisions of the United States Supreme Court show that, under the Fourth Amendment, even where there is probable cause, officers may not search a house without first obtaining a warrant unless there are exceptional circumstances such as a danger that the evidence will be removed or destroyed. (Chapman v. United States, 365 U.S. 610 [81 S.Ct. 776, 777 et seq., 5 L.Ed.2d 828]; Johnson v. United States, 333 U.S. 10, 13 et seq. [68 S.Ct. 367, 92 L.Ed. 436].)

People v. Berger, 44 Cal.2d 459, 461-462 [282 P.2d 509], is distinguishable. In that case the court held inadmissible at trial evidence found upon a search made pursuant to a warrant which was similar to a general warrant, without any restriction on the area to be searched or the things to be seized, and which was therefore invalid on its face. Where a warrant does not comply with the essential statutory and constitutional requirements relating to particularity of description, it cannot properly be regarded as protecting against unlawful searches, and the policy of encouraging the use of warrants obviously does not contemplate the use of void warrants.

The conclusion we have reached does not affect the rule that a defendant is entitled to know the identity of an informant in a case where the informant is a material witness with respect to facts directly relating to the defendant's guilt (People v. McShann, 50 Cal.2d 802, 806 et seq. [330 P.2d 33].)

To be consistent with the policy expressed in People v. Keener--a policy that the staff believes is sound--the following new subdivision should be added to Rule 34:

(4) Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal official information to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

In the comment to both Rule 34 and 36 we will point out, as the court did in the Keener case, that the new subdivision does not affect the rule that a defendant is entitled to know the identity of an informant (or to know official information) in a case where the informant is a material witness with respect to facts directly relating to the defendant's guilt (or the official information is necessary to the defendant's ability to defend himself properly).

Rule 36.5.

It is suggested in Exhibit VII that Rule 36.5 (page 92 of the tentative recommendation) is "a rule with no teeth in it--a rule authorizing the judge to exclude evidence but giving no one an effective remedy if the evidence is admitted." It is suggested in Exhibit VII "that the rule state either that such evidence is inadmissible or that the judge has a discretion to exclude it, and an abuse of discretion be constituted error against the person requesting its exclusion."

The suggestion assumes that Rule 40 is the rule that will be applicable (although this rule was disapproved by the Commission on the ground that it was existing law and unnecessary to state in the revised rules).

The staff believes that no change should be made in Rule 36.5. If the judge errs and fails to exclude evidence under Rule 36.5, the complaining party is in no different position than when the judge errs in failing to recognize a privilege of a nonparty witness. The staff again suggests the desirability of restoring Rule 40 with the revision that was suggested be made in Rule 40.

Rule 37.

There were no objections to this rule (pages 93-94c of the tentative recommendation).

Note, however, that the Northern Section of the State Bar Committee suggested that there was an inconsistency between subdivision (2) of Rule 37 and subdivision (2)(h) of Rule 28. As previously pointed out, no change in either provision appears to the staff to be necessary.

Exhibit VI (green pages), page 5, suggests that the Commission proposal with reference to the Attorney-Client privilege appears to cut back on the

developing area of discovery by the prosecution. "Under the Commission definition of 'confidential communication' it would appear that any report of an expert obtained by the defendant after being represented by counsel would be a privileged communication. The law in reference to discovery of such reports by the prosecution is not wholly clear at the present time but should the proposed rule be adopted it would more than likely end any discovery of these reports by the prosecution. In view of the fact that we have not yet reached the outer limits of discovery by the defense, we should try to preserve at least some prosecution discovery." In connection with this point, consider subdivision (4) of Rule 37.

Rule 37.5.

This rule has not been approved by the Commission. The Commission directed that it be sent out for comments with the tentative recommendation.

The only comment on this rule indicates that it is probably desirable. See Exhibit VII (second series of white pages), page 24. Please read the comment on the rule in Exhibit VII. The staff suggests the rule be approved.

Rule 37.7.

This rule has not been approved by the Commission. The Commission directed that it be sent out for comments with the tentative recommendation.

The only comment on this rule stated that it "seems desirable." See Exhibit VII (second series of white pages), page 24. The staff recommends approval of the rule.

Rule 38.

There were no objections to this rule as such. But see Exhibit VII, second series of white pages, pages 24-25. There the point is made that this rule, by negative implication, provides that evidence is admissible

against anyone except the holder of the privilege.

The writer of Exhibit VII objects to this rule applying where one spouse is required to testify against the other or where the judge fails to recognize a privilege where the holder of the privilege is not present at the proceeding to assert the privilege. These matters were mentioned in connection with the pertinent rules.

The staff suggests that Rule 38 be revised to read the way it was enacted in New Jersey. The revised rule would read:

> Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if disclosure was wrongfully made or erroneously required.

This statement of the rule is better than the previously approved rule. What if the physician or lawyer claims the privilege for the absent patient or client? What if the information is disclosed in a proceeding when another person was the holder of the privilege and claimed it? What if the information is disclosed in a proceeding where the holder was not present but the judge wrongfully required disclosure (failed to comply with Rule 36.5)?

Is any revision of this rule needed in view of Rule 23.5?

Rule 39.

There were no objections to this rule (pages 99-101 of tentative recommendation).

Should there be a right to comment on the failure of a party to call his spouse as a witness? The staff makes no recommendation on this.

Rule 40.

The commentators have assumed that this will be the law (those that mentioned this rule). It was previously suggested by the staff that this rule be restored to the URE with a revision to provide an exception when a privilege is claimed under Rule 23.5.

Rule 40.5.

The staff suggests that the following new rule be added to the privilege article:

> Rule 40.5. Nothing in Rules 22.3 to 40, inclusive, shall be construed to repeal by implication any other statute of law relating to privileges.

The suggested rule duplicates Rule 66.1 which was included in the tentative recommendation on hearsay evidence.

The purpose of the rule is to make it clear that this article does not repeal by implication any statute relating to privilege, nor does it bring within any privilege any information declared by statute to be unprivileged or make unprivileged any information declared by statute to be privileged.

If the proposed rule is approved, it will be clear that the following statutes would be retained in effect:

C.C.P. Section 2032(b)(2) provides that requesting and obtaining a report of the physician's physical, mental or blood examination ordered under Section 2032(a), the request being by the party against whom the order is made, waives the privilege as to the testimony by other examining physicians.

H. & S. Code Section 3197 makes the physician-patient and marital privileges inapplicable in prosecutions or proceedings under law relating to prevention and control of venereal disease. (This section is amended in the tentative recommendation.)

Penal Code Section 266h makes marital privilege inapplicable in prosecution for pimping.

Penal Code Section 266i makes marital privilege inapplicable in prosecution for pandering.

Penal Code Section 270e provides that in prosecutions for nonsupport of wife or child, "any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife shall not apply." (This section is amended in tentative recommendation.)

Civil Code Section 250 provides that the marital privileges do not apply in proceedings under the Uniform Civil Liability for Support Act.

There are also a great number of code sections providing that certain information is confidential.

Amendments and Repeals

There were no objections to the amendments and repeals.

The staff suggests that an additional deletion be made from Section 2065 (pages 108-109 of the tentative recommendation). The revised recommendation should state:

Section 2065 should be revised to read:

2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself. [~~;-but-he-need-not-give-an-answer-which-will have-a-tendency-to-subject-him-to-punishment-for-a-felony,-nor need-he-give-an-answer-which-will-have-a-direct-tendency-to-degrade his-character,-unless-it-be-to-the-very-fact-in-issue,-or-to-a-fact from-which-the-fact-in-issue-would-be-presumed.--But~~] A witness must answer as to the fact of his previous conviction for a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

The deleted language relating to an answer having a tendency to subject the person to punishment for a felony is superseded by Rules 24 and 25.

The language relating to an answer which would have a tendency to degrade his character also has been deleted. The meaning of this language seems to be that whereas a witness must testify to non-incriminating but degrading matter which is relevant to the merits

of the case,[1] nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However, such privilege seems to be largely--if not entirely--superfluous. Code of Civil Procedure Section 2051 provides that a witness may not be impeached "by evidence of particular wrongful acts." Manifestly, to the extent that the degrading matter referred to in Section 2065 is "wrongful acts," Section 2051 makes this portion of Section 2065 unnecessary. (The "wrongful acts" rule of Section 2051 would be continued in effect by Uniform Rule 22(d).) Moreover, since the witness is protected against impeachment by evidence of "wrongful acts," though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the degrading-matter privilege. For criticisms of this privilege, see Wigmore §§ 984, 2215, 2255; McGovney, Self-Incriminating and Self-Disgracing Testimony, 5 Iowa Law Bull. 174 (1920). This privilege seems to be seldom invoked in California opinions and, when invoked, it seems to be involved in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2051, or by virtue of both. See, for example, the following cases: People v. T. Wah Hing, 15 Cal. App. 195, 203 (1911)(abortion; prosecuting witness asked on cross-examination who was father of child. Held, immaterial--and, if

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[1] Clark v. Reese, 35 Cal. 89 (1869) (breach of promise to marry; defense that plaintiff had immoral relations with X; held X must answer to such relations, though answer degrading); San Chez v. Superior Court, 153 Cal. App.2d 162 (1957)(separate maintenance on ground of cruelty; defendant required to answer as to cruelty, albeit degrading).

asked to degrade, "equally inadmissible"); People v. Fang Chung, 5 Cal. App. 587 (1907)(defendant's witness in statutory rape case asked whether witness was seller of lottery tickets and operator of poker game. Held, improper, inter alia on ground of Section 2065. Note, however, the additional grounds for exclusion; viz. immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision); People v. Watson, 46 C.2d 818 (1956)(homicide; cross-examination as to defendant's efforts to evade military service. Held, irrelevant and violative of Section 2065). Hence, this portion of Section 2065 is superfluous now; it would likewise be superfluous under the Uniform Rules.

The matters covered by the remaining portions of Section 2065 are covered by Rules 7(1), 21 and 22 of the Uniform Rules. The repeal of the remaining portions of Section 2065 will be considered in the tentative recommendations relating to the pertinent URE rules.

The staff believes that the privileges recommendation is the best place to recommend deletion of the "degrading matter" privilege.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo. 63-57

EXHIBIT I

HELLER, EHRMAN, WHITE & MC AULIFFE
Attorneys
14 Montgomery Street - San Francisco 4

September 20, 1963

John H. DeMoully, Secretary
California Law Revision Commission
Stanford University
Stanford, California

RE: Committee to Consider Uniform Rules of Evidence

Dear Mr. DeMoully:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met on September 18 and 19 of 1963 to consider the privilege rules. Nothing was considered except the changes which have been made by the Law Revision Commission since our last study.

It is the opinion of the Northern Section that the Law Revision Commission has done an excellent job in bringing correlation to the various rules, a factor which was lacking before. Although in some places it appeared to the Northern Section that some of the changes and additions were over-produced, nevertheless, subject to those reservations which were made in our last report and which have not been adopted by the Law Revision Commission, and subject to the observation which will next hereinafter be made, the Northern Section approves the changes and additions.

The exception hereinbefore noted is with respect to section 2(h) of Rule 28. This provides an exception to the marital privilege if the person from whom disclosure of the communication is sought obtained his knowledge of the communication with the knowledge or consent of one of the spouses. It appears to the Northern Section that this provision is in conflict with section 2 of Rule 37.

Sincerely yours,

s/

Lawrence C. Baker, Chairman
Committee to Consider Uniform
Rules of Evidence

Law Offices

NEWELL & CHESTER
650 South Grand Avenue - Suite 500
Los Angeles 17, California

Madison 9-1231

December 4, 1963

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

Attention: Mr. John H. DeMoully

Gentlemen:

The Southern Section of the Committee to Consider Uniform Rules of Evidence met on October 28, 1963, and on November 19, 1963, to consider certain suggestions regarding the question of privileges and the question of authentication.

1. <u>Privileges</u>:

Mr. Mark P. Robinson asked permission to write a separate letter concerning Rule 23.5, Privilege Not to Testify Against Spouse. and Rule 28, Marital Privilege for Confidential Communications. His letter is attached hereto. Mr. Robinson's suggestions were further considered by the Committee. Regarding Rule 23.5, Privilege Not to Testify Against Spouse, the Committee disapproves of the proposed rule and felt that no case was made for changing the present California law.

2. <u>Rule 28, Marital Privilege for Confidential Communications</u>:

Mr. Robert Henigson favored the change proposed by the Commission. Mr. Philip F. Westbrook, Jr., felt that the proposed Rule 28 was a sound one but he would limit the exception if the communication is made in whole or in part "to aid . . . anyone . . . to commit . . . or to plan to commit . . . a crime." However, he would not eliminate the privilege where the communication was made to perpetrate or planned to perpetrate a fraud. As a matter of fact, the entire Committee felt, since California recognizes a negligent misrepresentation under the concept of fraud, as well as various kinds of constructive frauds, the proposed language poses serious questions of definition and construction.

Members Robinson and Newell felt that subsection (a) of subdivision 2 should be eliminated entirely.

In short, the Southern Section was in considerable disagreement regarding Rule 28, subdivision 2, subsection (a).

3. Authentication:

[omitted]

Very truly yours,

Robert M. Newell, Vice-Chairman
State Bar Committee on
Uniform Rules of Evidence

RMN:em

Enc.

Law Offices
VAUGHAN, BRANDLIN, ROBINSON & ROEMER

J.J. Brandlin
J.R. Vaughan
Mark P. Robinson
Walter R. Trinkaus
Richard I. Roemer
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Joseph F. Hamwi
Pat B. Trapp
John C. Atchley
William C. Falkenhainer

Equitable Life Assurance Bldg.
411 West Fifth Street
Los Angeles 13, California
Madison 6-4451

November 4, 1963

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

Attention: Mr. John H. DeMoully

Gentlemen:

The Chairman of the Southern Section of the Committee to Consider Uniform Rules of Evidence has kindly permitted the undersigned to write this separate comment on one of the proposed recommendations relating to the Uniform Rules of Evidence, Article V, Privileges.

This letter does not purport to represent the views of any other members of the Southern Section.

Rule 23.5 Privilege Not to Testify Against Spouse.

In general, the undersigned believes that the commission has recommended worthy changes to the URE as they apply to this subject matter. However, the undersigned is in disagreement with certain of the tentative recommendations.

Under this section as tentatively recommended the privilege will belong only to the testifying spouse. This is contrary to the present California law set forth in Section 1322 of the Penal Code which gives the privilege to both spouses. The rationale offered for this change states that a "party spouse" would be under considerable "temptation" to claim the privilege even where the marriage were already hopelessly disrupted. As an illustration of the problem the case of People v. Ward, 50 C. 2d 702, is cited. A reading of People v. Ward discloses that this case was not concerned in any way with the privilege under consideration. The entire discussion in People v. Ward is concerned with the question of "ex post facto" operation of Section 190.1 of the Penal Code which permits the jury to decide application of death penalties.

As far as the facts of the Ward case are concerned the husband would not have been able to prevent the testimony of his wife under the present Section 1322 of the Penal Code for the reason that under that section there is no privilege where: a crime has been committed by one spouse against the other, in cases of criminal violence by one against the other, or upon the child of one by the other, all of which are involved in the Ward case.

The whole concept of privilege is a balancing of social conveniences. Over the centuries society has come to the conclusion that certain relationships are to be encouraged and protected and that the search for justice or truth must be tempered where that policy comes into conflict with some other important policy. What society, as a whole, has learned over a long period of time should hardly be the subject of emasculative surgery by a small group such as the legal profession under the guise of "advising" society as to principles of law.

Indeed, the rationale given in the comment on URE Rule 23.5 indicates that the privilege "not to be called as a witness" is necessary to avoid the "prejudicial" effect, for example, of the prosecution calling the defendant's wife as a witness, thus forcing her to object before the jury. Under the present proposal a prosecutor could call a willing witness spouse to the stand to testify against the defendant spouse and force the defendant spouse to claim the privilege existing under Rule 28 against revealing marital confidential communications. Certainly that situation is not less prejudicial in effect.

It is respectfully submitted that Rule 23.5, subsection 2, be amended to grant the privilege to both spouses subject to the exceptions listed in subdivision No. 1.

It is further respectfully suggested that Rule 23.5, subdivision 1, subsection (c) be amended to grant a privilege to the testifying spouse (only) except where there has been a crime against the child of either. The reason for this suggestion is that there may be instances, especially in minor crimes, where the witness spouse may wish to overlook offenses against him, or her, in order to preserve the marital relationship. At the very least, the word "crime" should be changed to apply only to felony cases. Under the present proposal the prosecution could require the witness spouse to testify against the defendant spouse on any silly little misdemeanor committed against a third person while in the course of committing a "technical crime" against the witness spouse.

Rule 28, Marital Privilege for Confidential Communications.

Rule 28, subdivision 2, subsection (a) as amended by the tentative recommendation, states that there is no privilege for confidential communications if the communication is made, in whole or in part, "to aid . . . anyone . . . to commit . . . or to plan to commit . . . a crime or to perpetrate . . . or plan . . . to perpetrate . . . a fraud."

This, as admitted by the comment under Rule 28, changes the existing California rule which does not recognize such an exception to the privilege. The "wisdom of ages" is then brushed aside with one sentence, as follows: "The exception as revised does not seem so broad that it would impair the values that the privilege was created to preserve, and in many cases the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit." *

If the whole purpose of the privilege is to protect and preserve the marriage relationship and to encourage free and open communication between spouses, even though the privilege may conflict with the policy of seeking the "truth", then it appears to be begging the question to say that evidence of a communication which was made in part to aid . . . in committing . . . a crime . . . or . . . perpetrating . . . a fraud . . . will be . . . vital . . . in order to do justice". Indeed it is difficult to imagine many situations where a spouse would be called upon to testify to a communication which was relevant to a criminal proceeding unless the communication was made in part to "aid" in the commission of a crime.

In short, the present proposed recommendation would make the privilege, in a criminal case, pretty much illusory.

It is respectfully suggested that subsection (a) of subdivision 2 be eliminated in its entirety.

Yours very truly,

Mark P. Robinson

MPR:fp

*(Emphasis Ours)

EXHIBIT II

UNIVERSITY OF CALIFORNIA

SCHOOL OF LAW (BOALT HALL)
BERKELEY 4, CALIFORNIA

October 8, 1963

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

I have reviewed the draft of the Commissions' tentative recommendation for a statute defining the psychotherapist-patient privilege. I am strongly in favor of the establishment of such a privilege and in agreement with the objectives of the draft.

I have serious reservations, however, about the wisdom of including psychologists within the privilege. The fact that they now have about as broad a privilege as the law has ever recognized is a pure accident resulting from the fact that no one ever read the statute licensing psychologists all the way through.

Accordingly, I would like to see Sec. (1)(e) amended to limit the privilege to the psychologist only when he is examining or treating a patient while under the direction of a psychiatrist.

Similarly, I think it unwise to embrace within the meaning "psychotherapist" any practitioner of medicine. I think the definition ought to be limited to those doctors of medicine who are certificated to practice psychiatry.

As to part (4)(j) it seems to me that the wording should be improved. Rather than providing "as to evidence offered by the defendant in a criminal action or proceeding" it would be better to provide that the privilege did not exist in any case in which the defendant has raised any issue concerning his mental capacity or condition. Otherwise I think the draft will accomplish your objectives.

Cordially yours,

s/

Arthur H. Sherry
Professor of Law
and Criminology

AHS:jh

J. Victor Monke, Ph. D., M.D.
Suite 303, 9400 Brignton Way

October 28, 1963

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

In answer to your letter of September 30, 1963, regarding the proposals on "uniform rules of evidence," I submit the following:

1) I have had opportunity to read only pages 57 to 64 as they apply to the psychotherapist-patient relationship.

2) In general, I am in favor of Rule 27.5 as presented.

3) Under paragraph 1D1, I wonder why you make reference to a person authorized to practice medicine in any state or nation. Why is it not sufficient to specify a physician licensed in the State of California? I suppose you may have had in mind that persons from other states may be asked to testify in California. I think in some other aspects of medicine, at least with regard to licensure, the Board of Medical Examiners does not recognize the right of anyone to practice in California though he may have been licensed elsewhere.

4) Nothing is said about the matter of hospital records. I would gather that a psychiatrist's initial interview, initial examination, and progress notes would come under this heading of privilege and would, therefore, not be subpoenable. This is a very important point since in a good, modern psychiatric hospital, the chart should be a "workbook" via which the doctor and inpatient staff maintain a daily communication. In this sense the chart is something more than a document in which one may write obtusely so as to reveal nothing and yet meet the requirement of accreditation by medical boards of accreditation. Currently medical records are being dominated by insurance companies and courts to the end that it is often quite difficult to write in them the actual facts of the situation regarding a patient's health. It would be a great help to have this item clearly stated.

5) On page 62 it would certainly salve the feelings of the psychiatrists if, in your first line at the top of the page, you were to write "psychotherapist is defined as any medical doctor or a certified psychologist". There are still many psychiatrists who do not believe that the certified psychologists are adequately trained for therapy. That the psychologists so asserted, and so proceeded to get a bill stating that they were, is an acknowledged fact of legal history. Many physicians still would claim that the practice of psychotherapy is a medical function and that if psychologists were to be so certified they should have been certified under

the medical practices act as ancillaries to the medical profession, even as physiotherapists and nurses are. I do not want to open up an old issue here, but the sentence reads as though the "medical doctor" was the "Johnny-come-lately."

6) Contrariwise, the sentence somewhat lower, referring to the indistinct line between organic and psychosomatic illness is a point very well taken and is, in fact, the very basis on which many physician-psychiatrists think that the academically-trained certified psychologist is not equipped to do psychotherapy outside active association with the medical profession and which has active responsibility of a physician.

I appreciate the effort and understanding which went into the writing of this Rule 27.5. I wish the legal language was as understandable as the commentary! I hope that enough forces can be marshaled to place it into law in the very near future.

Sincerely yours,

J. Victor Monke, M.D.

JVM
mk

EXHIBIT IV

E. F. GALIONI, M.D.
SACRAMENTO, CALIFORNIA

November 4, 1963

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Mr. DeMoully:

I have reviewed the preliminary draft of A Tentative Recommendation Relating to the Uniform Rules of Evidence which you so kindly forwarded to me on September 30, particularly as it applies to Rule 27 and 27.5. I believe the Commission has made an excellent start in attempting to resolve a rather difficult and complex problem as it relates to privileges of patients in their confidential communications as they relate to health. I have the following comments to make on the content:

1. As you point out in your letter of transmittal, the privilege in the psychotherapist-patient section is somewhat broader than that in a patient-physician section. The major difference is the application of the privilege in criminal actions. Despite the Commission's attempt to clarify the reason for this difference I believe that the question will be raised as to why the physician-patient privilege could not be extended to cover criminal action as well.

2. I believe the extention of the privilege to include the licenses from other states or nations, or when the patient believes the person to be a bonafide psychotherapist, as defined in the section, is a desirable measure for the protection of the patient.

3. The section on psychotherapist-patient privilege may well contain the crux of controversy in the proposed recommendation. It certainly goes a long way toward providing similar privileges to both physicians and psychologists providing psychotherapy, and does resolve the problem of the psychologist now functioning under the attorney-client privilege. On the other hand, questions may be raised about why should this be limited to psychologists only. Such facilities as Family Service Agencies, etc., with well trained psychiatric social workers providing casework and counselling, would have similar confidential material presented to them in the course of their services. From your recommendations these people would not have such a privilege and would not be able to hold similar intimate material in confidence. However, if this were extended beyond present limitations serious problems would

arise in determining who would be entitled to such privileges. Groups of persons may be listed ad infinitum and the whole intent of the rule might break down. I believe as time goes on there will be effort by many groups (a) to utilize this section for the purposes of obtaining the patient-psychotherapist privilege of confidentiality and (b) to utilize this section to obtain an indirect recognition of their practicing psychotherapy whether they are actually doing so or not.

4. In the course of the practice of a psychiatrist there are times when he is confronted with the authorization by the patient to release information that would be to the patient's own detriment. This would be particularly true if the patient were suffering from a severe psychotic disorder that would not allow him to act in his own best interests. According to the Commission's recommendations, should such an individual give consent for the psychiatrist to provide information to the court, the psychiatrist would have no alternative other than to comply even though it might be detrimental to the patient in the long run. This seems to be similar to the stand taken by the Northern California Psychiatric Society. I'm sure this is a difficult point to deal with in a legal sense, since it involves the discretion of the person holding the information as to when to testify and when not to testify in keeping with the best interest of the patient. However, this is a matter that should be further considered by the Commission.

5. A rather technical question relates to the exception of the privilege when the psychotherapist has been appointed by the court. As indicated in the text of the draft, when the psychotherapist is appointed by the court it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. There is however one notable exception to this. This occurs when, as a condition of probation, an individual is required to undergo psychotherapy. Although this is not a desirable practice and interferes to some degree with the psychotherapeutic process, it does occur in actual practice and must be considered as a practical problem involving this particular section. If the psychotherapist has no privilege of confidential communication when psychotherapy is a condition of probation, the effectiveness of psychotherapy would be even more drastically hampered. It is quite possible that psychotherapy as a condition of probation may not come under this section. However, some clarification might be desirable.

I feel this is a strong beginning in attempting to clarify many of the problems that exist in the physician-patient and psychotherapist-patient relationship. As I pointed out above, I believe there are still some problems that have not been completely resolved by the proposed draft and I believe that further studies in these areas would certainly be quite fruitful. I will continue to be interested in further progress that you make relating to these sections of the uniform rules of evidence.

Yours sincerely,

E. F. Galioni, M.D.

Memo. 63-57

EXHIBIT V

COUNTY OF SANTA CLARA

County Counsel - Spencer M. Williams

November 7, 1963

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

Attn: Herman F. Selvin, Chairman

Re: Comments on the Proposed Amendments to the Rules of Evidence Concerning Privileges

Gentlemen:

Enclosed herewith are the comments which I have made in connection with the proposed revisions concerning the rules of evidence concerning privileges.

The opinions expressed herein are purely personal and do not necessarily reflect the opinions of the County Counsel or the combined opinions of the officers of the County Counsel's Office of the County of Santa Clara.

Yours very truly,

SPENCER M. WILLIAMS
County Counsel

by S/R. P. McNamee
Robert P. McNamee
Deputy County Counsel

RPM:blm
encls.

70 West Rosa Street - Civic Center - San Jose 10, California

Comments on the Tentative Recommendations Relative to the Uniform Rules of Evidence-Privileges - Proposed by the California Law Revision Commission

Although some of the comments contained in this paper repeat those made by the Law Revision Commission, such repetition is made only to create a frame of reference for additional comments not made by the Commission.

Generally, the Commission proposes to extend the privileges set forth in its recommendations to all proceedings where sworn testimony is taken, whether criminal, civil, administrative or legislative. In some instances the rules fail to achieve such extensions.

Since the establishment of a privilege is an exception to the general policy that commands testimony from anybody able to shed truth on the matter before the tribunal, a privilege is established because of a more important higher policy. Thus, in order to justify a privilege, it must be necessary to consider the policy argument which places it on a higher scale of values and, also, whether the procedure for claiming the privilege preserves the subject matter protected by the privilege. In most of the cases, the privilege relates to communications deemed desirable to protect in order to encourage disclosure in certain relationships, etc., e.g., Attorney-Clients, Doctors-Patients, Husbands-Wife, Priest-Penitent. These privileges protect the information disclosed. Another type of privilege protects not the information contained in communications but the identity of the informant. This type of privilege is exemplified when the police officer witness is allowed to refuse to reveal the name of an informer, or when a newspaper man is permitted to keep secret the names of informants who have given him news stories.

The policy behind these latter privileges is to promote the disclosure of information where the public interest is concerned. On the other hand, it opens the way for harmful, untruthful disclosures to the detriment of possibly innocent third persons who are denied the right of confrontation of their accusers. Balancing one policy against another, it is suggested that the right of a person to be confronted by his accuser is more important than promoting disclosures.

Another justification for a privilege is found in the privilege against self-incrimination which is grounded--not on protecting communications--but on the constitutionally expressed belief that in a democratic society, it is repugnant to compel a person to incriminate himself and that the absence of such constitutional right might promote brutal and reprehensible police measures. As a means of achieving the privilege against self-incrimination, the proposed rules not only give an individual a right not to be compelled to give testimony when he might incriminate himself, but also protect a defendant in a criminal case by refusing to permit his being called to testify. It is suggested, however, that if the privilege is to be given its fullest coverage, it should not be restricted to criminal actions. There are many types of actions in which a person is in the position of a defendant in a criminal case. In some actions, the decision of the Board or Tribunal conducting the proceedings will have a more punitive effect than many punishments awarded in criminal actions. Specifically, proceedings before a governmental administrative agency, such as a Contractor's Licensing Board, Real Estate Board or State Bar Proceedings, where the result might be the suspension, or cancellation of an individual licenses is much more punitive than the punishment which

might be meted out in criminal proceedings. The privilege not to be called as a witness could be extended to apply in such proceedings.

Similarly, the privilege afforded a witness not to give testimony where it would be self-incriminating is applicable only when the matter constitutes an element of a crime against the State of California or the United States. It is suggested, again, that in addition to the emphasis on criminal action, the privilege could be extended to include matters which would violate regulations of an administrative agency and which could result in punitive action by that agency. It is submitted that in the establishment of the privilege, it is inconsistent to give regulative agencies more leeway and power than the courts of law, particularly, in view of the punitive effect of many of their decisions.

In connection with the privilege not to testify against a spouse, the proposed rule establishes two privileges: the privilege <u>not to be called to testify</u> against a spouse and a privilege not to testify against a spouse. The privilege not to be called, applies only in criminal actions. For the fullest protection, this privilege should be extended to include other types of non-judicial proceedings for the same reasons mentioned in comments pertaining to the privilege against self-incrimination. Now, apparently, the privilege not to be called to testify can be claimed by either spouse, so that in a criminal proceeding, the husband, as defendant, may claim the privilege, and if he doesn't claim it the wife, as a witness, may do so. The proposed rules recommend, however, that the privilege not to testify, however, be changed so that the privilege may be claimed only by the person who is called a witness. For example, in a non-criminal proceeding, the wife is called to the

stand to testify against the husband. She may claim the privilege and not testify, if she elects to do so. On the other hand if she desires, she may not claim the privilege and proceed to testify. The husband as a party defendant, or an interested party in the proceedings, will have no right to claim the privilege and stop the testimony. The reason for this recommended change is that although the privilege is designed to protect the marriage relationship, if the marriage is disrupted the purpose for establishing the privilege no longer exists. This recommended change is based upon the assumption that the determination of the disrupted marriage can be or should be allowed to be made by only one of the individuals to the marriage, i. e., the witness. The parties to the marriage, however, may take different views as to whether the marriage is disrupted. If the reason for the recommended change is correct, it is not reflected in the present attitude towards divorce law, which still requires an adversary proceeding, affords a party an opportunity to contest the divorce and to preserve the marriage status, plus, in some locations, presents the opportunity to have marriage difficulties referred to a conciliation commissioner. Moreover, society seems to be shifting towards devices (private and public) for examining into the marital difficulties and to take such actions as will preserve the marriage, particularly, where there are children involved. Marriage counseling clinics, social worker, clinical psychologists and psychiatrists are all involved in examining into distressed marriages. Thus, the placing of the decision as to whether the marriage is disrupted on the shoulders of the witness ignores the attitude of the other spouse, and, moreover, is not in keeping with the prevailing attitude of the law and society

towards handling impaired marriages.

The Attorney-Client Privilege makes it clear that communications from client to lawyer and lawyer to client are to be protected. It is felt that under this privilege, it would be an appropriate time to discuss the privilege in connection with pre-trial discovery proceedings and would be an appropriate place to include any desired changes in the law concerning the attorneys work product. The subject of attorney-client privilege and work product are closely related and the desirability of including rules protecting attorneys work products with rules protecting attorney-client privileges should be considered.

The proposed rules and comments make it clear the lawyer-client privilege is extended to include governmental agencies. This is very important in view of the Brown Act restrictions on private meetings of public elected bodies. Perhaps, a separate provision specifically setting out the right of the governing bodies of public entities to confer with their attorney on legal matters should be done in this section.

The proposed rules state the privilege is that of the client, but they make it mandatory that an attorney claim the privilege on behalf of the client in those situations where the client is not present and the attorney is present. This is very good and this duty should be extended to other relationships such as Doctor-Patient, Psychotherapist-Patient, etc. The proposed rules leave open the question of communication; written or oral, between an attorney and a hired specialist who aids the attorney in litigation or advice. For example, it is clear that communications to the lawyer's secretary or through an interpreter are protected. It is not clear that if the attorney should hire an expert for technical infor-

mation, such as an engineer, accountant, chemist, physician, etc., the communication made by the client to the expert and transmitted to the attorney or communications between the attorney and experts are covered. Since those types of communications at some point merge into the work product, which has been previously mentioned, and since, under existing law, these are the problems most acute to the practitioner, study and analysis of this point by the Law Revision Commission would seem appropriate.

The proposed privilege between the Pschotherapist and Patient is extended to include psychiatrist, psychologist, physician and patient and this seems very advisable. The exceptions to this privilege might be examined again to judge their advisibility. Rule 25 (4a) makes an exception if the services of a psychotherapist were sought to aid anyone to commit or plan to commit a crime or tort or to avoid detection after the commission of a crime or tort. It is hard to see how the services of a psychotherapist would aid in the commission or plan to commit a crime or tort, unless he were a conspirator, but it is easy to see that the discussion of such matters could be a frequent and natural result of such relationship - just as in a priest-penitent relationship. It is even more clear that because of guilt feelings, disclosure of past crimes or torts would naturally flow from such relationships. Because disclosures of crimes and torts are to be expected in this relationship, the exception looks broad enough to do away with the privilege. It might be better to rephrase the section, making it clear the psychotherapist can not use the relationship as a means of conspiring to commit crimes or torts. Similarly, exception 4 makes an exception where the psychotherapist obtains information he is required to report to public officers of record in a public

place. It is not clear whether the privilege would be subject to such record keeping requirements that bodies other than the State Legislature might impose. For example, could a city pass an ordinance requiring all psychotherapists to report to the police department the identity of all individuals who during treatment have admitted the existing use of narcotics or abnormal behavior. If local ordinances requiring this could be adopted and were enforceable, the privilege is as strong as papier-mache'.

One other aspect of the communications involved in the Psychotherapist-Patient relationship should be examined and considered by the Commission. In private clinics and public clinics, hospitals and mental institutions, the utilization of services of specialized lay persons is a standard procedure. Psychiatric social workers take case histories, hold interviews, participate in group conferences concerning the patient under the supervision of a clinical psychologist or psychiatrist who sees the patient infrequently. How far are communications between these assistants and the patient and the attendant records to be protected? Will the fact that the hospital is a public hospital, County or State, affect the availability of such records?

The privilege afforded the Physician-Patient relationship is very weak. It is not clear whether the communications from the doctor to the patient are privileged as they are in the case of lawyer-client. The several exceptions, as a practical matter, make the privilege non-existent. Moreover, full protection to the patient requires analysis of the protection afforded hospital records. These records are not privileged at this time. In many instances, the treatment given a patient and, thus, the nature of his complaint, operation, etc., has been obtained by examining

hospital records. As an example, proposed legislation permitting abortion in cases of conception resulting from rape or incest has now been proposed. Assuming this type of operation were legal, the availability of hospital records in many cases, would result in disclosures which might be seriously opposed by the individual. One way of avoiding this would be for a doctor to perform such operations in the privacy of his office. This, however, is not desirable since it causes a patient to accept less satisfactory medical facilities in order to preserve secrecy. If the patient-physician privilege is worth creating, it deserves better treatment than that given in the proposed rules. Under the proposed rules, the patient may be mislead or deluded into thinking his communications to and from his doctor are privileged. Whereas, the many exceptions plus availability of the hospital records will make this a delusion in many instances. Moreover, the proposed rules do not show that careful consideration was given to more advanced and modern forms of medical treatment now practiced in many localities. For example, who is a doctor or physician under the proposed rules? In a clinic of doctors is the communication to or information obtained by laboratory technicians who take an X-ray, urine analysis, blood sample or medical history to be protected? In many aspects the modern physician practices in a manner that poses problems very similar to the ones posed in the attorneys work product situations. Again, what of the situation when the patient contracts for the services of a group of doctor-specialists like those employed by the Kaiser Foundation Medical Center. Are the communications to any doctor assigned him privileged? Are the records of the foundation and treatments given to him to be privileged? Similarly, are patients of a county hospital or state hospital who

are assigned to a resident staff doctor, without choice on the part of the patient, to be afforded the privilege? Are other governmental agencies such as the police, law enforcement officials, public health officials, officials responsible for preparing budgets, ordering supplies or other duties in connection with governmental administration to have access to such records? Since such records are kept by a public body, are they public records? These situations are present and acute and have important bearings on the question of the Patient-Physician relationship and merit further careful inquiry by the commission.

Time has not permitted an analysis of the provisions concerning privileges for the marital communications, Priest-Penitent relationship, Religious Belief, Political Votes, Trade Secrets, or Secrets of State, Communications to Grand Juries, or Identity of Informers.

Rule 37 subdivision (2) covering the waiver of privilege protects the communication privileged as to two parties, e.g., marital communication where the privilege has been waived or disclosed by one of the holders. For example in a disciplinary proceeding before a local administrative committee of the State Bar Association, I, an investigator, states that W, the divorced wife of H., the attorney being investigated, told I that on New Years Eve, 1965, that H told her he was going to raise the bonuses paid to Mr. A & Mr. B because they had done such a good job in chasing ambulances for him in 1964. Under the waiver clause, H could still claim the privilege. This seems desirable and particularly appropriate in view of the freedom with which hearsay evidence may be admitted in non-judicial proceedings.

The proposal to broaden the language for the official information

privilege does not seem wise. As proposed, any official of any public body, City Planning Commission, City Council, regulatory agency, school district or other governmental entity may refuse to give information where the disclosure is against public interest. Considering the number of cities, counties and special districts, there probably are thousands of administrative proceedings, which will never be reviewed by a judge in a court-of-law. In such proceedings many public employees may adopt the position that the detailing of certain information would be against the public interest. As drafted, this extension seems too broad and too important to be made casually. Perhaps, the policy behind the extension should be re-examined or, if not, at least more definitive lines of guidance adopted than the broad sweep comprehended by the term "public interest".

Although the proposed rules attempt to protect the rights of privilege holders by allowing a judge to claim the privilege where the holder or holders of the privilege are absent, and prohibiting punishment for contempt in any non-judicial proceeding where a party claims the privilege, the greatest weakness of the proposed rules lies in its failure to protect the privilege in out of court situations where the parties most interested are not present to claim the privilege.

For example, if a discharged secretary from a law office appears before a local planning hearing on a contact over proposed zoning, she could be sworn and give testimony concerning communications between an attorney and a client-builder without either of the latter two individuals being aware of her being called to testify. Similarly, a retired employee in a discovery deposition in a suit to which his former employer is not

a party may be asked questions and give answers revealing trade secrets of his former employer. Countless examples could be hypothicated where none of the parties vitally interested in claiming the privilege are present and, consequently, the privilege violated. It would seem advisable that the rules set up standards particularly applicable to presiding officers in non-judicial proceedings, where subpoenas may be issued or sworn testimony taken, detailing the procedures to be followed where situations arise involving privileges of persons not present nor represented. Moreover, the commission could explore the possibility of imposing a mandatory duty on lawyers to refrain from violating privileges belonging to absentee parties in discovery proceedings and other non-judicial proceedings in which a lawyer participates either as an advocate or as a member of the decision making body.

Another broad area where further study should be made is the conflict between the concept of privilege and that of records kept in fields of public financed services given to individuals. How far are the files and records on an individual of public defenders, county hospitals, state institutions, to be made accessible to the public? Are other governmental agencies or employees such as law enforcement officials, welfare officials, legislators, to have access to such records? Answers to these questions are essential when considering privileges and further consideration of such problems is merited.

Finally, the physicians, psychologists and lawyers in many locations are tending to utilize the services of specialized personnel--lay and professional. One law firm in Northern California openly acknowledges it has an association with an outstanding medical authority for advice on

personal injury actions handled by it. Association between attorneys and C.P.A.s, Engineers, Appraisers is becoming more common in different specialties. The form of clinic practice engaged in by many physicians, psychiatrists, psychologists and resulting use of lay specialists has already been mentioned. This whole area is complex and many problems with regard to communications, definitions of what are communications, diagnosis and opinions based on experience and research, the availability of records or reports based in whole or in part on information obtained from communications and research undertaken as a result of communications merit careful study.

The policies which have led to the establishment of privileges in our law of evidence are generally deep rooted and have been popularly accepted and understood. Generally, narrowing the scope of such privileges should be avoided. Rather, their extension into non-judicial proceedings should be encouraged because the soundness of the policies which led to their adaptation in courts of law are equally applicable to non-judicial proceedings. In those fields where a modern trend of specialized services performed by professional and lay personnel have supplanted the older personal individual to individual relationship, proposed changes in the rules of evidence should be proposed and made only after actively publicizing the changes and soliciting and obtaining the comments of those individuals, doctors, psychiatrists and lawyers, whose practice has adapted to the trend and who are daily brought into contact with the problems

involving privileges under modern practices for treatment or rendering services to clients.

DATED: November 7, 1963

/s/ Robert P. McNamee
Robert P. McNamee
Deputy County Counsel
County of Santa Clara

RPM:blm
11/7/63

EXHIBIT VI

Office of
DISTRICT ATTORNEY
Alameda County
Court House
Oakland 12, California
Highgate 4-0507

November 1, 1963

Mr. Spencer Williams
County Counsel
County of Santa Clara
70 West Rosa Street, Civic Center
San Jose 10, California

Dear Sir:

We have reviewed the proposed changes of the Law Revision Commission as they relate to privileges in Article 5. We are primarily concerned over the newly conceived psychotherapist-patient privilege. If adopted, this rule would appear to prevent the prosecution from obtaining or presenting psychiatric evidence of its own in any criminal proceeding.

Under Rule 27.5, the patient, as holder of the privilege, may prevent any psychotherapist (as defined) from disclosing any information, including that obtained by examination, from a patient who consults or submits to an examination for the purpose of securing a diagnosis or for treatment. It is thus apparent that any diagnosis or admission of a defendant which is opposed to the interest of the defendant may be kept out of evidence unless the Court has appointed the psychiatrist. There are many cases where psychiatric testimony is utilized without the necessity of a plea which requires the appointment of psychiatrists by the Court. The obvious, and most common, situation is the type of psychiatric testimony introduced under the rule of Peo. v. Wells, 33 Cal. 2d 330, and Peo. v. Gorshen, 51 Cal. 2d 716.

The only possible way, in this type of case, for the prosecution to present psychiatric evidence which contradicts the defense psychiatrist is by a prosecution-obtained expert witness. Once the defendant is represented by counsel, he can refuse to cooperate in any examination whether the Court appoints a psychiatrist or not. In this county we routinely obtain psychiatric examinations of suspects in homicide cases

as a part of our investigation before any charges are made. If this privilege is adopted, we will not be able to use this evidence for any purpose if the defendant chooses to prevent it.

The result will be that in every murder trial, the defendant will be allowed to call psychiatrists to testify as to his state of mind within the Wells-Gorshen concepts, and the prosecution will not be able to rebut their testimony even though it has such evidence available. The defendant can obtain all the psychiatric reports by discovery and if he doesn't like the results, he exercises his privilege. This completely illogical and unfair advantage in the truth-seeking process can hardly be justified in the name of good medicine.

The same result would obtain in 288 trials where expert evidence is offered under Peo. v. Jones, 42 Cal. 2d 219. Again, the defendant can arbitrarily prevent the introduction of any psychiatric evidence contra to his position. In addition to these situations, which are essentially rebuttal questions from the prosecution standpoint, the new rule would keep out other currently admissible evidence from the prosecution's case in chief. The psychiatric evidence admitted as part of the case in chief in Peo. v. Nash, 52 Cal. 2d 36, as well as that used in penalty phase prosecutions under Penal Code Sec. 190.1, e.g., Peo. v. Bickley, 57 Cal. 2d 788, would become inadmissible whenever the defendant desired to keep it out.

It should be readily apparent to anyone familiar with criminal trials that psychiatrists very frequently disagree in their opinions. We have had murder trials where as many as six psychiatrists testified on the question of legal sanity, splitting on yes or no, but having no agreement at all on the diagnosis which supported the opinion, and as a sort of piece de resistance, it turned out that all six were wrong when the defendant was given a physiological examination, including an electro-encephalogram, upon reaching State Prison.

Even where the psychiatrists are court-appointed, it is not at all uncommon that the Court must appoint a tie-breaker when the first two appointed disagree. Suffice it to say, psychiatry is not an exact science and we cannot permit a situation where both sides are not permitted a full and fair trial on such important issues.

It should be observed that this rule gives the defendant an absolute right to the introduction of ONLY that evidence supportive of his side. The defendant may obtain as many psychiatric examinations as he wants and even though the opinions obtained by himself are overwhelmingly opposed to his position, the only opinion the jury may hear is the favorable one he selects. There are no other situations where the defendant may so shop for an expert.

As to the court-appointed situations, the problem is not so acute but is still a problem. In this instance, the prosecution would be bound by the selection of the trial judge. We have had a recent case where both court-appointed psychiatrists rendered opinions that the defendant charged with murder was legally insane. We had obtained an opinion contra to this from a psychiatrist who had examined the defendant at the time of his arrest; with this opinion we were able to obtain a neurological examination of the defendant and demonstrate effectively that the basis of the opinions of the court-appointed psychiatrists was wrong. We could not expect such a result if the privilege were in existence.

In accord with modern penology, some of our police departments have psychiatrists available for all cases where it is felt advisable. In such instances, it is obvious that the psychiatrist is not going to treat the man he examines but that the examination will be used to enable the department to intelligently evaluate the suspect. The purpose is diagnosis to assist the police, the prosecution, the courts, the defendant. We can hardly expect a police department to obtain such information if it cannot be used in court.

This privilege is not the only proposal on the horizon of psychiatry and the law. There is a good deal of talk of doing away with the M'Naghten rule and replacing it with a rule, yet unagreed upon, which will tremendously increase the area of "legal insanity". All of the proposed substitutes for M'Naghten, place much more emphasis on mental state and augur vast increases in the use of psychiatric testimony at trial. A criminal trial structure which has the broadest possible area of relief from criminal sanctions and responsibility, based upon psychiatric opinion, and which simultaneously prevents the People from obtaining psychiatric evidence is almost

inconceivable, and yet is precisely what California will have if the currently proposed legislation in these areas is adopted.

The adoption of the privilege is apparently justified by the Commission by "several reports indicating that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under present law". Initially, one may wonder by what mystic process these persons who protected the confidentiality of their communications were also diagnosed as being in need of treatment. In any event, it is apparent that the Commission is talking about that rapport which the psychiatrist says he needs for treatment. The need in the criminal trial is not treatmental but rather, diagnostic. Surely the psychiatrist will not maintain that he cannot accurately diagnose mental illness within the definitions of law unless he has the peculiar rapport supposed to be obtained by confidentiality. Even the Commission recognizes the accuracy of his diagnosis where it operates to acquit. Rule 27.5, (3) (J). But apparently, confidentiality is more important than truth where the man who talked to the psychiatrist stands trial himself.

In summary, this proposed privilege would be extremely unfair to the prosecution, and the concept of a fair trial, without any substantial medical justification.

We would also raise a question as to Rule 34 and Rule 36 as they apply to official information and the identity of informants. It appears that these rules would penalize the State in each instance that the privilege was validly exercised. The effect is to destroy the utility of the privilege. In essence, it appears that the Rules amount to a codification of the rule in Priestly v. Superior Court, 50 Cal. 2d 812. There is, of course, proposed legislation pending which would operate to relieve some of the burdens imposed on the prosecution by Priestly. The proposed Rules will enact and broaden Priestly, if anything.

The Commission indicates that the current California law already imposes this penalty on the State when they claim the privilege. This is not true, at least in one important instance. In People v. Keener, 55 Cal.2nd 714, a search warrant was obtained based on an affidavit reciting information from an

unnamed reliable informant. The prosecution was allowed to claim the privilege without having the search warrant thrown out. It would appear that under Rule 36 either at the time of issuance of the warrant by the judge or during a proceeding under Penal Code Secs. 1539 and 1540, if the People claim the privilege the search warrant would be thrown out. In this respect, then, Rule 36 would reverse current California law.

The Commission proposal in reference to the Attorney-Client privilege also appears to cut back on the developing area of discovery by the prosecution. Under the Commission definition of "confidential communication" it would appear that any report of an expert obtained by the defendant after being represented by counsel would be a privileged communication. The law in reference to discovery of such reports by the prosecution is not wholly clear at the present time but should the proposed rule be adopted it would more than likely end any discovery of these reports by the prosecution. In view of the fact that we have not yet reached the outer limits of discovery by the defense, we should try to preserve at least some prosecution discovery.

We hope these comments may be of some help and appreciate the opportunity to express them. These are in hurried form and if there will be future time available, I am sure we can offer more considered comment. Please let us know if we can be of any assistance in the future.

Very truly yours,

J. F. COAKLEY
District Attorney

By
D. Lowell Jensen

Deputy

DLJ:CA

Memo. 63-57 EXHIBIT VII

COMMENTS ON PRIVILEGES ARTICLE OF THE UNIFORM RULES OF EVIDENCE
[Prepared by office of County Counsel - San Bernardino County]

Present California law regarding evidence states what evidence is admissible. For example C.C.P. 1845 provides that a witness can testify of those facts only which he knows of his own knowledge. . . C.C.P. 1850 provides that declarations in res gestae are admissible; etc. The Uniform Rules of Evidence provide that "all relevant evidence is admissible" except "as otherwise provided in these rules" (meaning the rules contained in the Uniform Rules of Evidence, hereafter referred to as the URE). This difference in approach appears to have little effect upon the rules of privilege since present California law, and the URE are rules of exclusion of relevant evidence.* Nevertheless, the difference in approach just referred to (rule of inclusion versus rule of exclusion) is important for the following reason. The URE cannot be adopted without repealing the present code provisions regarding evidence, almost all of which are inconsistent with the URE, and the URE applies only to court proceedings. Adoption of the URE and repeal of the present code provisions would leave no rules of evidence applicable to administrative, legislative, and executive proceedings.**

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* The basic rules of exclusion are stated in the same general manner in the URE as in C.C.P. 1881: A (certain type of) witness cannot be examined as to (certain) facts. However the URE provides, in addition, that certain evidence is inadmissible, thereby preventing its use even when the person with the privilege is absent or does not assert his privilege.

** This statement is subject to qualification in that the new rules on privilege would be applicable in some, but not all, administrative hearings. Government code section 11513 provides that in proceedings conducted under the terms of the Administrative Procedure Act the rules of privilege would be the same as "they now are or hereafter may be recognized in civil action." The Administrative Procedure Act does not apply to all state agencies nor, for example, to a local civil service board.

There are two possibilities: to repeal the present statutes on evidence only insofar as they affect court proceedings, or to provide in the URE itself what rules shall be applicable to proceedings other than court proceedings. Obviously the latter alternative is the more desirable. It avoids two sets of rules of evidence; it allows to non-court proceedings the advantages of clarifying the law (which is a major objective in adopting the URE); it still permits a relaxation of certain rules of evidence (like the hearsay exclusion) in informal proceedings. The latter alternative has been adopted in the preliminary draft of the California Law Revision Commission regarding the article on privileges. "Proceeding" is defined, for the purpose of that article, as "any action, hearing, investigation, inquest, or inquiry, whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body or any other person authorized by law to do so, in which testimony can be compelled to be given." In other words, the rules of privilege will apply to all proceedings. Quite likely the hearsay rule will apply to court proceedings only, or to a limited extent, in certain other specified proceedings. It is assumed that if the URE is adopted, it will be adopted with most of the modifications recommended by the California Law Revision Commission. Consequently these comments will be directed primarily to the URE as modified or revised by the Commission's recommendations. The URE as revised will be referred to as the RURE.

Following is a commentary, by sections or rules of the RURE, with emphasis on provisions which make substantial changes in substantive law or which would have a greater effect upon public bodies, especially counties, than on private individuals or corporations. Since there is no

assurance that the legislature would adopt any particular RURE rule rather than the corresponding URE rule, reference will occasionally be made to the URE.

22.3 DEFINITIONS
[Text of Rule omitted.]

The definition of proceedings is broad enough, when combined with rule 22.5 to make the rules of privilege applicable to every conceivable type of proceeding in which a person might be compelled to testify. Present California law is uncertain in this respect. Some privileges, such as the newsmen's privilege, are made expressly applicable to "a court, the legislature, or any administrative body," Government code section 11513 incorporates in administrative proceedings conducted under the Administrative Procedure Act the rules of privilege applicable to civil actions. The lawyer-client privilege was recognized in a grand jury proceeding (considered not judicial in nature) by a 1915 case. Quite likely the court would hold that the same rules of privilege should be followed in all proceedings but the RURE expressly makes it so. Other changes in definitions from the URE are for the purpose of making the language more consistent with California's other code sections - like substituting "defendant" for "accused". The definition section contains no important change in substantive law.

22.5 SCOPE OF THE PRIVILEGES ARTICLE
[Text of Rule omitted.]

This rule was commented upon in the discussion of rule 22.3.

23 PRIVILEGE OF DEFENDANT IN CRIMINAL ACTION
[Text of Rule omitted.]

This privilege not to be called at all as a witness is different from Rule 25 which gives a witness the privilege not to testify regarding matters which would incriminate him. The first paragraph is just a restatement of present law. Probably the second paragraph is also, although there are no California appellate cases in which the defendant was required to do more than stand for identification.

23.5 PRIVILEGE NOT TO TESTIFY AGAINST SPOUSE
[Text of Rule omitted.]

This section constitutes a major change in substantive law. There is no such provision in the URE. This proposed section is a compromise between present California law and dropping the privilege altogether. The "privilege" dealt with here is the dual privilege not to be called as a witness and not to testify. The marital communications privilege is an entirely different matter and is contained in Rule 28. Present California law (C.C.P. 1881 (1) & P.C. 1322) provides that a married person has a privilege, subject to certain exceptions, not to have his spouse testify for or against him in a civil or criminal action to which he is a party. P.C. 1322 also gives his spouse a privilege not to testify for or against him in a criminal action.

The RURE abolishes the right to refuse to testify <u>for</u> the other. The justification is said to be that refusal to testify for a spouse would probably be for mercenary or spiteful motives and could preclude access to evidence which might save an innocent person from conviction.

The RURE also abolishes the right of a party to prevent his spouse from testifying. The privilege not to testify is the witness's. An example was given of a man who murdered his wife's mother and sister and probably would have murdered his wife if she had not fled. The marital relationship was thoroughly shattered; yet, under present California law, the defendant was entitled to prevent his wife from testifying against him. The theory behind the proposed change is that the spouse testifying can determine what effect the testimony will have on the marriage relationship and can also determine whether that relationship is worth saving. The party spouse would be too concerned with the outcome of the action or proceeding to view the marriage relationship objectively.

Nevertheless, the proposed change seems impractical for at least two reasons. First, consider the case where the husband is a party and his wife does not want to testify. If he wishes, the husband may call her to testify for him - and when he does, the other side can call her. Though the privilege not to testify supposedly is the wife's privilege, as a practical matter the husband has the last word.

Second, consider the case where the wife does not wish to testify and the husband also does not want her to testify. The opposing party calls the wife to the stand. Already this is a violation of her privilege, under paragraph 2, but what can be done about it? The opposing party commences her examination, she asserts her privilege, but it is erroneously overruled. The judge orders her to answer the questions, and the wife complies. The husband has no recourse and no grounds for appeal. It was not his privilege that was violated. Rule 40 of the URE provides: "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege." The RURE omits this provision since it merely states the existing California law which will remain in effect if Rule 40 is not adopted.

There is a minor m tter of clumsy wording. Frequently in the RURE there is a positive statement followed by inconsistent statements. For example: "(1) A married person has a privilege not to testify against the other spouse in any proceeding except..." (all exceptions purportedly covered by subparagraphs a,b,c, and d). (3) "A witness who testifies in an action or proceeding with respect to a matter does not have the privilege under this rule to disclose in such action or proceeding anything relevant to that matter." "There is no privilege under this rule..." (under other circumstances)

It is suggested that subdivision (1) be modified to provide "Subject to the provisions of this rule, a married person has a privilege..."

From the point of view of law enforcement officers, rule 23.5 is an improvement over present California law. It permits the wife to testify against the husband when she wants to (assuming that the husband is the defendant), and it prevents violations of the wife's privilege (unintentional or otherwise) from being reversible error by the defendant.

24 DEFINITION OF INCRIMINATION
[Text of Rule omitted]

The definitions themselves, apparently make only one change in the substantive law. They make it clear that a matter is incriminating if it subjects the witness to prosecution by the State of California or by the United States. Paragraphs 2 and 3 make it clear that a matter is not incriminating when the witness has been granted immunity from conviction or when the statute of limitations has run-provided that he will be immune from conviction by both the United States and the State of California. The URE rule is not explicit as to whether the witness must disclose other links in the chain of evidence in order to invoke the claim of privilege. The RURE rule indicates that such disclosure is not necessary if other matters in evidence or disclosed in argument, the implications of the question, or the setting in which it is asked convince the judge that the answer sought would be incriminating.[1]

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1 Law enforcement could be affected by the fact that the states would not be able to compel a witness to testify by granting immunity from prosecution by the state when the witness would be subject to prosecution by the federal government.

25 SELF-INCRIMINATION: EXCEPTIONS.
[Text of Rule omitted.]

This rule sets forth the basic provision against self-incrimination contained in Article 1, section 13 of the California constitution. It then contains exceptions, qualifications and explanations, most of which have been developed by case law. Paragraph 1, states that in court proceeding the judge may overrule the claim of privilege. (Rule 37.7 provides that no person may be held in contempt for failure to disclose information claimed to be privileged until a court has determined that the matter is not privileged).

Paragraphs 2, 3 and 4 can be best considered as a group. "(2) No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition. (3) No person has the privilege to refuse to demonstrate his identifying characteristics such, for example, his handwriting, the sound of his voice and manner of speaking or his manner of walking or running. (4) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis."

These provisions are probably just a restatement of present law. Wigmore believes that the right against self-incrimination merely means the right not to have an admission of guilt extracted from the accused's own lips.

Does paragraph 4 violate the state or federal constitution? The ruling in the Rochin case was not based on the privilege against self-incrimination; but on unlawful search and seizure. Consequently the right to take a blood sample, a breath sample, or a urine sample stands on a different

footing from the supposed right to pump another's stomach, and no constitutional problems appear to be involved. (As partial authority for this statement, see People v. Duroncelay 48 C 2d 766). There is a strong dicta to the effect that a defendant could not be compelled to cooperate in the taking of a mental examination to determine his sanity* (or presumably sexual psycopathy). Whether these three paragraphs are a restatement or a change of the present law they seem desirable, provided that court does not decide that compulsion to submit to an examination of mental condition violates the defendant's constitutional rights.

Paragraphs 5 and 6 provide that when a person is a custodian or in possession of evidence (normally this would be books or records) which does not belong to him, he cannot refuse to produce it on the ground of self-incrimination. This is supposed to be a codification of present case law, although the new law may be more far-reaching.

An example given in the study by the California Law Revision Commission is as follows: D is on trial, charged with larceny of a watch, the property of A. The prosecution moves for an order requiring D to produce the watch for use as evidence against him. In support of the motion, the prosecution has A testify that A owns the watch and that D stole it from A. On the basis of this testimony, the court makes an order directing D to produce the watch. D. has no privilege to refuse to produce the watch even though it constitutes matter incriminating him.

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* People v. Strong 114 C.A. 522 (1931) states that if the defendant submits to an examination, the action is purely voluntary. The suggestion is that otherwise his constitutional right would be violated.

Paragraph 7 states that the defendant may be cross-examined as to all matters about which he was examined in chief. The URE would provide that the defendant completely waives his privilege against self-incrimination by testifying at all. Unlimited cross examination and automatic waiver of the privilege were considered to be in violation of the California constitution. Aside from constitutional problems, the RURE rule appears more logical and fair. It is a restatement of present law

Paragraph 8 provides that witnesses other than the defendant in a criminal action, upon waiving or failing to assert the privilege against incrimination cannot suddenly assert it in the middle of their testimony. Once they have testified regarding a matter when they could have claimed the privilege, they must answer all relevant questions pertaining to the matter. Cross-examination would not be restricted to the matter testified to on direct.

Whether the rule as a whole restates the present law or modifies it cannot be determined with certainty. It is difficult to see how it could have any adverse effect upon public bodies or law enforcement.

26 LAWYER-CLIENT PRIVILEGE
[Text of Rule omitted]

For the most part, this rule codifies the present case law. However, the RURE makes the following important changes;

(a) The eavesdropper rule is changed. If the communication was confidential, no one can testify regarding the communication. In that respect the attorney's secretary, the appraiser or doctor consulted by the attorney on the client's behalf, and an ordinary eavesdropper are placed in the same category. One justification given for the change in the eavesdropper rule (also applicable to other confidential communications) is the development

of electronic listening devices which make it more difficult than formerly to prevent eavesdropping.

(b) Present law (C.C.P. 1881-2) makes it appear that the secretary, clerk or stenographer of an attorney cannot be examined as to a confidential communication without the attorney's permission. RURE makes it clear that the privilege is the client's, and only the client can waive it. Furthermore, if he does waive the privilege, the attorney cannot assert it.

(c) According to present law, it is generally believed, that the presence of a third party, other than one of the attorney's employees, at the consultation between the attorney and the client destroys the privilege. The RURE defines "confidential communication" in such a way as to allow the presence of third persons who are present to further the interest of the client in the consultation or who are reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. This surely permits an expert to sit in or an employee of the client who has factual information at his disposal. Would this cover the neighbor woman who so frequently accompanies the wife seeking a divorce on her first trip to the attorney's office? Probably it would. While the neighbor's primary purpose is to lend moral support, she may serve a useful purpose by relating additional facts of her own knowledge and offering to corroborate portions of the wife's testimony.

(d) Explicit provisions are made as to who the holder of the privilege is in case of guardianship, termination of guardianship, death, etc. Also the privilege does not apply to an issue between parties who claim through a deceased client. Present law makes no provision for the transfer of the privilege, and in some circumstances (like death of client) it is doubtful

whether anyone can waive the privilege - even when no harm could result from disclosing the information and when it could be crucial in determining the rights of persons claiming through the deceased client.

(e) The lawyer-client privilege applies when the client reasonably believes that the "lawyer" is licensed to practice law - regardless of whether he is actually authorized to do so.

While these are several very important changes in the RURE lawyer- client privilege, as well as a codification of present law, the changes all seem desirable. Furthermore, with the possible exception of the controversial change in the eavesdropper rule, none would have an adverse effect upon public bodies or law enforcement.

27 PHYSICIAN-PATIENT PRIVILEGE
[Text of Rule omitted.]

In many respects, the RURE rules on the physician-patient privilege are similar to the rules on the lawyer-client privilege. For example, the definitions of "confidential communication" and "holder of the privilege" are substantially the same. Both rules treat the person reasonably believed to be authorized to practice law or medicine on the same basis as a person actually authorized. Both rules exclude the testimony of eavesdroppers. Both rules make the personal representative, rather than surviving spouse, children or guardian of children, the holder of the privilege upon the death of the patient, or the guardian or conservator when he is incompetent. This makes it possible for someone to waive the privilege when it is desirable to do so, and when no privilege-holder is left (after estate is distributed and personal representative discharged), the privilege expires. The RURE contains a sensible and desirable change over present law. When the doctor is required by law to report information to a public official, to be made a public record,

the privilege does not apply. It is more sensible to let the doctor testify to a fact directly rather than to subpoena the public records, which the very doctor on the stand may have prepared. Another difference from the lawyer-client privilege is that a plan to commit a crime or a tort is not privileged on the theory that discussion of such matters with a doctor is neither customary nor required to obtain treatment.

There are other minor changes. According to present law, a litigant seeking to recover for personal injuries waives the privilege. The RURE provides that in an action by a parent for injuries to a child, or in a wrongful death action, the privilege again is waived. This provision causes the same treatment in similar cases rather than having different results depending upon the plaintiff named.

For the most part, rule 27 is a restatement of present law. Other than the change in the eavesdropper rule, it contains nothing objectionable to counties or law enforcement.

27.5 PSYCHOTHERAPIST-PATIENT PRIVILEGE
[Text of Rule omitted.]

According to present law, there are two sets of rules applicable, depending upon whether the psychotherapist is a psychiatrist or a psychologist. This is an arbitrary distinction since in both cases the treatment may be exactly the same. The patient is urged to reveal his innermost thoughts (possibly with drugs or hypnotism to overcome all inhibitions), and his willingness to do so is essential to successful treatment. The law now gives the patient consulting a psychologist the lawyer-client privilege which is reasonably appropriate. However this has occasionally caused difficulty when the psychologist's testimony was needed - for example, in guardianship proceedings or when the psychologist was appointed by the court for the

purpose of examining the patient and testifying. Present law gives the patient consulting a psychiatrist or other medical doctor only the physician-patient privilege, which is much too narrow. For example, the latter privilege does not apply in criminal proceedings. The RURE will give the patient the same privilege whether he is consulting a psychologist, a psychiatrist, an ordinary medical doctor or a person reasonably believed to be some kind of medical doctor, provided that the consultation or examination is for the diagnosis or treatment of a mental or emotional condition. Note that the privilege does not exist merely because the patient reasonably believes the psychotherapist was a psychologist when he is, in fact, neither an M.D. nor a psychologist. This provision seems odd and inconsistent, but there is a policy reason for this distinction. Many persons such as palm readers, mindreaders, hypnotists, meta-physicians, practitioners of unorthodox religions, and marriage counselors hold themselves out to the public as psychologists.

Consequently, unless the patient believes the psychotherapist is a medical doctor, he acts at his peril if he does not make certain that he is a psychologist, licensed under Chapter 6.6 of Division 2 of the Business and Professions Code. It is not the policy of the law to encourage a confidential relationship between a patient and a quack, and there would be many practical problems if the privilege were to exist merely because the patient thought that he was consulting a psychologist.

The psychotherapist-patient privilege given by the RURE is quite similar to the lawyer-client privilege. The provisions regarding the holder of the privilege, eavesdropping, what a confidential communication consists of, etc. are substantially the same. The exceptions to the privilege follow similar lines but there are additional exceptions resulting from the different nature of the relationship.

(f) In an action brought by or on behalf of the patient in which the patient seeks to establish his competence.

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

(i) As to any information which the psychotherapist or the 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.

(j) As to evidence offered by the defendant in a criminal action or proceeding.

Sub-paragraphs (f), (g), (h) and (i) are self-explanatory. It would seem that (f) is superfluous since such a proceeding would fall under category (g). The purpose for sub-paragraph (j) is one that might easily be overlooked from a casual reading. The patient can waive the privilege, so (j) would not be necessary to authorize the defendant to call his own psychotherapist as a witness. The purpose is to allow a defendant other than the patient to do so. If D is being tried for the murder of X, D may call P, a psychotherapist, and force him to testify that A admitted to him that he, A, killed X. At least that is the justification given with the preliminary

draft of the RURE. The theory is that P's testimony will be admissible under the new hearsay rules (63-10) a declaration against penal interest. QUERY: Would this really be a declaration against penal interest? Would it subject him to criminal liability or make him an object of hatred, ridicule or social disapproval in the community? The fact that the declaration would be confidential and could not be used aginst A would seem to prevent such a declaration from falling within this exception to hearsay rule. A, could make such a statement as a favor to D at no risk to himself. A, could not be cross-examined, since P is the witness, nor could A be compelled to testify because of the privilege against self-incrimination. This would be an extremely unreliable type of hearsay. It would encourage collusion and dishonesty. Such testimony might create a reasonable doubt in jurors' minds regarding the guilt of D. Since paragraph (J) does not, itself, make such . . . . evidence admissible over a hearsay objection, this subparagraph might be considered innocuous and disregarded. However, since its purpose is to permit such testimony, as indicated by the preliminary draft, a court might be persuaded to take the same view on the hearsay objection as the Law Revision Commission. Therefore, it is desirable to have (J) eliminated from the proposed rules. Otherwise rule 27.5 contains nothing objectionable to counties or law enforcement.

28 MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS
[Text of Rule omitted.]

The same new provision for excluding the testimony of eavesdroppers is contained in this rule as elsewhere in this chapter. The provisions regarding "holder of the privilege" are much less elaborate than under the lawyer-client, physician-patient, or psychotherapist-patient privilege and the privilege of each spouse terminates upon his death. The URE provided that the privilege would terminate upon the dissolution of the marriage, but the RURE changed the proposed rule to make it the same as present California law.

An important change from present law is that C.C.P. 1881 gives the privilege only to the non-testifying spouse. The wording is "Nor can either ... be, without the consent of the other, examined as to any communication..." The witness spouse has no privilege to refuse to testify.[1] The RURE gives the privilege against disclosure to both spouses.[2]

The URE rule, giving the privilege only to the spouse who transmitted the communication was not followed in the RURE. The RURE follows present California law in this respect, and it is more logical. If the husband could only object to the admission of his own statements, but could not prevent the admission of his wife's statements, his half of the conversation could often be inferred.

1 At least that is the situation where the non-testifying spouse is a party and could be deemed to have given his consent by failure to object. A literal reading would indicate that when the witness's spouse was not present in court to give his consent, or had not previously given his consent to disclosure, the privilege could not be waived by the witness.

2 Also it is clear under the RURE that when W is a witness and W's spouse is not a party and does not claim the privilege, W may either waive or assert the privilege.

2(a), (b) and (c) are restatements of existing law. The exception for litigation between spouses 2(d) is recognized under existing law, but the RURE extend the exception to similar cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse. 2(e) and 2(f) are restatements of present law.

2(g) seems to introduce an inconsistency. Both spouses are supposed to have the privilege not to testify regarding confidential communications; yet this provision forces the witness spouse to testify at the will of the party spouse. The substance of Rule 28 is that if the party spouse desires that the testimony be admitted, it will be admitted. This inconsistency is similar to the inconsistency contained in Rule 23.5 (privilege not to testify against spouse). The former rule purportedly gave the privilege not to testify to the witness spouse, but he could be compelled to testify by the party spouse. In other words the difference between the two rules is as follows: In both cases the witness spouse is supposed to have a privilege not to testify (or not to testify regarding certain matters). Under Rule 23.5 the witness spouse <u>cannot</u> be prevented from testifying if he wishes; under Rule 28 the party spouse <u>can</u> prevent the witness spouse from testifying (regarding confidential communications). In either case, if the party spouse wants the testimony, he can compel that it be given.

Sub-paragraph (h) restates present law. When the marital confidence is breached by a spouse, it is lost - at least partially lost. When a spouse tells another what was said in confidence, this other person cannot be prevented from testifying - assuming that there is no objection on the ground of hearsay. The hearsay objection would not apply, of course, when the tattle-tale spouse was a party or when an eavesdropper was listening to the

confidential conversation itself with the knowledge or consent of one of the spouses.

Paragraph 2(g) of this rule is objectionable for the same reason that paragraph 4 of Rule 23.5 is objectionable. However neither paragraph 2(g) nor any other part of Rule 28 is likely to have any adverse effect upon counties or law enforcement.

28.5 CONFIDENTIAL COMMUNICATIONS: BURDEN OF PROOF
[Text of Rule omitted.]

The rationale for this rule is that if the burden of proof were on the person claiming the privilege, in many cases he would be compelled to reveal the subject matter of the communication in order to establish his right to the privilege. Whether or not this is the present rule of law in California (and the Law Revision Commission apparently is in doubt about this), it seems desirable.

QUERY: Is there a conflict between proposal and the policy to admit all relevant evidence in ascertaining the truth?

29 PRIEST-PENITENT PRIVILEGE
[Text of Rule omitted.]

The only proposed change from present law is that the priest, as well as the penitent, is given the privilege not to testify regarding the penitential communication. This rule also provides that the penitent himself cannot be compelled to disclose the penitential communication, while C.C.P. 1881-3 merely provides that the priest cannot be examined without the consent of the penitent. However there is little doubt that if the cases were to be decided under present law, the court would hold that the penitent could not be forced to disclose the penitential communication. This result has been

consistently reached by the courts when other privileges have been asserted. This rule should have no effect upon counties or law enforcement.

30 RELIGIOUS BELIEF

The URE rule provided: "Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness." The rule has been entirely eliminated in the RURE because in People v. Copsey, 71 C 548 (1887) the Supreme Court held that evidence of a witness's religious belief (or lack of it) was incompetent for impeachment purposes. Since the URE rule would give the witness a privilege only when his credibility as a witness was an issue, and since present law states that his religious belief is incompetent anyway, even without a privilege, this rule was deemed unnecessary.

31 POLITICAL VOTE
[Text of Rule omitted.]

This rule simply codifies present law.

32 TRADE SECRET
[Text of Rule omitted.]

No statute and no case have explicitly recognized the trade secret privilege in California. However dicta has hinted that it exists, and indirect recognition of the privilege is afforded by C.C.P. 2019 which provides that in discovery proceedings the court may make protective orders prohibiting inquiry into "secret processes, developments or research." The case, which by dicta, suggested that the privilege exists, overruled the privilege because of plaintiff's need for the information to establish his case. (Watson v.

Superior Court 66 CA 275). So if the privilege is now recognized, it is subject to the exception about concealing a fraud or working an injustice. With this exception, the rule seems rather innocuous. In all probability, it does not change the present law.

33 SECRET OF STATE

The URE rule regarding federal secrets (military secrets or secrets relating to international relations or national security) has not been adopted by the RURE. Such secrets are adequately protected by federal law, which would prevail over any state laws whose coverage was less broad.

34 OFFICIAL INFORMATION
[Text of Rule omitted.]

Several changes have been made as compared to the URE rule in an attempt to make the rule a restatement of present California law. The URE gave the privilege of non-disclosure to any witness, and furthermore such evidence would be inadmissible. Thus, if a private litigant obtained knowledge of official information, he could refuse to disclose it even if the public entity did not wish to claim the privilege. The justification for such a rule is that the public entity might not be represented at the hearing and would have no opportunity to claim the privilege. Furthermore, the provision making such evidence inadmissible would give the party opposing disclosure a basis for appeal, thereby inducing the party seeking disclosure and the judge to be exceptionally careful so as not to risk prejudicial error. The general principle is that a litigant cannot complain if another's claim of privilege is erroneously overruled even though it is the litigant who is adversely affected by the disclosure.

That is the principle necessarily adopted by the RURE rule, which does not make the evidence inadmissible. However, Rule 36.5 states that the judge shall exclude, on his own motion, privileged information when the person entitled to the privilege is neither party nor witness - unless such person authorizes disclosure. The protection given by Rule 34 in conjunction with Rule 36.5 is much less complete than the protection given by the URE. Another difference is that if a person acquires official information by unauthorized means, no one has the privilege to withhold it. The rationale is that once the secret is lost, there is no purpose in trying to protect it. Nevertheless a situation might exist where both the witness and the public entity would desire to keep the official information secret, and there should be a way to prevent the widening of the leak.

Paragraph 2 provides that the privilege against disclosure automatically exists when disclosure is forbidden by an Act of Congress or a statute of this state, but in other cases, the judge has a discretion. He must weigh the public interest served by a non-disclosure against the interest of justice served by disclosure. The judge has considerable discretion in the latter case, but it is difficult to imagine any other way of handling the problem.

Paragraph 3 provides that in a criminal proceeding when the public entity asserts its privilege of non-disclosure, the judge shall make an order or finding of fact adverse to the people of the State upon any issue to which the privileged information is material. Some provision of this type is needed "since the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense." (<u>United States v</u>

Reynolds 345 US1) However, this provision goes too far. If this disclosure is forbidden by law, why should the state be penalized?

The situation is different from the case of an informer where the state can waive the privilege if it wishes, depending upon the importance of obtaining the conviction as compared to losing the future usefulness of the informer. A proposed modification is as follows: Take Rule 2A out of paragraph 2 and change it to provide: "Evidence shall be inadmissible when disclosure is forbidden by an Act of Congress of the United States or a statute of this State." Paragraph 3 would read: "If....the state.... refuses to disclose...on the ground that it is privileged under the provisions of paragraph 2..." In other words, information, disclosure of which state or federal law prohibits, would be inadmissible, and the public entity would not have to claim a privilege. Rule 3, pertaining to findings or rulings favorable to the defendant would only apply to cases in which the public entity had an option and elected to claim the privilege. Rule 34, as it now stands, would interfere with law enforcement and would constitute a temptation on the part of a public entity to violate the law regarding disclosure in order to avoid a miscarriage of justice. Furthermore this rule probably goes further than present law in giving a criminal defendant a type of windfall.

35 COMMUNICATIONS TO GRAND JURY

This provision of the URE has been omitted from the RURE, primarily because the URE rule gives protection to witnesses other than grand jurors.

36 IDENTITY OF INFORMER
[Text of Rule omitted.]

This rule is practically the same as Rule 34 concerning official information. Provision is made that when the privilege is invoked against a

defendant in a criminal case, he shall have all issues material to the matter not disclosed determined in his favor. Such a provision is logical here. This rule is intended to be a restatement of present law, and it should have no adverse effect upon counties or law enforcement.

36.5 CLAIM OF PRIVILEGE BY JUDGE
[Text of Rule omitted.]

This rule does not appear in the URE but is supposed to be declarative of existing law. The objection to this rule is that it does not state what the consequences will be when the judge fails to exclude such evidence. Can the party against whom it is admitted claim error? (See discussion of Rule 23.5). Or is this a rule with no teeth in it - a rule authorizing the judge to exclude evidence but giving no one an effective remedy if the evidence is admitted? It is suggested that the rule state either that such evidence is inadmissible or that the judge has a discretion to exclude it, and an abuse of discretion shall be constituted error against the person requesting its exclusion.

37 WAIVER OF PRIVILEGE
[Text of Rule omitted.]

URE Rule 37 applies to all privileges. RURE makes them applicable only to Rules 26 through 29. Rule 32 (Trade Secrets) has no waiver provision on the theory that once the "secret" is made known, it is no longer a secret. The other rules contain their own waiver provisions. Whatever changes in the URE which have been made by the Law Revision Commission were for the purpose of making the RURE a restatement of existing law. It seems logical that disclosure of privileged information to one's spouse, lawyer, priest, etc. should not be a waiver of the privilege. Paragraph 3 states this

principle explicitly, although the courts would probably reach the same result in the absence of this provision. The same is true of paragraph 4 -- that the court would probably reach the same result without it. This rule is of interest, not because it changes the law, but because it failed to adopt many of the provisions contained in the URE.

37.5 RULING ON CLAIM OF PRIVILEGE
[Text of Rule omitted.]

This rule does not appear in the URE. It is self-explanatory and is probably desirable. Although the draft of the law commission does not so indicate, it appears to be a departure from California law in allowing certain matters in an adversary proceeding to be communicated to the judge by a witness (quite likely accompanied by the attorney) from one side out of the hearing and presence of the other side. Does this violate a fundamental right, at least in criminal cases, by not allowing the "presence" of a party at all stages of the proceedings and the right to confront witnesses against him?

37.7 RULING UPON PRIVILEGED COMMUNICATIONS IN NONJUDICIAL PROCEEDINGS
[Text of Rule omitted.]

The rationale for this rule is that nonjudicial proceedings are often conducted by persons untrained in law. The commission's comments state that this rule does not apply to anybody - such as the Public Utilities Commission - that has constitutional power to impose punishment for contempt. Whether or not it is a restatement of present law, the law seems desirable.

38 ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED
[Text of Rule omitted.]

The negative implication is that such evidence is admissible against anyone except the holder of the privilege. In most cases, that is a

desirable principle. However critical comments have been made with regard to various sections where the witness rather than the party, is given a privilege and it would appear that the party would have no remedy in case of an erroneous ruling. The best example is the situation where one spouse is compelled to testify against the other. In this and other cases, the party has a legitimate interest in prohibiting disclosure, but the privilege is given to the witness for policy reasons. If the witness waives the privilege, the party has no right to object, but when the witness asserts the privilege and is nevertheless required to disclose information, it seems rather unfair to the party. Also it was suggested that a party be given a right to exclude privileged information when the holder of the privilege is not present at the proceeding to assert the privilege. Present rules allow (perhaps require) the judge to exclude it, but if the judge fails to do his duty, the party apparently has no remedy. Despite these comments, there is not objection to Rule 38 by itself. It is really the other rules that ought to be changed, to create exceptions to the general principle set forth in Rule 38.

39 REFERENCE TO EXERCISE OF PRIVILEGES
[Text of Rule omitted.]

The rule distinguishes between the exercise of a privilege and failure to produce evidence. In some cases it might be necessary for a party to waive a privilege in order to explain or deny testimony produced by the other party. Neverthless it is not the exercise of the privilege which may be commented upon but merely the party's failure to explain or deny unfavorable evidence. The URE rule said nothing about the right to comment on failure to explain or deny evidence, and perhaps such a provision is unnecessary. However, without such a provision, it might be inferred that

the right to comment did not exist,* and this provision removes any doubts.

40 EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

The URE rule provided: "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege." This rule has been omitted from the RURE on the ground that it is not a rule of evidence and only states the existing law which will remain in effect anyway.

[NEWSMEN'S PRIVILEGE]

The newsmen's privilege has been omitted from the RURE. This changes present law since the newsmen's privilege was extremely broad, applying to the Legislature or any administrative proceeding as well as a court. A majority of states do not have a newsmen's privilege, and it is usually not as broad as California's many legal scholars think that it is not justified. Also, there is a problem where to stop. Should the privilege of Time and Newsweek be different from that of a newspaper? Should a company newspaper be treated the same as a newspaper of general circulation? Where should the line be drawn?

Certainly the proposed change will not have an adverse effect upon counties or law enforcement.

* Except in criminal cases, in which the right to comment is given by the State Constitution.

Memo 63-57

EXHIBIT VIII.

Office of the Attorney General
Department of Justice
Library and Courts Building, Sacramento 14

November 29, 1963

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

Attention: John H. DeMoully
Executive Secretary

Dear Mr. DeMoully:

We have received your letter of November 15, 1963, requesting our comments with relation to the preliminary draft of a tentative recommendation relating to the Privileges Article of the Uniform Rules of Evidence.

We regret that due to the extremely heavy calendar of the criminal divisions of this office, we have been unable to complete an examination of this material and will be unable to forward you our comments by December 1st, but will endeavor to do it as soon as the court commitments will permit us.

Yours very truly,

STANLEY MOSK
Attorney General

DORIS H. MAIER
Assistant Attorney General

DHM/mjk

mtg.

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article V. Privileges

January 1964

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

Revised December 1, 1963

Approved for printing: December 31, 1963

LETTER OF TRANSMITTAL

To His Excellency, Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article V (Privileges) of the Uniform Rules of Evidence and the research study relating thereto. This report is one in a series of reports being prepared by the Commission, each report covering a different portion of the Uniform Rules of Evidence.

The major portion of the research study was prepared by the Commission's research consultant, Professor James H. Chadbourn of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

HERMAN F. SELVIN
Chairman

December 1963

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

Relating to

THE UNIFORM RULES OF EVIDENCE

Article V. Privileges

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article V of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 23 through 40, relates to privileges.

The word "privileges," within the meaning of Article V of the URE and this tentative recommendation, refers to the 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 action; or (2) an exemption from the duty to testify about certain specific matters--as in the case of the privilege that every person has to refuse to testify about incriminating matters; or (3) a right to keep another person from testifying

1 A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

concerning certain matters--such as the privilege of a client to prevent his lawyer from revealing the client's confidential communications.

Because privileges operate to withhold relevant information, they necessarily handicap the court or jury in its effort to reach a just result. Nevertheless, courts and legislatures have determined from time to time that it is so important to keep certain information confidential that the needs of justice should be sacrificed to that end. The investigation of truth and the dispensation of justice, however, demand restricting the privileges that are granted within the narrowest limits required by the purposes they serve; every step beyond these limits provides an obstacle to the administration of justice. On the other hand, when it is necessary to grant a privilege, the privilege granted must be broad enough to accomplish its purpose--it must not be subject to exceptions that strike at the very interest the privilege is created to protect.

Much of California's existing statutory law in regard to privileges is found in Section 1881 of the Code of Civil Procedure. This section sets forth the privileges arising out of the relationship of husband and wife, attorney and client, clergyman and confessor, and physician and patient. The section also sets forth the newsman's privilege with respect to his sources of information and the public officer's privilege in regard to confidential governmental information. Some of the remaining California law concerning privileges is found in the Constitution and in statutes scattered throughout the codes.

The statutory and constitutional provisions relating to privileges are incomplete and defective. Much of the law can be found only in judicial decisions. For example, the existing statutes make no mention of the many exceptions that exist to the lawyer-client privilege. Whether a particular exception exists in California can be determined in some instances only after hours of

painstaking research; in other instances, it cannot be determined at all for the case law on the subject is incomplete. Even in those areas covered by statute, the statutory language is frequently imprecise and confusing.

Moreover, the existing law is in some instances out of harmony with modern conditions. For example, the existing privileges have not protected against testimony by eavesdroppers because in an earlier day an individual could be expected to take precautions against others overhearing his confidential communications. With the development of electronic methods of eavesdropping, however, he can no longer assume that a few simple precautions will prevent others from overhearing his statements and, hence, consideration should be given to extending some privileges to protect against this danger. Then, too, existing law has not recognized the problems peculiar to the psychiatrist-patient relationship and the need for protecting the confidential communications made in the course of that relationship.

REVISION OF URE ARTICLE V

The Commission tentatively recommends that URE Article V, revised as hereinafter indicated, be enacted in California.[2] The substitution of detailed statutory rules relating to privileges for the existing statutory and court-made rules would eliminate much of the uncertainty that now exists. In the formulation of these detailed rules, anachronisms may be eliminated from the California law and the law may be brought into harmony with modern conditions.

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[2] The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

Although the Commission approves the general format of the rules on privilege contained in URE Article V, the Commission has concluded that many changes should be made in the rules. In some cases, the suggested changes go only to language. For example, in some instances, different language is used in different URE rules when, apparently, the same meaning is intended in the rules. The Commission has eliminated these unnecessary differences in order to assure uniformity of interpretation. In other cases, however, the changes proposed reflect a different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such instances, the rule proposed by the Commission provides a broader privilege than that proposed by the Commissioners on Uniform State Laws. In some cases, the tentative recommendation also provides a broader privilege than that provided by existing California law.

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Where language has merely been shifted from one part of a rule to another, however, the change has not been shown in strikeout and italics; only language changes are so indicated. The text of several additional rules tentatively recommended by the Commission but not included in the URE is shown in italics. Each rule is followed by a comment setting forth the major considerations that influenced the Commission in recommending important substantive changes in the rule or in the corresponding California law. For a detailed analysis of the various URE rules and the California law relating to privileges, see the research study beginning on page 301.

RULE 22.3- DEFINITIONS

As used in this article:

(1) "Civil proceeding" means any proceeding except a criminal proceeding.

(2) "Criminal proceeding" means an action or proceeding brought in a court by the people of the State of California, and initiated by complaint, indictment, information, or accusation, either to determine whether a person has committed a public offense and should be punished therefor or to determine whether a civil officer should be removed from office for wilful or corrupt misconduct, and includes any court proceeding ancillary thereto.

(3) "Disciplinary proceeding" means a proceeding brought by a public entity to determine whether a right, authority, license, or privilege, including the right or privilege to be employed by the public entity, should be revoked, suspended, terminated, limited, or conditioned, but does not include a criminal proceeding.

(4) "Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

(5) "Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law to do so) in which, pursuant to law, testimony can be compelled to be given.

(6) "Public employee" means an officer or employee of a public entity.

(7) "Public entity" means the United States, this State, or any public entity in this State.

(8) "Public entity in this State" means the Regents of the University of California, a county, city, district, public authority, public agency, or other political subdivision or public corporation in this State.

COMMENT

Because the revised privileges article applies in all proceedings of any kind in which testimony can be compelled by law to be given (see Revised Rule 22.5 and the Comment thereto), it is necessary to use terms that do not appear in the URE rules. These terms are defined in this rule. Certain terms used in connection with but one rule are defined in the rule using the term. Most of the definitions are self explanatory, but four of them deserve comment.

"Criminal proceeding." The definition of "criminal proceeding" closely follows the definition in Penal Code Section 683. The definition is broadened, however, so that it includes a proceeding by accusation for the removal of a public officer under Government Code Section 3060 et seq. The definition also includes ancillary proceedings, such as writ proceedings to test the sufficiency of the evidence underlying an indictment or information or to attack a judgment of conviction. These proceedings are included in the definition so that the rules of privilege in such proceedings will be the same as they are in the criminal action itself.

"Disciplinary proceeding." The definition of "disciplinary proceeding" follows the definition of the kind of proceeding initiated by accusation in Government Code Section 11503. The definition has been modified to make it clear that it covers not only license revocation and suspension proceedings, but also personnel disciplinary proceedings.

"Presiding officer." "Presiding officer" is defined so that reference may be made to the person who makes rulings on questions of privilege in nonjudicial proceedings. The term includes arbitrators, hearing officers,

referees, and any other person who is authorized to make rulings on claims of privilege. It, of course, includes the judge or other person presiding in a judicial proceeding.

"Proceeding." "Proceeding" is defined to mean all proceedings of whatever kind in which testimony can be compelled by law to be given. It includes civil and criminal actions and proceedings, administrative proceedings, legislative hearings, grand jury proceedings, coroners' inquests, arbitration proceedings, and any other kind of proceeding in which a person can be compelled by law to appear and give evidence. The definition is broad because a question of privilege can arise in any situation where a person can be compelled to testify.

Generally speaking, a person's duty to testify in a particular proceeding arises by reason of the issuance of a subpoena by any of the numerous agencies, commissions, departments, and persons authorized to issue subpoenas for a variety of purposes. Compliance with a subpoena, or, in other words, the legal compulsion of testimony, may be accomplished by several means. By far the most common means is the contempt power. The power to hold a recalcitrant witness in contempt may be exercised directly by some authorities, such as courts, certain constitutionally authorized administrative bodies, and the Legislature when in session, while other authorities exercise this power only indirectly by appeal to the courts. For other means, see, e.g., Government Code Section 27500 (making it a misdemeanor to fail "wilfully and without reasonable excuse" to attend and testify at an inquest in response to a subpoena issued by a coroner); Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958), and People v. McShann, 50 Cal.2d 802, 330 P.2d 33 (1958) (enforcing the duty to testify by making an adverse order or finding of fact against the offending party, including dismissal of the action).

RULE 22.5. SCOPE OF THE PRIVILEGES ARTICLE

Except as otherwise provided by statute, the provisions of this article apply in all proceedings.

COMMENT

The URE rules as proposed are applicable only to court proceedings. They are not applicable in other kinds of proceedings. The URE rules are so limited partly because they are designed for adoption by courts under their rulemaking authority, as well as by legislation, and there would be a question whether the courts could impose their rules on other bodies. See UNIFORM RULE 2 and the Comment thereto.

Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to a trier of fact who is not trained to sift the reliable from the unreliable. Privilege rules, however, are different from other rules of evidence. Privileges are granted for reasons of policy unrelated to the reliability of the information that is protected by the privilege. As a matter of fact, privileges have a practical effect only when the privileged information is relevant to the issues in a pending proceeding.

Privileges are granted because it is necessary to permit some information to be kept confidential in order to carry out certain socially desirable policies. Thus, for example, it is important to the attorney-client relationship or the marital relationship that confidential communications made in the course of such relationships be kept confidential; and, to protect such relationships, a privilege to prevent disclosure of such communications is granted.

If confidentiality is to be effectively protected by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be illusory if a court were the only place where the privilege could be invoked. Every officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information if the privilege rules were applicable only in judicial proceedings.

Therefore, the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given. Revised Rule 22.5 makes the privilege rules applicable to all such proceedings. In this respect, it follows the precedent set in New Jersey when revised URE privilege rules were enacted. See N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49).

Whether Revised Rule 22.5 is declarative of existing law is uncertain. No California case has decided the question whether the existing judicially recognized privileges are applicable in nonjudicial proceedings. By statute, however, they have been made applicable in all adjudicatory proceedings conducted under the terms of the Administrative Procedure Act. GOVT. CODE § 11513. And the reported decisions indicate that, as a general rule, privileges are assumed to be applicable in nonjudicial proceedings. See, e.g., Ex parte McDonough, 170 Cal. 230, 149 Pac. 566 (1915); In re Bruns, 15 Cal. App.2d 1, 58 P.2d 1318 (1936); Board of Educ. v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 82 (1954); McKnew v. Superior Court, 23 Cal.2d 58, 142 P.2d 1 (1943). Thus, Revised Rule 22.5 appears to be declarative of existing practice, but there is no authority as to whether it is declarative of existing law. Its enactment will remove any existing uncertainty concerning the right to claim a privilege in a nonjudicial proceeding.

RULE 23. PRIVILEGE OF DEFENDANT IN CRIMINAL ACTION

(1) [Every-person-has] A defendant in [any] a criminal [action] proceeding [in-which-he-is-an-accused] has a privilege not to be called as a witness and not to testify.

(2) [An-accused-in-a-criminal-action-has-a-privilege-to-prevent-his spouse-from-testifying-in-such-action-with-respect-to-any-confidential communication-had-or-made-between-them-while-they-were-husband-and-wife, excepting-only-(a)-in-an-action-in-which-the-accused-is-charged-with-(i) a-crime-involving-the-marriage-relation,-or-(ii)-a-crime-against-the-person or-property-of-the-other-spouse-or-the-child-of-either-spouse,-or-(iii)-a desertion-of-the-other-spouse-or-a-child-of-either-spouse,-or-(b)-as-to-the communication,-in-an-action-in-which-the-accused-offers-evidence-of-a communication-between-himself-and-his-spouse.]

[(3)] [An-accused] A defendant in a criminal [action] proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

[(4)--If-an-accused-in-a-criminal-action-does-not-testify,-counsel may-comment-upon-accused's-failure-to-testify,-and-the-trier-of-fact may-draw-all-reasonable-inferences-therefrom.]

COMMENT

Rules 23, 24, and 25 generally.

In California, as in most other states, the Constitution grants a privilege against self-incrimination. This privilege, guaranteed by Article I, Section 13 of the California Constitution, has two aspects. First, the defendant in a criminal case has a privilege not to be called as a witness and not to testify. This privilege is recognized in Revised Rule 23. Second, every person, whether or not accused of a crime, has a privilege when testifying

in any proceeding to refuse to give information that might tend to incriminate him. This privilege is contained in Revised Rules 24 and 25.

Because the privileges stated in Revised Rules 23, 24, and 25 are derived from the Constitution, these privileges would exist whether or not these rules were enacted in statutory form. Nonetheless, approval of these rules is desirable in order to codify, and thus summarize and collect in one place, a number of existing rules and principles that today must be extracted from a large amount of case materials and statutes.

Rule 23. Revised Rule 23 restates without substantive change the existing California law. See People v. Clark, 18 Cal.2d 449, 116 P.2d 56 (1941), People v. Tyler, 36 Cal. 522 (1869); People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). The URE reference to "an accused" has been replaced with language more technically accurate in California practice in light of Penal Code Sections 683 and 685.

Subdivision (2) of URE Rule 23 has been deleted because it deals with confidential communications between spouses. The entire subject of confidential communications between spouses is covered by Revised Rule 28. See also Proposed Rule 27.5, dealing with the privilege of a spouse not to testify against the other spouse.

Subdivision (4) of URE Rule 23 has been deleted because the matter of commenting on the exercise of the privilege provided by Rule 23 is covered by Revised Rule 39(2).

RULE 24. DEFINITION OF INCRIMINATION

(1) A matter will incriminate a person within the meaning of these rules if it:

(a) Constitutes [~~,-or-forms-an-essential-part-of,-or,-taken-in connection-with-other-matters-disclosed,-is~~] an element of a crime under the law of this State or the United States; or

(b) Is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a [~~violation-of-the laws-of-this-State-as-to-subject-him-to-liability-to-punishment-therefor,~~] crime; or

(c) Is a clue to the discovery of a matter that is within paragraph (a) or (b) above. [~~unless~~]

(2) Notwithstanding subdivision (1), a matter will not incriminate a person if he has become [~~for-any-reason~~] permanently immune from [~~punishment~~] conviction for [~~such-violation~~] the crime.

(3) In determining whether a matter is incriminating, other matters in evidence or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors shall be taken into consideration.

COMMENT

The Commission has substituted for the URE rule a definition of incrimination that is similar in form to the version of this rule enacted in New Jersey. N.J. REV. STAT. § 2A:84A-18. However, unlike the rule recommended here, the New Jersey rule extends the definition of incrimination to include matter that constitutes an element of crime under the law of a sister state.

The revised rule clarifies several ambiguities that exist in the URE rule. The word "crime" is used in the revised rule instead of "violation,"

and "conviction" is used instead of "punishment," to indicate (1) that the privilege is not available to protect a person from civil--as opposed to criminal--punishment, and (2) that the possibility of criminal conviction alone, whether or not accompanied by punishment, is sufficient to warrant invocation of the privilege.

The revised rule, too, provides protection against possible incrimination under a federal law, but not under a law of another state or foreign nation. The scope of the privilege as it now exists in California is not clear, for no decision has been found indicating whether or not the existing California privilege provides protection against incrimination under the laws of a sovereignty other than California. The inclusion of protection against possible incrimination under a federal law is desirable to give full meaning to this privilege, for all persons subject to California law are at the same time subject to federal law. Expansion of protection to include the law of sister states or foreign nations seems unwarranted.

The revised rule makes it clear, which the URE rule does not, that other links in the chain of incrimination need not be disclosed before the privilege may be invoked. The witness may be aware of other matters which, when taken in connection with the information sought, are a basis for a reasonable inference of the commission of a crime. The protection of the privilege would be substantially impaired if such other matters had to be disclosed before the privilege against self-incrimination could be invoked. See People v. McCormick, 102 Cal. App.2d Supp. 954, 228 P.2d 349 (1951). Subdivision (3) indicates, however, that whether a matter is incriminating is not left to the uncontrolled discretion of the person invoking the privilege. The court ultimately must decide whether a matter is incriminating. In making this determination, it must consider not only the other matters disclosed, but also the context of the question, the nature of the information sought, and many other pertinent factors.

RULE 25. SELF-INCRIMINATION PRIVILEGE

[Subject-to-Rules-23-and-37,] Every natural person has a privilege [,-which-he-may-claim,] to refuse to disclose [in-an-action-or-to-a-public official-of-this-state-or-any-governmental-agency-or-division-thereof] any matter that will incriminate him if he claims the privilege, except that under this rule [,]:

(1)[(a)] If the privilege is claimed in [an-action] a proceeding conducted by or under the supervision of a court, the matter shall be disclosed if the judge finds that the matter will not incriminate the witness. [;-and]

(2) [(b)] No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics [,] or his physical or mental condition. [;-and]

(3) No person has the privilege to refuse to demonstrate his identifying characteristics, such as, for example, his handwriting, the sound of his voice and manner of speaking, or his manner of walking or running.

(4) [(c)] No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [;-and]

(5) [(d)] No person has the privilege to refuse [to-obey-an-order-made by-a-court] to produce for use as evidence or otherwise a document, chattel, or other thing under his control constituting, containing, or disclosing matter incriminating him if [the-judge-finds-that,-by-the-applicable-rules of-the-substantive-law,] some other person, [or-a] corporation, [or-other] association, or other organization (including a public entity) owns or has

a superior right to the possession of the thing ordered to be produced.
[;-and]

[(e)--a-public-official-or-any-person-who-engages-in-any-activity, occupation,-profession-or-calling-does-not-have-the-privilege-to-refuse to-disclose-any-matter-which-the-statutes-or-regulations-governing-the office,-activity,-occupation,-profession-or-calling-require-him-to-record or-report-or-disclose-concerning-it;-and

-(f)--a-person-who-is-an-officer,-agent-or-employee-of-a-corporation or-other-association,-does-not-have-the-privilege-to-refuse-to-disclose any-matter-which-the-statutes-or-regulations-governing-the-corporation- or-association-or-the-conduct-of-its-business-require-him-to-record-or report-or-disclose;-and]

(6) No person has the privilege to refuse to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection for the purpose of aiding or facilitating the supervision or regulation by a public entity of an office, occupation, profession or calling when such order is made in the aid of such supervision or regulation.

[(g)] (7) Subject to Rule 21,[5] a defendant in a criminal [action] proceeding who [voluntarily] testifies in [the-action] that proceeding upon the merits before the trier of fact [does-not-have-the-privilege-to-refuse

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[5] Rule 21 is the subject of a later study and recommendation by the Commission. The rule as contained in the URE is as follows:

> RULE 21. Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

~~to-disclose-any-matter-relevant-to-any-issue-in-the-action~~] may be cross-examined as to all matters about which he was examined in chief.

(8) Except for the defendant in a criminal proceeding, a witness who, without having claimed the privilege under this rule, testifies in a proceeding before the trier of fact with respect to a matter does not have the privilege under this rule to refuse to disclose in such proceeding anything relevant to that matter.

COMMENT

Revised Rule 25 sets forth the privilege, derived from Article I, Section 13 of the California Constitution, of a person when testifying to refuse to give information that might tend to incriminate him. This privilege should be distinguished from the privilege stated in Revised Rule 23, which is the privilege of a defendant in a criminal case to refuse to testify at all. As in the case of Revised Rule 23, the Commission recommends that the law relating to the privilege against self-incrimination be gathered together and articulated in a statute such as Revised Rule 25.

Introductory Clause. The words "in an action or to a public official of this State or to any governmental agency or division thereof" have been deleted from the statement of the privilege because they are unnecessary in view of Proposed Rule 22.5, which makes all privileges available in all proceedings where testimony can be compelled. Rules of evidence cannot speak in terms of a privilege not to disclose in those situations where there is no duty to disclose; evidentiary privileges exist only when a person would, but for the exercise of a privilege, be under a duty to speak. For example, such rules are not concerned with inquiries by a police officer regarding a crime nor with the rights, duties, or privileges that a person may have at the police station. Thus, the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary privilege because he is under no legal duty to talk to the police officer. Whether such an accusation and the accused's response thereto are admissible evidence is a separate problem with which Revised Rule 25 does not purport to deal. See, however, Revised Rule 63(6) (confession or admission of

defendant in criminal case) and Revised Rule 62(1) in Tentative Recommendation and a Study relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 309, 319-320 (1963).

The reference to Rules 23 and 37 has been omitted because subdivisions (7) and (8) indicate the extent to which this privilege is subject to waiver.

Subdivisions (1), (2), (3), and (4). These subdivisions declare existing California law. Overend v. Superior Court, 131 Cal. 280, 283, 63 Pac. 372, 373 (1900)(judge determines availability of privilege); People v. Lopez, 60 Cal.2d , 32 Cal. Rptr. 424, 435-436, 384 P.2d 16, 27-28 (1963) (acts mentioned in subdivisions (2) and (3) of Revised Rule 25 not privileged); People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957), and People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953)(no privilege to prevent taking samples of body fluids). Of course, nothing in these subdivisions authorizes the violation of constitutional rights in regard to the manner in which such evidence is obtained. See Rochin v. California, 342 U.S. 165 (1951).

Subdivision (3) has been added to make it clear that a defendant in a criminal case can be required to demonstrate his identifying physical characteristics so long as he is not required to testify. Under subdivision (3), the privilege against self-incrimination cannot be invoked to prevent the taking of a sample of handwriting, a demonstration of the defendant's speaking the same words as were spoken by the criminal as he committed the

crime, or a demonstration of the defendant's manner of walking so that a witness can determine if he limps like the person observed at the scene of the crime, etc. This matter may be covered by subdivision (2) of the revised rule; but subdivision (3) will avoid any problems that might arise because of the phrasing of subdivision (2).

Subdivision (5). Subdivision (d) of the URE rule, now subdivision (5), has been revised to indicate more clearly that organizations other than corporations are included among those who may have a superior right of possession. This subdivision probably states existing law insofar as it denies the privilege to an individual who would be personally incriminated by surrendering public documents or books of a private organization in his possession. See Wilson v. United States, 221 U.S. 361 (1911), and cases collected in Annot., 120 A.L.R. 1102, 1109-1116 (1939). See also 8 WIGMORE, EVIDENCE § 2259b (McNaughton rev. 1961). Although there apparently is no California case holding that an individual has no privilege with respect to other types of property in his custody but owned by another, the logic supporting this exception is persuasive. The word "owns" has been added to avoid a possible problem where, for example, articles of incorporation vest exclusive custody of books and records in a corporate officer, even though they are the property of the corporation.

Subdivision (6). Subdivisions (e) and (f) in the URE rule are disapproved by the Commission because they provide that public officials

and others who engage in any form of activity, occupation, or business that is subject to governmental regulation may be deprived of the privilege against self-incrimination by regulations and statutes requiring them to report or disclose certain matters. No cases have held that the privilege against self-incrimination can be so easily destroyed. The cases interpreting the privilege have held only that a record that is actually kept pursuant to a statutory or regulatory requirement is not subject to the privilege if the production of the record is sought in connection with the governmental supervision and regulation of the business or activity. See Shapiro v. United States, 335 U.S. 1 (1948). Subdivision (6), which has been included in the revised rule in lieu of subdivisions (e) and (f) expresses this rule.

The cases have also held that public employees and persons engaged in regulated activities may be required by statute or regulation to disclose information relating to the regulated activity and may be disciplined for failure or refusal to make the required disclosure, but such cases have never held that such persons have lost their privilege against self-incrimination. See Shapiro v. United States, supra. See also People v. Diller, 24 Cal. App. 799, 142 Pac. 797 (1914). Under the revised rule, public employees may still be required to make disclosures concerning their administration of public affairs, and may still be discharged if they refuse to do so; but, under the revised rule, it is clear that they do not surrender the privilege against self-incrimination as a condition of their employment.

Subdivision (7). The Commission has revised subdivision (g) of the URE rule, now subdivision (7) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). See People v. McCarthy, 88 Cal. App.2d 883, 200 P.2d 69 (1948). Subdivision (g)

of the URE rule conflicts with Section 13, Article I of the California Constitution as interpreted by the California Supreme Court. See People v. O'Brien, 66 Cal. 602, 6 Pac. 695 (1885). See also People v. Arrighini, 122 Cal. 121, 54 Pac. 591 (1898).

Subdivision (8). The Commission has included a specific waiver provision in subdivision (8) of Revised Rule 25. URE Rule 37 provides a waiver provision that applies to all privileges. However, the waiver provision of Rule 37 would probably be unconstitutional if applied to the privilege against self-incrimination. Thus, Rule 37 has been revised so that it does not apply to Revised Rule 25, which has been expanded to include a special waiver provision.

Note that, under subdivision (8) of Revised Rule 25, the privilege against self-incrimination is waived only in the same action or proceeding, not in a subsequent action or proceeding. California cases interpreting Article I, Section 13 of the California Constitution appear to limit waiver of the privilege against self-incrimination to the particular proceeding in which the privilege is waived. See Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900); In re Sales, 134 Cal. App. 54, 24 P.2d 916 (1933). A person can claim the privilege in a subsequent case even though he waived it in a previous case. See In re Sales, supra.

Subdivision (8) does not apply to a defendant in a criminal action or proceeding; the extent of the waiver by a defendant in a criminal case is governed by subdivision (7) of the revised rule.

RULE 26. LAWYER-CLIENT PRIVILEGE

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

(a) "Client" means a person, [or] corporation, [or-other] association, or other organization (including a 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 who are present to further the interest of the client in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, 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 (including a public entity) if dissolved.

(d) [(e)] "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) [~~(1)~~] 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~~] the client, whether or not a party, has a privilege [~~(a)-if-he-is-the-witness~~] to refuse to disclose, and to prevent another from disclosing, [~~any-such~~] a confidential 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.~~] between client and lawyer if the privilege is claimed by:

(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 a person authorized to permit disclosure.

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

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

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

(a) [to a communication] If [the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was] 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] who claim through [the] a deceased 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,] or by the client [to his lawyer], of a duty arising out of the lawyer-client relationship. [or]

(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. [, or]

(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.

(f) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased client, purporting to affect an interest in property.

(g) As to a communication between a physician and a client who consults the physician or submits to an examination by the physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental condition if the communication, including information obtained by an examination of the client, is not privileged under Rule 27.

(h) As to a communication between a psychotherapist and a client who consults the psychotherapist or submits to an examination by the psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition if the communication, including information obtained by an examination of the client, is not privileged under Rule 27.3.

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

COMMENT

This rule sets forth the lawyer-client privilege now found in subdivision 2 of Section 1881 of the Code of Civil Procedure. This rule, however, contains a much more accurate statement of the privilege than does the existing statute.

The URE rule has been rearranged and rewritten to conform to the form and style of the other rules relating to privileged communications. The definitions, for example, have been placed in subdivision (1), as they are in Rules 27 and 29. The language of the rule has been modified in certain respects, too, so that precisely the same language is used in this rule as is used in other rules when the same meaning is intended.

Subdivision (1)--Definitions.

Paragraph (a)--"Client." The definition of "client" has been revised to make it clear that governmental organizations are considered clients for the purpose of the lawyer-client privilege. This change makes it clear that the State, cities, and other public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned. This is existing law in California. See Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025 (1954).

The definition of "client" has also been extended by adding the words "other organization." The language of the revised rule is intended to cover such unincorporated organizations as labor unions, social clubs, and fraternal societies when the organization (rather than its individual members) is the client.

The reference to "lawyer's representative" has been deleted. This term was included in the URE rule to make it clear that a communication to an

attorney's stenographer or investigator for the purpose of transmitting the information to the attorney is protected by the privilege. This purpose is better accomplished by a modification of the definition of "confidential communication" in paragraph (b). Under the proposed revisions of these definitions, communications to physicians and similar persons for transmission to an attorney are clearly protected, whereas the protection afforded by the URE rule would depend on whether such persons could be called a "lawyer's representative."

The definition of "client" has also been modified to make it clear that the term includes an incompetent who himself consults a lawyer. Subdivision (1)(c) and subdivision (2) of the revised rule provide that the guardian of an incompetent can claim the privilege for the incompetent client and that, when the incompetent client is again competent, the client may himself claim the privilege.

Paragraph (b)--"Confidential communication." "Confidential communication between client and lawyer" has been defined. The term is used to describe the type of communications that are subject to the lawyer-client privilege. The definition permits the defined term to be used in the general rule stated in subdivision (2), and conforms the style of this rule to the style of other rules in the privileges article.

In accord with existing California law, the revised rule provides that the communication must be in the course of the lawyer-client relationship and must be confidential. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234-235, 231 P.2d 26, 30 (1951). Confidential communications also include those made to third parties, such as accountants or similar experts, for the purpose of transmitting such information to the

lawyer. Thus, the phrase, "reasonably necessary for the transmission of the information," restates existing California law. See, e.g., City and County of San Francisco v. Superior Court, supra, which involved a communication to a physician. Although the rule of this case would be changed by subdivision (4)(g) and (h) insofar as it applies to communications to physicians and psychotherapists consulted as such, subdivision (1)(b) retains the rule for other expert consultants. (See Comment to subdivision (4)(g) and (h), infra.) A lawyer at times may desire to have a client reveal information to an expert consultant and himself at the same time in order that he may adequately advise the client. The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" makes it clear that these communications, too, are confidential and within the scope of the privilege, despite the presence of the third party. This part of the definition probably restates existing California law. See Attorney-Client Privilege in California, 10 Stan. L. Rev. 297, 308 (1958). See also Himmelfarb v. United States, 175 F.2d 924, 938-939 (9th Cir. 1949).

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person, such as a spouse, business associate, or joint client, who is present to aid the consultation or to further their common interest in the subject of the consultation. These words may change existing California law, for under existing law the presence of a third person will sometimes be held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. See Attorney-Client Privilege in California, 10 Stan. L. Rev. 297, 308 (1958), and authorities there cited in notes 67-71.

Paragraph (c)--"Holder of the Privilege." The substance of the sentence found in URE Rule 26(1), reading "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," has been stated in the form of a definition in subdivision (1)(c) of the revised rule. This definition is similar to the definition of "holder of the privilege" found in URE Rule 27, relating to the physician-patient privilege. It makes clear who can waive the privilege for the purposes of Rule 37. It also makes subdivision (2) of the revised rule more concise.

Under subdivision (1)(c)(i) and (ii) of the revised rule, the guardian of the client is the holder of the privilege if the client is incompetent, and an incompetent client becomes the holder of the privilege when he becomes competent. For example, if the client is a minor of 20 years of age and he or his guardian consults the attorney, the guardian under subdivision (1)(c)(ii) is the holder of the privilege until the client becomes 21; thereafter, the client himself is the holder of the privilege. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer. The existing California law is uncertain. The statutes do not deal with the problem and no appellate decision has discussed it.

Under subdivisions (1)(c)(iii), the personal representative of the client is the holder of the privilege when the client is dead. He may either claim or waive the privilege on behalf of the deceased client. This may be a change in the existing California law. Under the California law, it seems probable that the privilege survives the death of the client and that no one can waive it after the client's death. See Collette v. Sarrasin, 184 Cal. 283, 289, 193 Pac. 571, 573 (1920). Hence, the privilege apparently

must be recognized even though it would be clearly to the interest of the estate of the deceased client to waive it. If this is the present California law, the URE provision would be a desirable change. Under the URE rule and under the revised rule, the personal representative of a deceased client may waive the privilege when it is to the advantage of the estate to do so. The purpose underlying the privilege--to provide a client with the assurance of confidentiality--does not require the recognition of the privilege when to do so is detrimental to his interest or to the interests of his estate.

Under subdivision (1)(c)(iv), the successor, assign, or trustee in dissolution of a dissolved corporation, association, or other organization is the holder of the privilege after dissolution. This changes the effect of the last sentence of URE Rule 26(1), which has been omitted from the revised rule, since there is no reason to deprive such entities of a privilege when there is only a change in form while the substance remains.

The definition of "holder of the privilege" should be considered with reference to subdivision (2) of Revised Rule 26 (specifying who can claim the privilege) and Revised Rule 37 (relating to waiver of the privilege).

Paragraph (d)--"Lawyer." The Commission approves the provision of the URE rule that defines "lawyer" to include a person "reasonably believed by the client to be authorized" to practice law. Since the privilege is intended to encourage full disclosure by giving the client assurance that his communication will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney should be sufficient to justify application of the privilege. See 8 Wigmore, Evidence § 2302 (McNaugton rev. 1961), and cases there cited in note 1. See also McCormick, Evidence § 92 (1954).

The Commission has omitted the requirement of the URE that the client must believe reasonably that the lawyer is licensed to practice in a jurisdiction that recognizes the lawyer-client privilege. Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions. The California client should not be required to determine at his peril whether the jurisdiction licensing his particular lawyer recognizes the privilege. He should be entitled to assume that the lawyer consulted will maintain his confidences to the same extent as would a lawyer in California. The existing California law in this regard in uncertain.

Subdivision (2)--General rule.

The substance of the general rule contained in URE Rule 26(1) has been set out in the revised rule as subdivision (2). The rule has been revised to conform to the form and style of Rule 27 so that precisely the same language is used where the same meaning is intended.

Privilege must be claimed. Revised Rule 26, as well as the original URE rule, is based upon the premise that the privilege must be claimed by a person who is authorized to claim the privilege. If there is no claim of privilege by a person with authority to make the claim, the evidence is admissible. To make this meaning clear, the words "are privileged" have been deleted from the preliminary language of subdivision (2). Subdivision (2) sets forth the persons authorized to claim the privilege, and, under Proposed Rule 36.5, a judge can, on his own motion, exclude a confidential attorney-client communication on behalf of an absent holder.

Since the privilege is recognized under the revised rule only when claimed by or on behalf of the holder of the privilege, the privilege will

exist under these rules only for so long as there is a holder in existence. Hence, the privilege ceases to exist when the client's estate is finally distributed and his personal representative discharged. This is apparently a change in the California law. Under the existing law, it seems likely that the privilege continues to exist after the client's death and no one has authority to waive the privilege. See Collette v. Sarrasin, supra, 184 Cal. 283, 193 Pac. 571 (1920). See also Paley v. Superior Court, 137 Cal. App.2d 450, 290 P.2d 617 (1955), and discussion of the analogous situation in connection with the physician-patient privilege in the Study, infra at 000-000. Although there is good reason for maintaining the privilege while the estate is being administered--particularly if the estate is involved in litigation--there is little reason to preserve secrecy at the expense of justice after the estate is wound up and the representative discharged.. Thus, the better policy seems to be expressed in the URE and the revised rule, which terminates the privilege upon discharge of the client's personal representative.

Persons entitled to claim the privilege. Paragraphs (a), (b), and (c) of revised subdivision (2) state the substance of the last sentence of URE Rule 26(1), reading "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," with some changes.

Under paragraph (a) of revised subdivision (2), the "holder of the privilege" may claim the privilege. Under paragraph (b) of revised subdivision (2), persons authorized to do so by the holder may claim the privilege. Thus, the guardian, the client, or the personal representative

(when the "holder of the privilege") may authorize another person, such as his attorney, to claim the privilege. Paragraph (c) of revised subdivision (2) states more clearly the substance of what is contained in URE Rule 26(1), which provides that the privilege may be claimed by "the client in person or by his lawyer."

"Eavesdroppers." Paragraph (c) of URE Rule 26(1) was drafted by the Commissioners on Uniform State Laws to make it clear that the lawyer-client privilege can be asserted to prevent eavesdroppers from testifying concerning the confidential communications they have intercepted. See Uniform Rule 26 Comment. Although this paragraph has been deleted from the revised rule, its substance has been retained by the provision of subdivision (2) that permits the privilege to be claimed to prevent anyone from testifying to a confidential communication. Probably, this will change the existing California law. See People v. Castiel, 153 Cal. App.2d 653, 315 P.2d 79 (1957). See also Attorney-Client Privilege in California, 10 Stan. L. Rev. 297, 310-312 (1958), and cases there cited in note 84. However, the rule stated in the revised rule and the URE rule is a desirable one. Clients and lawyers should be protected against the risks of wrongdoing of this sort. See Penal Code Section 653i, making it a felony to eavesdrop upon a conversation between a person in custody of a public officer and that person's lawyer. No one should be able to use the fruits of such wrongdoing for his own advantage by using them as evidence in court. The extension of the privilege to prevent testimony by eavesdroppers would not, however, affect the rule that the making of the communication under circumstances where others could easily overhear is some evidence that the client did not intend the communication to be confidential. See Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 131 (1889).

Revisions in URE language. The words "if he is the witness" have been deleted from subdivision (2) of the revised rule because they impose a limitation that is neither necessary nor desirable. Inasmuch as these rules apply in any type of proceeding, they apply at times when the person from whom information is sought cannot be regarded technically as a witness--as, for example, on a request for admissions under California discovery practice.

The word "another" has been used instead of "witness" in the preliminary language because "witness" is suggestive of testimony only at a trial. The existence of privilege makes it possible for the client to prevent a person from disclosing the communication at a pretrial proceeding as well as at the trial.

Paragraphs (a), (b), and (c) of URE Rule 26(1)--subdivision (2) of the revised rule--have been deleted. Those paragraphs indicate the persons against whom the privilege may be asserted. The privilege, where applicable, should be available against any witness. Hence, the limitations of these paragraphs have been deleted as unnecessary and undesirable.

Subdivision (3)--When lawyer must claim privilege.

Under subdivision (3) of the revised rule, the lawyer must claim the privilege on behalf of the client unless otherwise instructed by a person authorized to permit disclosure. Subdivision (3) is included to preclude any implication, from the authorization in subdivision (2)(c), that a lawyer may have discretion whether or not to claim the privilege for his client. Compare Business and Professions Code Section 6068e.

Subdivisions (4) and (5)--Exceptions. The exceptions to the general rule, which were stated in subdivision (2) of the URE rule, have been set forth

in subdivisions (4) and (5) of the revised rule. None of these exceptions is expressly stated in the existing California statute. However, most of them are recognized to some extent by judicial decision.

Subdivision (4)(a)--Crime or fraud. Paragraph (a) of subdivision (4) provides that the privilege does not apply where the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. Abbott v. Superior Court, 78 Cal. App.2d 19, 177 P.2d 317 (1947). URE Rule 26 extends this exception to bar the privilege in case of consultation with the view to commission of any tort. The Commission has not adopted this extension of the traditional scope of this exception. Because of the wide variety of torts, and the technical nature of many, the Commission believes that to extend the exception to include all torts would present difficult problems for an attorney consulting with his client and would open up too large an area for nullification of the privilege.

The URE rule requires the judge to find that "the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort." The Commission has substituted the word "anyone" for the reference to "the client." The applicability of the privilege and the exception should not depend upon who is going to commit the crime. The privilege should not provide a sanctuary for planning crimes by anyone. The broader term is also used in Rule 27 (in both the URE and the revised versions).

The original URE rule required the judge to find that "sufficient

evidence, aside from the communication, has been introduced to warrant a finding" that the legal service was sought for a fraudulent or illegal purpose. The Commission has eliminated this requirement from revised subdivision 4(a) as unnecessary in view of Proposed Rule 37.5, which has been added by the Commission.

Subdivision (4)(b)--Parties claiming through deceased client. Subdivision (4)(b) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through a deceased client. Under existing California law, all must claim through the client by testate or intestate succession in order for the exception to be applicable; a claim by inter vivos transaction apparently is not within the exception. Paley v. Superior Court, 137 Cal. App.2d 450, 460, 290 P.2d 617, 623 (1955). The URE and the revised rule include inter vivos transactions within the exception.

The traditional exception between claimants by testate or intestate succession was based on the theory that the privilege is granted to protect the client's interests against adverse parties and, since claimants in privity with the estate claim through the client and not adversely, the client presumably would want his communications disclosed in litigation between such claimants in order that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. Yet, there is no reason to suppose, for example, that a client's interests and desires are not represented by a person claiming under an inter vivos transaction--a deed--executed by a client in full possession of his faculties while those interests and desires are necessarily represented by a claimant under a will executed while the claimant's mental stability was dubious. Therefore, the Commission can perceive no basis in logic or policy for refusing to extend the exception to cases where one or more of the parties is claiming by inter vivos transaction. See the discussion in the Study, infra at 000-000.

The URE rule does not require the client to be deceased before the exception applies. The revised rule restores the requirement of existing law that the client be deceased. The exception is based on the client's

presumed intent; hence, while the client is living, his claim of privilege should be recognized, for it effectively dispels any belief that he desires disclosure.

Subdivision (4)(c)--Breach of duty. The breach of duty exception stated in subdivision (4)(c) has not been recognized by a holding in any California case, although a dictum in one opinion indicates that it would be. Pacific Telephone and Telegraph Co. v. Fink, 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956). The exception is approved because it would be unjust to permit a client to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge. The subdivision has been revised to make it clear that the duty involved must be one arising out of the lawyer-client relationship, e.g., the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services.

Subdivision (4)(d), (e), and (f)--Attesting witness; dispositive instruments. The exception stated in subdivision (4)(d) has been confined to the type of communication one would expect an attesting witness to testify to. Merely because an attorney acts as an attesting witness should not wipe out the lawyer-client privilege as to all statements made concerning the documents attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. Under existing law, the attesting witness exception has been used as a device to obtain information from a lawyer relating to dispositive instruments when the lawyer received the information in his capacity as a lawyer and not merely in his

capacity as an attesting witness. See generally, In re Mullin, 110 Cal. 252, 42 Pac. 645 (1895).

Although the attesting witness exception stated in paragraph (d) is limited to information of the kind to which one would expect an attesting witness to testify, there is merit in making the exception applicable to all dispositive instruments. One would normally expect that a client would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Accordingly, two new exceptions--paragraphs (e) and (f)--have been created relating to dispositive instruments generally. Under these exceptions, the lawyer--whether or not he is an attesting witness--will be able to testify concerning the intention or competency of a deceased client and will be able to testify to communications relevant to the validity of various dispositive instruments that have been executed by the client.

Subdivision (4)(g) and (h)--Communications to physicians and psychotherapists. These exceptions make the lawyer-client privilege inapplicable to protect a communication between the lawyer's client and a physician or psychotherapist consulted as such if the communication is not independently privileged under the substantive rules relating to physicians (Rule 27) and psychotherapists (Rule 27.3), respectively. This changes existing California law. In City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951), the court held that, even though a client's communication to a physician was not privileged under the physician-patient privilege, the communication nevertheless was privileged under the lawyer-client privilege because the purpose of the client's consultation with the physician was

to assist the lawyer in preparing the client's lawsuit. The broader implications of this decision in regard to a conduit theory of communications between client and lawyer are not affected by the exceptions stated in paragraphs (g) and (h), for it is clear under subdivision (1)(b) that either the client or the lawyer may communicate with each other through agents. However, in the specific situations covered by paragraphs (g) and (h)--communications between a client and a physician or psychotherapist consulted as such--other rules spell out in detail the conditions and circumstances under which communications to physicians (Revised Rule 27) and psychotherapists (Revised Rule 27.3) are privileged. Where a client's communication to either of these persons is not protected by the privilege granted these relationships, there is no reason to protect the communication by applying a different privilege in circumvention of the policy expressed in the privilege that ought to be applied. The admissibility of relevant and material evidence bearing upon substantive issues in a given case should not be determined on the basis of whether a lawyer is consulted before a client sees his physician or psychotherapist for diagnosis or treatment.

Subdivision (5)--Joint clients. Subdivision (5) of the revised rule--the joint client exception--states existing California law. Harris v. Harris, 136 Cal.379, 69 Pac. 23 (1902). The exception as proposed by the Commissioners on Uniform State Laws has been modified because, under the original language of the URE, the exception appears to apply only to communications from one of the clients to the lawyer. Under the revised rule, the exception applies to communications either from or to the lawyer.

RULE 27. PHYSICIAN-PATIENT PRIVILEGE

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

(a) [(a)] "Confidential communication between patient and physician [and-patient]" means [such] information, including information obtained by an examination of the patient, 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 who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which [it] the physician is [transmitted.] consulted, and includes advice given by the physician in the course of that relationship.

(b) [(c)] "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) [(a)] "Patient" means a person who [,] consults a physician or submits to an examination by a physician for the [sole] purpose of securing a diagnosis or preventive, palliative, 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) [(b)] "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] the patient, whether or not a party, has a privilege [in-a-civil-action 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] if the privilege is claimed by:

(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 a person authorized to permit disclosure.

(3) The physician who received or made a communication subject to the privilege under this rule shall claim the privilege whenever he:

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

(4) [(3)] 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-evidence,-aside -from-the-communication-has been-introduced-to-warrant-a-finding-that] 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) [(e)-upon-an-issue-between-parties-claiming-by] As to a communication relevant to an issue between parties who claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction [from-a-deceased-patient].

(c) As to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

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

(e) [(b)] As to a communication relevant to [upon] an issue [as-to] concerning the validity of a [document-as-a-will-of-the patient,] deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.

(f) [(a)-upon-an-issue-of-the-patient's-condition] In [an-action] a 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.

(g) In [an-action] a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence. [or]

(h) In a criminal proceeding.

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

(j) In a disciplinary proceeding.

(k) [(4)--There-is-no-privilege-under-this-rule] In [an-action] a 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 (i) by the patient, or (ii) [of] by any party claiming through or under the patient, or (iii) by any party claiming as a beneficiary

of the patient through a contract to which the patient is or was a party.

(L) [~~(5)--There-is-no-privilege-under-this-rule~~] As to information which the physician or the 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.

[~~(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.~~]

COMMENT

The privilege created by Rule 27 is very similar to the privilege created by subdivision 4 of the Code of Civil Procedure. The URE rule is, however, a clearer statement of the privilege.

Subdivision (1)--Definitions.

Paragraph (a)--"Confidential communication." The definition of "confidential communication" has been revised to include language taken from the URE version of Rule 26. As revised, the definition requires that the information be transmitted in confidence between a patient and his physician in the course of the physician-patient relationship. This requirement eliminates the need for subdivision (2)(b) of the URE rule, which required the judge to find that the patient or physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis or to prescribe or render treatment. This definition probably includes more communications than does the URE language. For example, it would be difficult to fit the statement of the doctor to the patient giving his diagnosis within the provisions of URE subdivision (2)(b), whereas such statements are clearly within the definition of "confidential communication" as revised. It is uncertain whether the doctor's statement is covered by the existing California privilege.

Paragraph (b)--"Holder of the privilege." The definition of "holder of the privilege" has been rephrased in the revised rule to conform to the similar definition in Revised Rule 26. Under this definition, a guardian of the patient is the holder of the privilege if the patient is incompetent. This differs from the URE rule which makes the guardian of the person of the patient the holder of the privilege. Under the revised definition, if the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege. The provision making the personal representative of the patient the holder

of the privilege when the patient is dead may change the existing California law. Under the present California law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. See the discussion in the Study, infra at 000-000. If this is the existing California law, it would be changed because the personal representative of the patient will have authority to claim or waive the privilege after the patient's death. The change is desirable, for the personal representative can protect the interest of the patient's estate in the confidentiality of these statements and can waive the privilege when the estate would benefit by waiver. And, when the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing the courts with complete access to evidence relevant to the causes before them should prevail over whatever remaining interest the decedent may have had in secrecy.

This definition of "holder of the privilege" should be considered with subdivision (2) of the revised rule (specifying who can claim the privilege) and Rule 37 (relating to waiver of the privilege).

Paragraph (c)--"Patient." The Commission disapproves the requirement of the URE rule that the patient must consult the physician for the sole purpose of treatment or diagnosis preliminary to treatment in order to be

within the privilege. This requirement does not appear to be in the existing California law. See McRae v. Erickson, 1 Cal. App. 326, 332-333, 82 Pac. 209, 212 (1905). Since treatment does not always follow diagnosis, the limitation of diagnosis to that which is "preliminary to treatment" is undesirable. Also, inclusion of the limitation "sole" with respect to the purpose of the consultation would eliminate some statements fully within the policy underlying the privilege even though made while consulting the physician for a dual purpose. For example, a repairman might visit a physician both for the purpose of obtaining treatment from the physician and for the purpose of repairing the physician's equipment. Statements made by the patient during the course of the visit to enable the physician to diagnose and treat him would seem to be as deserving of protection as statements made by another person whose sole purpose was to obtain treatment. Of course, statements made for another purpose, such as repairing the equipment, would not be protected by the privilege.

Paragraph (d)--"Physician." Paragraph (d) of subdivision (1) defines physician to include a person "reasonably believed by the patient to be authorized" to practice medicine. This changes existing California law, which requires the physician to be licensed. CODE CIV. PROC. § 1881 (4). If we are to recognize this privilege, we should be willing to protect the patient from reasonable mistakes as to unlicensed practitioners. The privilege also should be applicable to communications made to a physician authorized to practice in any state or nation. When a California resident travels outside the State and has occasion to visit a physician during such travel, or where a physician from another state or nation participates in the treatment of a person in California, the patient should be

entitled to assume that his communications will be given as much protection as they would be if he talked to a California physician in California. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate to the physician.

Subdivision (2)--General rule.

The basic statement of the physician-patient privilege is set out in the revised rule as subdivision (2). The following modifications of this provision of the URE rule have been made in the revised rule:

(1) The rule has specifically been made subject to Rule 37 (waiver) and subdivision (7) of URE Rule 27 has been omitted as unnecessary.

(2) Under subdivision (4)(h) of the revised rule, the privilege is not applicable in criminal actions and proceedings. The URE rule would have extended the privilege to a prosecution for a misdemeanor. The existing California statute makes the privilege unavailable in any criminal action or proceeding. CODE CIV. PROC. § 1881 (4). The Commission is unaware of any criticism of the existing California law. In addition, if the privilege were applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, as under the URE rule, it would be possible for the prosecutor in some instances to prosecute for a felony in order to make the physician-patient privilege not applicable. A rule of evidence should not be a significant factor in determining whether a defendant is to be prosecuted for a misdemeanor or a felony.

(3) The language of the URE rule indicating the persons who may be silenced by an exercise of the privilege has been omitted.

The purpose of this language in the URE rule is to indicate that the privilege may not be exercised against an eavesdropper. For the reasons appearing in the discussion of Revised Rule 26 (see pages 000-000, supra), an eavesdropper should not be permitted to testify to a statement that is privileged under this rule. The revised rule will permit the privilege to be asserted to prevent an eavesdropper from testifying. The existing California law probably does not provide this protection against testimony by eavesdroppers. See generally Kramer v. Policy Holders Life Ins. Assn., 5 Cal. App.2d 380, 42 P.2d 665 (1935), and Horowitz v. Sacks, 89 Cal. App. 336, 265 Pac. 281 (1928).

(4) The language of subdivision (2)(d) of the URE rule has been revised to state more clearly who is authorized to exercise the privilege.

Subdivision (3)--When physician must claim privilege.

Subdivision (3), which has been added to the revised rule, directs the physician to claim the privilege on behalf of the patient whenever he is authorized to do so unless he is otherwise instructed. Under the language of the URE rule, it is not clear that the physician is a person "authorized to claim the privilege" for the holder of the privilege.

Subdivision (4)--Exceptions.

The exceptions to the physician-patient privilege have been gathered together in subdivision (4). The language has been conformed to that used in Rule 26 and the order in which the exceptions appear has been altered so that they are in the same order in which comparable exceptions appear in Rule 26.

Paragraph (a)--Crime or tort. While Revised Rule 26 provides that the lawyer-client privilege does not apply when the communication was made to enable anyone to commit or plan to commit a crime or a fraud (see pages 000-000, supra), subdivision (4)(a) of Revised Rule 27 creates an exception to the physician-patient privilege where 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_. This difference in treatment of the physician-patient privilege stems from the fact that persons do not ordinarily consult their physicians in regard to matters which might subsequently be determined to be a tort or crime. On the other hand, people ordinarily consult lawyers about precisely these matters. The purpose of the privilege--to encourage persons to make complete disclosure of their physical and mental problems so that they may obtain treatment and healing--is adequately served without broadening the privilege to provide a sanctuary for planning or concealing crimes or torts. Because of the different nature of the lawyer-client relationship, a similar exception to the lawyer-client privilege would substantially impair the effectiveness of the privilege. Whether this exception exists in California law has not yet been decided, but it probably would be recognized in an appropriate case in view of the similar court-created exception to the lawyer-client privilege.

Paragraph (b)--Parties claiming through deceased patient. The language of subdivision (4)(b) of the revised rule has been revised to conform to the language of the comparable exception in Revised Rule 26. See the discussion of this exception at 000-000, _supra_.

Paragraph (c)--Breach of duty. Subdivision (4)(c) has been added to the revised rule. It expresses an exception similar to that found in subdivision

(4)(c) of Revised Rule 26. If a patient charges a doctor with a breach of duty, he should not be privileged to withhold from the doctor evidence material to the doctor's defense.

Paragraphs (d) and (e)--Dispositive instruments. In subdivisions (4)(d) and (e) of the revised rule, the URE exception relating to the validity of a will is broadened to provide an exception for communications relevant to an issue concerning the intention or competency of the deceased patient with respect to, or the validity of, any dispositive instrument executed by the now deceased patient. Where this kind of issue arises in a lawsuit, communications made to his physician by the person executing the instrument become extremely important. Permitting these statements to be introduced in evidence after the patient's death will not materially impair the privilege granted to patients by this rule. Existing California law provides an exception virtually coextensive with that provided in the revised rule. CODE CIV. PROC. § 1881 (4).

Paragraph (f)--Guardianship proceedings. The exception provided in subdivision (4)(f) of the revised rule is broader than the URE rule; it covers not only commitments of mentally ill persons but also covers such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the privilege should not apply because the proceedings are being conducted for the benefit of the patient. In such proceedings, he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare. There is no similar exception in existing California law. McClenahan v. Keyes, 188 Cal. 574, 206 Pac. 454 (1922). But see 35 OPS. CAL. ATTY. GEN. 226 regarding the unavailability of the present physician-patient privilege where the physician acts pursuant to court appointment for the explicit purpose of giving testimony.

Paragraph (g)--Competency proceedings. Language has been added to subdivision (4)(g) of the revised rule to distinguish the proceedings referred to in this subdivision from commitment proceedings covered by the exception stated in subdivision (4)(f), supra. This exception, too, is new to California law; but, when a patient's condition is placed in issue by instituting such a proceeding, the patient should not be permitted at the same time to withhold from the court the most vital evidence relating to his condition.

Paragraphs (h) and (i)--Criminal conduct. The URE rule, in subdivision (2), provides that the privilege does not apply in felony prosecutions. The revised rule, in subdivision (4)(h), retains the existing California rule that the privilege is inapplicable in all criminal prosecutions. CODE CIV. PROC. § 1881 (4). See also People v. Griffith, 146 Cal. 339, 80 Pac. 68 (1905).

The URE rule, in subdivision (3), provides also that the privilege is inapplicable in civil actions to recover damages for the patient's felonious conduct. As revised, this exception is found in subdivision (4)(i), which makes the privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. The exception is provided in the URE rule because of the inapplicability of the privilege in felony prosecutions, and its broadened form appears in the revised rule because of the inapplicability of the revised privilege in all criminal prosecutions. Under the URE article relating to hearsay, the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. See UNIFORM RULE 63(3). Thus, if this exception did not exist, the evidence subject to the privilege under this rule would be available in the civil trial if the criminal trial were conducted first but not if the civil trial were conducted first. The admissibility of evidence should not depend on the order in which civil and criminal matters are tried.

This exception is provided, therefore, so that the same evidence is available in the civil case whether the criminal case is tried first or last.

Paragraph (j)--Quasi-criminal proceedings. Because the URE rules do not purport to apply in nonjudicial proceedings, nothing in the rules indicates whether this privilege should apply in such proceedings. The revised rules, however, apply in all proceedings except as otherwise provided by statute. Therefore, subdivision (4)(j) has been included in the rule to provide that the privilege may not be claimed in those administrative proceedings that are comparable to criminal proceedings, *i.e.*, proceedings brought for the purpose of imposing discipline of some sort. Under existing law, this privilege is available in all administrative proceedings conducted under the Administrative Procedure Act because it has been incorporated in Government Code Section 11513(c) by reference; but it is not specifically made available in administrative proceedings not conducted under the Administrative Procedure Act because the statute granting the privilege in terms applies only to civil actions. The revised rule sweeps away this distinction, which has no basis in reason, and substitutes a distinction that has been found practical in judicial proceedings.

Paragraph (k)--Patient-litigant exception. The URE rule provides that there is no privilege in an action in which the condition of the patient is an element or factor of the claim "or defense" of the patient. The revised rule--subdivision (4)(k)--does not extend the patient-litigant exception this far. Instead, it provides that the privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. A plaintiff should not be empowered to deprive a defendant of the privilege merely by bringing an action or proceeding and placing the defendant's condition in issue. But, if the patient himself tenders the issue of his condition, he should do so with the realization that he will not be able

to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege. A limited form of this exception is recognized in existing California law by making the privilege inapplicable in personal injury actions. Code Civ. Proc. § 1881 (4); City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951). The exception as revised extends the existing exception to other situations where the patient himself has raised the issue of his condition.

The revised rule--subdivision (4)(k)--provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (wrongful death). The URE rule does not contain this provision. Under the existing California statute, a person authorized to bring the wrongful death action may consent to the testimony by the physician. Code. Civ. Proc. § 1881 (4). As far as testimony by the physician is concerned, there is no reason why the rules of evidence should be different in a case where the patient brings the action and a case where someone else sues for the patient's wrongful death.

The revised rule--subdivision (4)(k)--provides, also, that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in a case under the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff

Paragraph (L)--Required reports. The provision of the URE rule providing that the privilege does not apply as to information required by statute to be reported to a public officer or recorded in a public office has been extended in subdivision (4)(L) to include information required to be reported by other provisions of law. The privilege should not apply where the information

is public, whether it is reported or filed pursuant to a statute or an ordinance, charter, regulation, or other provision. There is no comparable exception in existing California law; it is a desirable exception, however, because no valid purpose is served by preventing the evidentiary use of relevant information that is required to be reported and made public.

RULE 27.3. PSYCHOTHERAPIST-PATIENT PRIVILEGE

(1) As used in this rule:

(a) "Confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist 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 who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes advice given by the psychotherapist in the course of that relationship.

(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 a diagnosis or preventive, palliative, or curative treatment of his 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 or (ii) a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(2) Subject to Rule 37 and except as otherwise provided in this rule, a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(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 a person authorized to permit disclosure.

(3) The psychotherapist who received or made a communication subject to the privilege under this rule shall claim the privilege whenever he:

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If 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 who 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 of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

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

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.

(f) In a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence.

(g) In a 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 (i) by the patient, or (ii) by any party claiming through or under the patient, or (iii) by any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(h) If the psychotherapist is appointed by order of a court to examine the patient.

(i) As to information which the psychotherapist or the 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.

COMMENT

Neither the URE nor the existing California law provides any special privilege for psychiatrists other than that which is enjoyed by physicians generally. On the other hand, persons who consult psychologists have a broad privilege under the terms of Business and Professions Code Section 2904. Yet, the need for a privilege broader than that provided to patients of medical doctors is as great for persons consulting psychiatrists as it is for persons consulting psychologists. Adequate psychotherapeutic treatment is dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Unless a patient can be assured that such information will be held in utmost confidence, he will be reluctant to make the full disclosure upon which his treatment depends. The Commission has received several reports indicating that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, the Commission recommends that a new privilege be established that would grant to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege will operate to withhold relevant evidence in some cases where such evidence would be crucial, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

Proposed Rule 27.3 is designed to provide this additional privilege. The privilege applies also to psychologists and supersedes the psychologist-patient privilege provided in the Business and Professions Code. The new privilege will be one for psychotherapists generally.

Definition of "psychotherapist." In subdivision (1)(d), "psychotherapist" is defined as any medical doctor or certified psychologist. The privilege is not confined to those medical doctors whose practice is limited to psychiatry because many medical doctors who do not specialize in the field of psychiatry nevertheless practice psychiatry to a certain extent. Some patients cannot afford to go to specialists and must obtain treatment from doctors who do not limit their practice to psychiatry. Then, too, because the line between organic and psychosomatic illness is indistinct, a physician may be called upon to treat both physical and mental or emotional conditions at the same time. Disclosure of a mental or emotional problem will often be made in the first instance to a family physician who will refer the patient to someone else for further specialized treatment. In all of these situations, the psychotherapist privilege should be applicable if the patient is seeking diagnosis or treatment of his mental or emotional condition.

Scope of the privilege. Generally, the new privilege follows the physician-patient privilege and the comments made under Rule 27 will apply to the provisions of Proposed Rule 27.3. The following differences, however, should be noted:

(1) The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal actions and similar proceedings. See Revised Rule 27(4)(h). Since the interests to be protected are somewhat different, this difference in the scope of the two privileges is justified, particularly since the Commission is advised that proper psychotherapy often is denied a patient solely because of a fear that the psychotherapist may be compelled to reveal confidential communications in a criminal proceeding.

Although the psychotherapist-patient privilege applies in a criminal proceeding, the privilege is not available to a defendant who puts his mental or emotional condition in issue, as, for example, by a plea of insanity or diminished responsibility. The exception provided in paragraph (g) of

subdivision (4) makes this clear. This is only fair. In a criminal proceeding in which the defendant has tendered his condition, the prosecution should have available to it the best information that can be obtained in regard to the defendant's mental or emotional condition. That evidence most likely can be furnished by the psychotherapist who examined or treated the patient-defendant.

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. See Revised Rule 27(4)(f), supra at 000. There is no similar exception in the psychotherapist-patient privilege. A patient's fear of future commitment proceedings based upon what he tells his psychotherapist would inhibit the relationship between the patient and his psychotherapist almost as much as would the patient's fear of future criminal proceedings based upon such statements. If a psychotherapist becomes convinced during a course of treatment that his patient is a menace to himself or to others because of his mental or emotional condition, he is free to bring such information to the attention of the appropriate authorities. The privilege is merely an exemption from the general duty to testify in a proceeding in which testimony can ordinarily be compelled to be given. The only effect of the privilege would be to enable the patient to prevent the psychotherapist from testifying in any commitment proceedings that ensue.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. See Revised Rule 27(4)(i). Nor does it apply in administrative disciplinary proceedings. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply

in criminal cases; hence, there is no similar exception in civil actions or administrative proceedings involving the patient's criminal conduct.

Court appointed psychotherapist. Subdivision (4)(h) provides an exception if the psychotherapist is appointed by order of a court to examine the patient. Where the relationship of psychotherapist and patient is created by court order, there is not a sufficiently confidential relationship to warrant extending the privilege to communications made in the course of that relationship. Moreover, when the psychotherapist is appointed by the court, it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. Therefore, it would be inappropriate to have the privilege apply to that relationship. See generally 35 OPS. CAL. ATTY. GEN. 226 regarding the unavailability of the present physician-patient privilege under these circumstances.

RULE 27.5. PRIVILEGE NOT TO TESTIFY AGAINST SPOUSE

(1) A married person has a privilege not to testify against the other spouse in any proceeding except:

(a) A proceeding to commit or otherwise place his spouse or his property, or both, under the control of another because of his alleged mental or physical condition.

(b) A proceeding brought by or on behalf of a spouse to establish his competence.

(c) A criminal proceeding in which one spouse is charged with (i) a crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage, or (ii) a crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage, or (iii) bigamy or adultery, or (iv) a crime defined by Section 270 or 270a of the Penal Code.

(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(2) Subject to the exceptions listed in subdivision (1), a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this subdivision.

(3) Unless wrongfully compelled to do so, a married person who testifies in a particular proceeding does not have a privilege under this rule in that proceeding.

(4) There is no privilege under this rule in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Rule 27.5.

Under this rule, a married person has two privileges: (1) a privilege not to testify against his spouse and (2) a privilege not to be called as a witness in any proceeding to testify against his spouse. No similar privileges are contained in the URE.

Privilege not to testify. The privilege not to testify--subdivision (1)--is recommended because compelling a married person to testify against his spouse would in many cases seriously disturb if not completely disrupt the marital relationship of the persons involved. Society stands to lose more from such disruption than it stands to gain from the testimony which would be made available if the privilege did not exist.

The privilege provided by this subdivision is based in part on a 1956 recommendation and study made by the Commission. See Recommendation and Study relating to The Marital "For and Against" Testimonial Privilege, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES F-1--F-19 (1957).

Privilege not to be called as witness. The privilege not to be called as a witness--subdivision (2)--is somewhat similar to the privilege given the defendant in a criminal case under Rule 23. This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution calling the defendant's wife as a witness, thus forcing her to object before the jury. The privilege not to be called does not apply, however, in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding, but he may refuse to answer a question that would compel him to testify against his spouse.

Exceptions. The exceptions to the privilege under this rule are similar to those contained in Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, but the exceptions in this rule have been made consistent with those provided in Revised Rule 28--the marital communications privilege.

Waiver. Subdivision (3) provides that the privileges under this rule will be waived whenever the spouse entitled to claim the privilege testifies. Thus, a married person cannot call his spouse to give favorable testimony and expect the spouse to invoke this privilege to keep from testifying on cross-examination to unfavorable matters.

Subdivision (4) precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives all marital privileges. Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927); Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448 (1929). But cf. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940 (1920). And when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. Hagen v. Silva, 139 Cal. App.2d 199, 293 P.2d 143 (1956). Similarly, when the spouses join as plaintiffs in an action to recover damages to one of them, the cause of action being community property at the time the case was decided, each has been held

to have waived the privilege as to the testimony of the other. In re Strand, 123 Cal. App. 170, 11 P.2d 89 (1932). However, the privilege is available to the plaintiff spouse who sues alone to recover for his personal injuries, even though the recovery would have been community property. Rothschild v. Superior Court, 109 Cal. App. 345, 293 Pac. 106 (1930). But cf. Credit Bureau of San Diego v. Smallen, 114 Cal. App.2d Supp. 834, 249 P.2d 619 (1952). This rule has seemingly been developed to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse under Section 1881(1). It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. Ayres v. Wright, 103 Cal. App. 610, 284 Pac. 1077 (1930).

Present law.

Under Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

The "for" privilege. The Commission has concluded that the marital testimonial privilege provided by existing law as to testimony by one spouse for the other should be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his favor. If a case can be imagined in which a

party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in favor of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction.

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege to prevent his spouse from testifying against him in a civil action. The privilege under Rule 23.5 is given exclusively to the witness spouse because he instead of the party spouse is more likely to make the determination of whether to claim the privilege on the basis of its probable effect on the marital relationship. For example, because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of People v. Ward, 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 13-year-old sister. He had threatened to murder his wife--and it seems likely that he would have done so had she not fled. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the

privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

RULE 28. MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

(1) Subject to Rule 37 and except as otherwise provided in [Paragraphs-(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 constitutes-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 another [the-other] from disclosing, a communication [s-found-by-the-judge] if he claims the privilege and the communication was [to-have been-had-or] made in confidence between [them] him and the other spouse while they were 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) [(a)] If [the-judge-finds-that-sufficient-evidence,-aside from-the-communication,-has-been-introduced-to-warrant-a finding--that] the communication was made, in whole or in part, to enable or aid anyone to commit or [to] plan to commit a crime or [a-tort] to perpetrate or plan to perpetrate a fraud.

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

(c) In a proceeding brought by or on behalf of either spouse in which the spouse seeks to establish his competence.

(d) [(a)] In [an-action] a proceeding by one spouse against the other spouse, or in a proceeding by a person claiming by testate or intestate succession or by inter vivos transaction from a deceased spouse against the other spouse. [(b)-in-an-action-for-damages-for-the-alienation-of-the affections-of-the-other,-or-for-criminal-conversation-with-the-other,-or]

(e) [(c)] In a criminal [action] proceeding in which one [of-them] spouse is charged with (i) a crime against the person or property of the other spouse 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 person or property of the other spouse, or (iii) bigamy or adultery, or [desertion-of-the-other-or-of-a-child-of-either] (iv) a crime defined by Section 270 or 270a of the Penal Code. [,-or]

(f) In a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(g) [(d)] In a criminal [action] proceeding in which the [accused offers-evidence-of-a] communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

[(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.]

COMMENT

Rule 28 expresses the privilege for confidential marital communications. Under existing law, the privilege for confidential marital communications is provided in subdivision 1 of Code of Civil Procedure Section 1881.

Subdivision (1)--General rule

Who can claim the privilege. Under the URE rule, only the spouse who transmitted to the other the information which constitutes the communication can claim the privilege. Under existing California law, the privilege may belong only to the nontestifying spouse inasmuch as the statute provides: "Nor can either . . . be, without the consent of the other, examined as to any communication made by one to the other during the marriage." (Emphasis added.) It is likely, however, that the statute would be construed to grant the privilege to both spouses. See generally In re De Neef, 42 Cal. App.2d 691, 109 P.2d 741 (1941). But see People v. Keller, 165 Cal. App.2d 419, 423-424, 332 P.2d 174, 176 (1958).

Under the revised rule, both spouses are the holders of the privilege and either spouse may claim it. As a practical matter, it is often difficult to separate the subject matter of statements made from one spouse to another from the subject matter of the replies. Hence, if the privilege were only that of the communicating spouse, the nature of the privileged statement might be revealed by obtaining from the other spouse, if willing to testify, what was said in return. Protection for each spouse can be provided only by giving the privilege to both.

Under the revised rule, a guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed

at all, can be claimed only by or on behalf of the surviving spouse.

Termination of marriage. Under existing California law, the privilege may be claimed as to confidential communications made during a marriage even though the marriage has terminated at the time the privilege is claimed. Code Civ. Proc. § 1881(1); People v. Mullings, 83 Cal. 138, 23 Pac. 229 (1890). The URE rule, however, would permit the privilege to be claimed only during the marital relationship; no privilege would exist after the marriage is terminated by death or divorce. This portion of the URE rule has been revised to retain the existing California law. Free and open communication between spouses would be unduly inhibited if one of the spouses could be compelled to testify as to the nature of such communications after the termination of the marriage.

Eavesdroppers. The URE rule provides no protection against eavesdroppers. It provides that the privilege may be asserted only to prevent testimony by a spouse; hence, a person who has overheard a confidential communication between spouses may testify concerning what he overheard. The revised rule, however, permits the privilege to be exercised against anyone. Thus, eavesdroppers may be prevented from testifying by a claim of privilege. This constitutes a change in the existing law, for the existing law also provides no protection against eavesdroppers. See generally People v. Peak, 66 Cal. App.2d 894, 153 P.2d 464 (1944); People v. Mitchell, 61 Cal. App. 569, 215 Pac. 117 (1923). The change is desirable, however, for no one should be able to use the fruits of such wrongdoing for his own advantage by using them as evidence in court. The protection afforded against eavesdroppers also changes existing law that permits a third party to whom one of the spouses has revealed a confidential

communication to testify concerning it. People v. Swaile, 12 Cal. App. 192, 195-196, 107 Pac. 134, 137 (1909), People v. Chadwick, 4 Cal. App. 63, 87 Pac. 384 (1906). See also Wolfe v. United States, 291 U.S. 7 (1934). Under Rule 37, such conduct would constitute a waiver of the privilege only as to the spouse who makes the disclosure; the privilege would remain intact as to the spouse not consenting to such disclosure.

Criminal cases. Rule 23(2), as proposed in the URE, provides a defendant in a criminal case with a special privilege as to confidential marital communications. About the only difference between Rules 28 and 23(2) of the URE as originally proposed is that under URE Rule 23(2) the privilege applies even though the person claiming the privilege is not the communicating spouse. Another possible difference is that URE Rule 23(2) would create a post-coverture privilege, although this is not altogether clear. In any event, the revisions of Rule 28 have eliminated any possible differences between Revised Rule 28 and URE Rule 23(2). Therefore, subdivision (2) of URE Rule 23 has become superfluous in the revised rules and has been eliminated.

Waiver. Since the revised rule gives each spouse the right to claim the privilege, subdivision (3) of the URE rule is no longer appropriate and has been omitted. The question when the privilege under the revised rule is terminated is one that is dealt with in Rule 37, relating to waiver.

Subdivision (2)--Exceptions

The exceptions provided in Rule 28 have been reorganized so that they appear in the same order in which the exceptions appear in the other communication privileges. These exceptions, for the most part, are recognized in existing California law. The exception provided in URE subdivision (2)(b) has been eliminated because there are no actions for alienation of affections or for criminal conversation in California. CIV. CODE § 43.5.

Paragraph (a)--Crime or fraud. In paragraph (a) of subdivision (2), the revised rule sets forth an exception when the communication was made to enable or aid anyone to commit or plan to commit a crime or fraud. The original URE version of the exception would have made the exception applicable whenever the communication was made for the purpose of committing or planning to commit a crime or a tort. The privilege is justified by the need for the freest sort of communication between spouses about all aspects of their business, social, and private lives. Because of the wide variety of torts and the technical nature of many, an extension of the exception to include all torts would nullify the privilege to too great an extent. This exception does not appear to have been recognized in the California cases dealing with this privilege. Nonetheless, the exception as revised does not seem so broad that it would impair the values the privilege was created to preserve, and in many cases the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit.

Paragraphs (b) and (c)--Guardianship and competency proceedings. Paragraphs (b) and (c) of subdivision (2) have been added in the revised rule. These paragraphs express an exception contained in the existing California law. CODE CIV. PROC. § 1881(1) (exception added by Cal. Stats. 1957, Ch. 1961, p. 3504). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, virtually all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. Therefore, inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings, it would be undesirable to

permit either spouse to invoke a privilege to prevent information vital to the court's determination from being presented to the court.

Paragraph (d)--Litigation between spouses. The exception for litigation between the spouses, subdivision (2)(d), is recognized under existing law. CODE CIV. PROC. § 1881(1). The revised rule extends the principle of the exception to similar cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse. See generally Estate of Gillett, 73 Cal. App.2d 588, 166 P.2d 870 (1946).

Paragraphs (e) and (f)--Crime against spouse or children. Subdivision (2)(e) of the revised rule restates with minor variations an exception that is recognized under existing California law. CODE CIV. PROC. § 1881(1). Paragraphs (e) and (f) of subdivision (2) of the revised rule together create an exception for all the proceedings mentioned in Section 1322 of the Penal Code.

Paragraph (g)--Communication offered by defendant spouse. The exception in subdivision (2)(g) of the revised rule does not appear to have been recognized in any California case. Nonetheless, it appears to be a desirable exception. When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his case, his spouse, or his former spouse, should not be privileged to withhold the information. The privilege for marital communications is granted to enhance the confidential relationship between spouses. Yet, nothing would seem more destructive of marital harmony than to permit one spouse to refuse to give testimony which is material to establish the defense of the other spouse in a criminal proceeding.

RULE 28.5. CONFIDENTIAL COMMUNICATIONS: BURDEN OF PROOF

Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof[8] to establish that the communication was not confidential.

COMMENT

Revised Rules 26, 27, 27.3, and 28 all provide a privilege for communications made "in confidence" in the course of certain relationships. Although there appears to have been no cases involving the question in California, the general rule elsewhere is that such a communication is presumed confidential and the party objecting to the claim of privilege has the burden of showing that the communication was not made in confidence. See generally, with respect to the marital communication privilege, 8 Wigmore, Evidence § 2336 (McNaughton rev. 1961). See also Blau v. United States, 340 U.S. 332, 333-335 (1951). In adopting by statute the privileges article of the URE, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. Rev. Stat. § 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52.

The rule is desirable. If the privilege claimant were required to show the communication was made in confidence, in many cases he would be compelled to reveal the subject matter of the communication in order to

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[8] "Burden of proof" is defined in Uniform Rule 1 as synonymous with burden of persuasion. The term does not refer merely to the burden of producing evidence.

establish his right to the privilege. Hence, Proposed Rule 28.5 is submitted with the rules relating to privileged communications to establish the rule of presumptive confidence in California, if it is not the rule already. See Sharon v. Sharon, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889); Hager v. Shindler, 29 Cal. 47, 63 (1865)("Prima facie, all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

RULE 29. PRIEST-PENITENT PRIVILEGE

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

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

(b) [(c)] "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-is-a-member] communication made in confidence in the presence of no third person to a priest who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.

(c) [(a)] "Priest" means a priest, clergyman, minister of the gospel, or other officer of a church or of a religious denomination or religious 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-by-members-of-his-church,-denomination-or-organization;]

(2) Subject to Rule 37, a penitent [person], whether or not a party, has a privilege to refuse to disclose, and to prevent [a-witness] another from disclosing, a penitential communication if he claims the privilege [and-the judge-finds-that-(a)-the-communication-was-a-penitential-communication-and (b)-the-witness-is-the-penitent-or-the-priest,-and-(c)-the-claimant-is-the penitent,-or-the-priest-making-the-claim-on-behalf-of-an-absent-penitent].

(3) Subject to Rule 37, a priest, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

COMMENT

Rule 29 sets forth the privilege that is now granted by California law in subdivision 3 of Code of Civil Procedure Section 1881.

There may be several reasons for the granting of this privilege, but at least one underlying reason seems to be that the law will not compel a clergyman to violate--nor punish him for refusing to violate--the tenets of his church which require him to maintain secrecy as to confessional statements made to him in the course of his religious duties. See generally 8 Wigmore, Evidence §§ 2394-2396 (McNaughton rev. 1961). The rule has been revised in several respects in order to give adequate expression to this policy.

The definition of "penitential communication" has been revised so that it is no longer necessary for a court to determine the content of the statement; the court need determine only that the communication was made in the presence of the priest only and that the priest has a duty to keep the communication secret. Under existing law, the communication must be a "confession"; under the URE rule, the communication must be a "confession of culpable conduct."

The URE rule requires the penitent to be a member of the church, denomination, or religious organization of which the priest or clergyman receiving the confession is a member. The rule has been revised to eliminate this requirement, thus retaining the existing California law.

The revised rule permits the privilege to be claimed by either the penitent or the priest. The URE rule also permits either to claim the privilege, but the priest is permitted to claim the privilege only for an absent penitent. Under the revised rule, it is clear that the priest has

a privilege in his own right. In this regard, the revised rule differs from existing California law in that the present statute gives a penitent a privilege only to prevent the priest from disclosing a confession. Literally construed, the statute would not give the penitent himself the right to refuse disclosure of the confession. However, similar privilege statutes have been held to grant a privilege both to refuse to disclose and to prevent the other communicant from disclosing the privileged statement. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 236, 231 P.2d 26, 31 (1951) (attorney-client privilege); Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 526, 47 Pac. 364, 366 (1897) ("a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose"). Hence, it is likely that the statute granting the priest-penitent privilege would be similarly construed.

The addition of the reference to Rule 37 is a clarifying change, not substantive, for in the original URE, Rule 37 itself makes clear that it applies to Rule 29.

Under the revised rule, a priest is under no legal compulsion to claim the privilege; hence, a penitential communication may be admitted if the penitent is deceased, incompetent, or absent and the priest fails to claim the privilege. This probably changes existing California law; but, if so, the change is desirable. For example, if a murderer had confessed the crime to a priest and then died, the priest might under the circumstances decide not to claim the privilege and, instead, give the evidence on behalf of an innocent third party who had been indicted for the crime. The extent to which the priest should keep secret or reveal confessional communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual priest involved and the discipline of the religious body of which he is a member.

RULE 30. RELIGIOUS BELIEF

[~~Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.~~]

COMMENT

The net effect of URE Rule 30 is to declare that a person's theological or religious belief is inadmissible on the ground of privilege on the issue of his credibility as a witness. In People v. Copsey, 71 Cal. 548 12 Pac. 721 (1887), the Supreme Court held that evidence of the lack of religious belief on the part of a witness is incompetent for impeachment purposes and, therefore, that objections to questions concerning the witness' religious belief were properly sustained. Thus, the existing California law declares that the evidence stated by URE Rule 30 to be privileged is incompetent for impeachment purposes, while the URE rule provides that the evidence is privileged if sought to be introduced for that purpose.

The Commission disapproves the URE rule because it excludes evidence of religious belief on the issue of credibility only when the witness himself is asked for the objectionable information. Nothing in this rule would preclude the introduction of such evidence by means of other witnesses. The problem involved actually concerns what evidence is competent on the issue of credibility. The Commission will recommend a provision covering the question of religious belief when URE Rules 20-22, which deal with evidence as to credibility, are studied.

RULE 31. POLITICAL VOTE

If he claims the privilege, [every] a person has a privilege to refuse to disclose the tenor of his vote at a [political] public election where the voting is by secret ballot unless [the-judge-finds that-the-vote-was-cast] he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

COMMENT

Revised Rule 31 declares the existing California law. The California cases declaring such a privilege have relied upon the provision of the Constitution that "secrecy in voting be preserved." Cal. Const., Art. II, § 5. See Bush v. Head, 154 Cal. 227, 97 Pac. 512 (1908); Smith v. Thomas, 121 Cal. 533, 54 Pac. 71 (1898). Since the policy of ballot secrecy extends only to legally cast ballots, the California cases and Revised Rule 31 recognize that there is no privilege as to the manner in which an illegal vote has been cast. Patterson v. Henley, 136 Cal. 265, 68 Pac. 821 (1902).

The rule has been revised to cover the subject of waiver by prior disclosure because Revised Rule 37 applies only to the communication privileges (Revised Rules 26 through 29).

RULE 32. TRADE SECRET

The owner of a trade secret has a privilege, which may be claimed by him or by his agent or employee, to refuse to disclose the secret and to prevent [other-persons] another from disclosing it if [the-judge-finds that] the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

COMMENT

Although no California cases have been found holding evidence of a trade secret privileged, at least one California case has recognized that such a privilege may exist unless its holder has injured another and the disclosure of the secret is indispensable to the ascertainment of the truth and the ultimate determination of the rights of the parties. Willson v. Superior Court, 66 Cal. App. 275, 225 Pac. 881 (1924) (trade secret held not subject to privilege because of plaintiff's need for information to establish case against the person asserting the privilege). Indirect recognition of such a privilege has also been given in Section 2019 of the Code of Civil Procedure, which provides that in discovery proceedings the court may make protective orders prohibiting inquiry into "secret processes, developments or research."

The privilege is granted so that secrets essential to the successful continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness's duty to testify as the means for injuring an otherwise profitable business. See generally 8 Wigmore, Evidence § 2212 (3) (McNaughton rev. 1961). Nevertheless, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that may be classified as trade secrets. Recog-

nizing the privilege as to such information would serve only to hinder the courts in determining the truth without providing the owner of the secret any needed protection. In many cases, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny.

Therefore, the privilege is recognized under this rule only if its application will not tend to conceal fraud or otherwise work injustice. The privilege will protect trade secrets only where they constitute a subordinate means of proof relative to the other evidence in the case. It will not permit concealment of a trade secret when disclosure is essential in the interest of justice.

With the limitations expressed in the rule, the privilege deserves express recognition in the California law. The limits of the privilege are necessarily uncertain and will have to be worked out through judicial decisions.

RULE 33. SECRET OF STATE

[(1)--As-used-in-this-Rule,-"secret-of-state"-means-information-not open-or-theretofore-officially-disclosed-to-the-public-involving-the-public security-or-concerning-the-military-or-naval-organization-or-plans-of-the United-States,-or-a-State-or-Territory,-or-concerning-international-relations.

(2)--A-witness-has-a-privilege-to-refuse-to-disclose-a-matter-on-the ground-that-it-is-a-secret-of-state,-and-evidence-of-the-matter-is-inadmissible, unless-the-judge-finds-that-(a)-the-matter-is-not-a-secret-of-state,-or-(b)-the chief-officer-of-the-department-of-government-administering-the-subject-matter which-the-secret-concerns-has-consented-that-it-be-disclosed-in-the-action.]

COMMENT

The Commission disapproves URE Rule 33.

Federal laws provide adequate protection for military secrets and secrets relating to international relations or national security. See, e.g., Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953). See also United States v. Reynolds, 345 U.S. 1 (1953). Such laws will prevail over any state laws that might be deemed to require the disclosure of such information.

So far as secrets of the State and local entities are concerned, they are adequately protected by Revised Rules 34 and 36 and by various statutes prohibiting revelation of specific kinds of official information.

No privilege of this sort is now recognized by the California statutes. Under existing law, governmental secrets are protected either by subdivision 5 of Code of Civil Procedure Section 1881, which--like Revised Rule 34--prohibits disclosure when the interest of the public would suffer thereby, or by specific statutes--such as the provisions of the Revenue and Taxation Code prohibiting disclosure of tax returns. See, e.g., Rev. & Tax Code §§ 19281-19289.

RULE 34. OFFICIAL INFORMATION

(1) As used in this rule, "official information" means information not open or theretofore officially disclosed to the public [relating-to internal--affairs--of-this-State-or-of-the-United-States] acquired by a public employee [official-of-this-State-or-the-United-States] in the course of his duty. [,-or-transmitted-from-one-such-official-to-another-in-the course-of-duty.]

(2) A [witness] public entity has a privilege to refuse to disclose [a-matter-on-the-ground-that-it-is] official information, and to prevent such disclosure by anyone who has acquired the information in a manner authorized by the public entity, [,-and-evidence-of-the-matter-is-inadmissible,] if [the-judge-finds-that-the-matter-is-official-information,] the privilege is claimed by a person authorized by the public entity to do so and:

(a) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State [,] ; or

(b) [disclosure-of-the-information-in-the-action-will-be-harmful-to-the interests-of-the-government-of-which-the-witness-is-an-officer-in-a-governmental capacity.] Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that it be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(3) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this rule by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(4) Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal official information to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

COMMENT

Rules 34 and 36 generally.

URE Rules 34 and 36 set forth the privilege that is now granted by subdivision 5 of Section 1881 of the Code of Civil Procedure. That subdivision says: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

URE Rule 34 provides that official information is privileged if its revelation would be harmful to the interest of the government--irrespective of the need for the information in the particular case. Under the existing law, the exercise of the privilege in a criminal case where the privileged information is material to the defense will result in a dismissal of some cases, and, in others, it will result in the striking of a witness' testimony or an item of evidence. See Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958); People v. McShann, 50 Cal.2d 802, 808, 330 P.2d 33, 36 (1958).

On the other hand, under URE Rule 36, a judge is required to hold the identity of an informer unprivileged if revelation of his identity is needed to assure a fair determination of the issues--without regard for the interest of the public. This rule would be applied even in litigation between private parties. No reason appears for not permitting the public's interest to be considered--as it is under Code of Civil Procedure Section 1881 and URE Rule 34 for all other kinds of official information.

Revised Rules 34 and 36 eliminate the inexplicable difference between the official information privilege and the informer privilege as proposed in the URE. Under the revised rules, the admissibility of both official information generally and the identity of an informer will be determined under the same standard, which requires consideration of both the interest of the public in the confidentiality of the information and the interest of the public and the litigants in the just determination of the litigation. And under the revised rules, as under existing law, if either the official information privilege or the informer privilege is exercised in a criminal case, the government must suffer an adverse order on the issue upon which the privileged information is material to the defense. However, the public entity bringing the action is not subject to an adverse order where disclosure is forbidden by federal statute. This is in accord with the present law as recently determined in People v. Parham, 60 Cal.2d ___, 34 Cal. Rptr. , 385 P.2d (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike the witnesses' testimony affirmed).

Revised Rule 34.

Subdivision (1). The phrase "relating to the internal affairs of this State or of the United States" has been deleted from subdivision (1) in order to broaden its coverage to include official information in the possession of local entities in California. The term "public employee," defined in Revised Rule 22.3, has been substituted for "public official of this State or of the United States" in order to make it clear that the privilege exists for official information of local governmental entities as well as official information of the State or of the United States.

Subdivision (2). The phrase "and evidence of the matter is inadmissible" has been deleted from subdivision (2). The phrase was included in the original URE to indicate that the privilege could be claimed by anyone. The revised rule permits the privi-ege to be invoked by the public entity concerned with the disclosure of the information or by an authorized agent thereof. Since the privilege is granted to enable the government to protect its secrets, no reason exists for permitting the privilege to be exercised by persons who are not concerned with the public interest.

Under the revised rule, the privilege may be asserted only against persons who have acquired the information in an authorized manner. If, for example, a person reported by telephone a violation of the law, his identity would be privileged under Revised Rule 36 and the information furnished would be privileged under Revised Rule 34. If another person were present when the telephone call was made, the privileges granted by Revised Rules 34 and 36 could not be used to prevent that third person from testifying concerning what he heard and saw. No case has been discovered involving this issue, but the present language of subdivision 5 of Code of Civil Procedure Section 1881 indicates that no privilege exists under present law that would exclude such testimony.

Under Revised Rule 34, official information is absolutely privileged if its disclosure is forbidden by either a federal or state statute. Other official information is subject to a conditional privilege; the judge must determine in each instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweigh the other. The Commission recognizes that a statute cannot establish hard and fast rules to guide the judge in this process of balancing public and private interests. He should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information.

Subdivision (3). Subdivision (3) expresses the rule of existing law that in a criminal case, "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." United States v. Reynolds, 345 U.S. 1, 12 (1953). In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the court must dismiss the case if the State does not reveal the information. In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant. See, e.g., Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958). In those cases, the court will strike the testimony of a particular witness or make some other order appropriate under the circumstances if the State insists upon its privilege.

It should be noted that subdivision (3) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (3) does not require the imposition of its sanction if the privilege is invoked, and the information is withheld, by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (3) states existing California law. People v. Parham, 60 Cal.2d , 34 Cal. Rptr. , 385 P.2d (1963)(prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (4). This subdivision states the existing California law as declared in People v. Keener, 55 Cal.2d 714, 12 Cal Rptr. 859, 361 P.2d 587 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Since Revised Rule 34 treats official information the same as the identity of an informer is treated under Revised Rule 36, this subdivision has been added to the URE rule. For a discussion of this subdivision in the precise situation that gives rise to its inclusion, see the Comment on Rule 36, infra at 000.

RULE 35. COMMUNICATION TO GRAND JURY

[~~A-witness-has-a-privilege-to-refuse-to-disclose-a-communication-made to-a-grand-jury-by-a-complainant-or-witness,-and-evidence-thereof-is inadmissible,-unless-the-judge-finds-(a)-the-matter-which-the-communication concerned-was-not-within-the-function-of-the-grand-jury-to-investigate,-or (b)-the-grand-jury-has-finished-its-investigation,-if-any,-of-the-matter, and-its-finding,-if-any,-has-lawfully-been-made-public-by-filing-it-in-court or-otherwise,-or-(c)-disclosure-should-be-made-in-the-interests-of-justice.~~]

COMMENT

The Commission disapproves URE Rule 35.

Sections 911 and 924.2 of the California Penal Code require a grand juror to maintain secrecy concerning the testimony of witnesses examined before the grand jury. There are two exceptions to this statutory requirement: (1) a court may require a grand juror to disclose the testimony of a witness for the purpose of ascertaining whether it is consistent with the testimony given by the witness before the court, and (2) a court may compel a grand juror to disclose the testimony given before the grand jury when the witness who gave such testimony is charged with perjury in connection therewith. Penal Code § 924.2.

Unlike the existing California law, the URE rule grants the privilege to the witness as well as to the members of the grand jury, and the exceptions provided in the URE rule are far more extensive than the exceptions provided in the existing California law.
The existing California privilege exists only for the protection of the grand jurors; the witnesses before the grand jury cannot invoke the privilege and no one can predicate error upon the fact that a grand juror violated his obligation of secrecy and related what was said. On the other hand, the URE rule makes the evidence inadmissible. Hence, any party may object to the introduction of such evidence.

The Commission believes that the URE rule is not broad enough in one respect--that is, the exceptions are so sweeping that the secrecy of the grand jury proceedings is not adequately protected. On the other hand, the Commission believes that the provisions of the URE

rule are too broad in another respect--that is, the right to claim the privilege is given to persons who have no legitimate interest in maintaining the secrecy of the grand jury proceedings.

In both respects, the existing California law seems superior to the URE rule. Hence, the Commission disapproves Rule 35.

RULE 36. IDENTITY OF INFORMER

(1) A [witness] public entity has a privilege to refuse to disclose the identity of a person, if such identity is not or has not theretofore been officially made known to the public, who has furnished information as provided in subdivision (2) of this rule purporting to disclose a violation of [a provision-of] the laws of this State or of the United States [to-a-representative-of-the-State-or-the-United-States-or-a-governmental-division-thereof, charged-with-the-duty-of-enforcing-that-provision,-and-evidence-thereof-is inadmissible,-unless-the-judge-finds-that] and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity, if the privilege is claimed by a person authorized by the public entity to do so and:

(a) [the-identity-of-the-person-furnishing-the-information-has-already been-otherwise-disclosed] Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(b) [disclosure-of-his-identity-is-essential-to-assure-a-fair-determination of-the-issues.] Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(2) This rule applies only if the information is furnished by the informer directly to a law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or is furnished by the informer to another for the purpose of transmittal to such officer or representative.

(3) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(4) Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

COMMENT

Under existing law, the governmental privilege as to the identity of an informer is granted by subdivision 5 of Code of Civil Procedure Section 1881. Under this section, information as to the identity of an informer is privileged to the same extent as is official information generally. There appears to be no reason to change the existing law in this regard, for the policy reasons requiring secrecy as to the identity of informers seem to be the same as those requiring secrecy as to all official information. Accordingly, Rule 36 has been revised to provide that the privilege may be

claimed under the same conditions that the official information privilege may be claimed. See the comment to Revised Rule 34, supra at 000-000.

The revised rule provides a privilege concerning the identity of an informer to a law enforcement officer or to a representative of an administrative agency charged with enforcement of the law. URE Rule 36 requires the informer to furnish the information to a governmental representative who is "charged with the duty of enforcing" the provision of law which is alleged to be violated. An informer, however, should not be required to run the risk that the official to whom he discloses the information is one "charged with the duty of enforcing" the law alleged to be violated. For example, under Revised Rule 36, if the informer discloses information concerning a violation of state law to a federal law enforcement officer, the identity of the informer is protected. However, his identity would not be protected under URE Rule 36.

The revised rule also applies when the information is furnished indirectly to a law enforcement officer as well as directly. The URE rule might be construed to apply to informers who furnish information indirectly, but the revised language eliminates any ambiguity that may exist in this regard.

Subdivision (4). The language used in this subdivision is identical to the precise holding in People v. Keener, 55 Cal.2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961). Nothing in this rule, of course, affects the defendant's right to discover the identity of an informer where such information is material to the issue of the defendant's guilt. Where the issue concerns the legality of a search made pursuant to a warrant, however, there is sufficient protection afforded the defendant by the procedures relating to the circumstances under which a warrant may be obtained.

RULE 36.5. CLAIM OF PRIVILEGE BY PRESIDING OFFICER

(1) The presiding officer shall exclude, on his own motion, information that is subject to a claim of privilege under this article if:

(a) The person from whom the information is sought is not a person authorized to claim the privilege; and

(b) There is no party to the proceeding who is a person authorized to claim the privilege.

(2) The presiding officer may not exclude information under this rule if:

(a) There is no person entitled to claim the privilege in existence; or

(b) He is otherwise instructed by a person authorized to permit disclosure.

COMMENT

This rule does not appear in the URE. A similar provision does appear, however, in the Model Code of Evidence. Model Code of Evidence, Rule 105 (e) (1942). It may have been omitted from the URE because the judge's power was regarded as inherent.

The rule is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, under Revised Rule 26, a third party--perhaps the lawyer's secretary--may have been present when a confidential communication was made. In the absence of both the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Proposed Rule 36.5. Thus, Proposed Rule 36.5 requires a judge to claim the privilege for the absent holder.

Proposed Rule 36.5 apparently is declarative of the existing California law. See People v. Atkinson, 40 Cal. 284, 285 (1870) (attorney-client privilege).

RULE 37. WAIVER OF PRIVILEGE

~~A-person-who-would-otherwise-have-a-privilege-to-refuse-to-disclose or-to-prevent-another-from-disclosing-a-specified-matter-has-no-such-privilege with-respect-to-that-matter-if-the-judge-finds-that-he-or-any-other-person while-the-holder-of-the-privilege-has-(a)-contracted-with-anyone-not-to claim-the-privilege-or,-(b)-without-coercion-and-with-knowledge-of-his privilege,-made-disclosure-of-any-part-of-the-matter-or-consented-to-such-a disclosure-made-by-any-one.~~

(1) Except as otherwise provided in this rule, the right of any person to claim a privilege provided by Rules 26, 27, 27.3, 28, or 29 is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such a disclosure made by anyone. Consent to disclosure is manifested by a failure to claim the privilege in any proceeding in which a holder of the privilege has the legal standing and opportunity to claim the privilege or by any other words or conduct of a holder of the privilege indicating his consent to the disclosure.

(2) Where two or more persons are the holders of a privilege provided by Rules 26, 27, 27.3, or 28, the privilege with respect to a communication is not waived by a particular holder of the privilege unless he or a person with his consent waives the privilege in a manner provided in subdivision (1) of this rule, even though another holder of the privilege or another person with the consent of such other holder has waived the right to claim the privilege with respect to the same communication.

(3) A disclosure that is itself privileged under this article is not a waiver of any privilege.

(4) A disclosure in confidence of a communication that is protected by a privilege provided by Rule 26, 27, or 27.3, when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

COMMENT

This rule covers in some detail the matter of waiver of privileges. The language of the URE rule has been revised to state more clearly the manner in which a waiver is accomplished and to make some significant substantive changes in the URE rule.

Scope. URE Rule 37 applies to all of the privileges. The revised rule applies only to the communication privileges--Revised Rules 26, 27, 27.3, 28, and 29.

Revised Rules 23 through 25, 27.5, 31, and 33 through 36 contain their own waiver provisions. Hence, it is unnecessary to make Rule 37 applicable to these privileges. It is also unnecessary to make Rule 37 applicable to Rule 32 (trade secrets), for a matter will cease to be a trade secret if the secrecy of the information is not guarded; therefore, a specific rule of waiver is not needed.

Subdivision (1). Subdivision (1) of the revised rule states the general rule with respect to the manner in which a privilege is waived. It makes it clear that failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver. This seems to be the existing California law. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951); Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688 (1897). There is, however, at least one case that is out of harmony with this rule.

People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954)(defendant's failure to claim privilege to prevent a witness from testifying as to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

Subdivision (2). Under the URE rule, a waiver by any person while a joint holder of the privilege waives the privilege for all joint holders. Under subdivision (2) of the revised rule, a waiver of the privilege by one joint holder does not operate to waive the privilege for any of the other joint holders of the privilege. Subdivision (2) declares the existing California law. See People v. Kor, supra, 129 Cal. App.2d 436, 277 P.2d 94 (1954)(at the time of the communication, the attorney was acting for both the defendant and the witness who testified); People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951).

Subdivision (3). Subdivision (3) of the revised rule makes it clear that a privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his attorney-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence what it was that he told his wife. And a person does not waive the attorney-client privilege as to a communication related to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The concept of waiver is based upon the thought that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been

such an abandonment of the secrecy to which the holder is entitled to deprive the holder of his right to maintain further secrecy.

Subdivision (4). Subdivision (4) has been added to maintain the confidentiality of communications in situations where the communications are disclosed to others in the course of accomplishing the purpose for which the communicant was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will be better able to advise his client, the disclosure is not a waiver under this rule. Nor would a physician's or psychotherapist's keeping of confidential records, such as confidential hospital records, necessary to diagnose or treat a patient be a waiver under this rule. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure. With respect to the interrelationship of the lawyer-client privilege with the physician-patient and psychotherapist-patient privileges in cases where the same person is both client and patient, see the discussion in the Comment to Rule 26, supra at 000.

Knowledge of the privilege. The URE rule provides that a waiver is effective only if disclosure is made by the holder of the privilege "with knowledge of his privilege." This requirement has been eliminated because the existing California law apparently does not require a showing that the person knew he had a privilege at the time he made the disclosure. See People v. Ottenstror, 127 Cal. App.2d 104, 273 P.2d 289 (1954); Rose v. Crawford, 37 Cal. App.664, 174 Pac. 69 (1918). But cf. People v. Kor, 129 Cal. App.2d 436, 447, 277 P.2d 94, 100-101 (1954) (concurring opinion). The privilege is lost because the seal of secrecy has in fact been broken and because the holder did not himself consider the matter sufficiently confidential to keep it secret. If the holder does not think it important to keep the matter secret, there is then no reason to permit him to exclude the communication when it is needed in order to do justice.

Waiver by contract. The URE rule provides that a privilege is waived if the holder has contracted to waive it. This has been omitted from the revised rule. Under the revised rule, the fact that a person has agreed to waive a particular privilege for a particular purpose--as, for example, an agreement to waive the physician-patient privilege in an application for insurance--does not waive the privilege generally unless disclosure is actually made pursuant to such authorization. The fact that a person has contracted not to claim a privilege should not be a determining factor as to the existence of the privilege in cases bearing no relationship to the contract. On the other hand, once disclosure is made pursuant to the contract, the seal of secrecy is broken and the holder of the privilege should no longer be able to claim it.

The omission of the provision for waiver by contract will not affect the rights of the contracting parties. Thus, under Revised Rule 37, the privilege still remains despite a contract to waive it; but Revised Rule 37 does not relieve a person from any liability that may exist for breach of the contract to waive the privilege. This makes applicable to the communication privileges a rule that has been applied in connection with the privilege against self-incrimination. See Hickman v. London Assurance Corp., 184 Cal. 524, 195 Pac. 45 (1920) (recovery on fire insurance policy denied where insured refused on ground of self-incrimination to submit to examination provided for in the policy). See also Christal v. Police Commission, 33 Cal. App.2d 564, 92 P.2d 416 (1933); 8 Wigmore, Evidence § 2275 (McNaughton rev. 1961). There is no reason why a similar rule should not be made applicable to the communication privileges generally. Though no California cases involving this specific situation have been found, the logic of the rule expressed in Revised Rule 37 is persuasive.

RULE 37.5. RULING UPON A CLAIM OF PRIVILEGE

(1) Subject to subdivision (2), the presiding officer may not require disclosure of information claimed to be privileged under this article in order to rule on the claim of privilege.

(2) When a court is ruling on a claim of privilege under Rule 32, 34, or 36 and is unable to rule on the claim without requiring disclosure of the information claimed to be privileged, the judge may require the person from whom disclosure is sought or the person entitled to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person entitled to claim the privilege and such other persons as the person entitled to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of the person entitled to claim the privilege, what was disclosed in the course of the proceedings in chambers.

COMMENT

This rule does not appear in the URE. Under this rule, as under existing law, revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged, for such a coerced disclosure would itself violate the privilege. See Collette v. Sarrasin, 184 Cal. 283, 288-289, 193 Pac. 571, 573 (1920).

An exception to the general rule is provided for information claimed to be privileged under Rule 32 (trade secret), Rule 34 (official information), or Rule 36 (identity of an informer). Because of the nature of these privileges, it will sometimes be necessary for the judge to examine the information claimed to be privileged in order to balance the interest in seeing that justice is done in the particular case against the interest in maintaining the secrecy

of the information. See cases cited in 8 Wigmore, Evidence § 2379, p. 812 n. 6 (McNaughton rev. 1961). And see United States v. Reynolds, 345 U.S. 1, 7-11 (1953), and pertinent discussion thereof in 8 Wigmore, Evidence § 2379 (McNaughton rev. 1961). Even in these cases, the rule provides adequate protection to the person claiming the privilege. If the judge determines that he must examine the information in order to determine whether it is privileged, the rule provides that it be disclosed in confidence to the judge and shall be kept in confidence if he determines the information is privileged. Moreover, in view of Proposed Rule 37.7, disclosure of the information cannot be required (for example, in an administrative proceeding), for the exception in subdivision (2) of Proposed Rule 37.5 applies only when the judge of a court is ruling on the claim of privilege.

RULE 37.7. RULING UPON PRIVILEGED COMMUNICATIONS IN NONJUDICIAL PROCEEDINGS

(1) No person may be held in contempt for failure to disclose information claimed to be privileged unless a court previously has determined that the information sought to be disclosed is not privileged. In a court proceeding brought to compel a person to disclose information claimed to be privileged, the judge shall determine whether the information is privileged in accordance with Rule 8 and Rule 37.5.

(2) This rule does not apply to any public entity that has constitutional contempt power, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code.

COMMENT

This rule does not appear in the URE. The rule is needed to protect persons claiming privileges in nonjudicial proceedings. Because nonjudicial proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he runs the risk of being held in contempt for failing to disclose such information. That the determination of privilege in a judicial proceeding is a question for the judge is well established in the present California law. See, e.g., Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025 (1954).

This rule, of course, does not apply to any body--such as the Public Utilities Commission--that has constitutional power to impose punishment for contempt. See, e.g., Cal. Const., Art. XII, § 22. Nor does this rule apply to witnesses before the State Legislature or its committees. See Government Code Sections 9400-9414.

RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

Evidence of a statement or other disclosure is inadmissible against [~~the~~] a holder of [~~the~~] a privilege if [~~the-judge-finds-that-he-had-and~~]:

(1) A person entitled to claim the privilege claimed it [~~a-privilege-to-refuse-to-make-the-disclosure~~] but [was] nevertheless disclosure wrongfully was required to be made [~~make-it~~]; or

(2) The presiding officer failed to comply with Rule 36.5.

COMMENT

Revised Rule 38 protects a holder of a privilege from the detriment that might otherwise be caused when a judge erroneously overrules a claim of privilege and compels revelation of the privileged information. Under Revised Rule 38, the evidence is inadmissible against the holder in a subsequent proceeding. Compare People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951) (prior disclosure by attorney held inadmissible in later proceeding where holder of the privilege first had opportunity to object to attorney's testifying). Though Revised Rule 37 provides that such a coerced disclosure does not waive a privilege, it does not provide specifically that evidence of the prior disclosure is inadmissible; this rule makes clear the inadmissibility of such evidence.

URE Rule 38 does not cover the case in which some person other than the holder--as, for example, the lawyer who has received a confidential communication from a client--is compelled to make the disclosure of the privileged information. The URE rule has been revised to provide that a coerced disclosure may not be used in evidence against the holder--whether the coerced disclosure was made by the holder himself or by some other person. As so revised, the rule probably states existing California law, see People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954). However, there is little case authority upon the proposition. The URE rule also has been revised to cover the situation where the presiding officer at the time the disclosure was made failed to comply with Proposed Rule 36.5, which requires the exclusion of privileged evidence where a person entitled to claim the privilege had no standing or opportunity to do so.

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES

(1) Subject to paragraphs (2) and (3) of this rule [(4), Rule 23,] :

(a) If a privilege is exercised not to testify [or to prevent another from testifying , either in the action or] with respect to [particular matters] any matter, or to refuse to disclose or to prevent another from disclosing any matter, the [judge] presiding officer and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any [adverse] inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding. [In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case,]

(b) The court, at the request of [the] a party [exercising the] who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, [may] shall instruct the jury [in support of such privilege] that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(2) In a criminal proceeding, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.

(3) In a civil proceeding, the failure of a person to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the presiding officer and by counsel and may be considered by the trier of fact.

COMMENT

URE Rule 39 generally expresses the California rule in regard to the comments that may be made upon, and the inferences that may be drawn from, an exercise of a privilege. See People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481 (1955). The Commission has revised the URE rule to clarify the restrictions upon the trier of fact and to require, rather than merely to permit, the court to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of the privilege. Whether or not to give such an instruction should not be subject to the court's discretion. Also, the nature of the instruction required to be given is stated more specifically in the revised rule. The language of the URE rule--"in support of such privilege"--is somewhat ambiguous.

Subdivision (2) of Revised Rule 39 has been substituted for URE Rule 23(4) to retain existing California law. Cal. Const., Art. I, § 13; Penal Code § 1323. The Commission disapproves of subdivision (4) of URE Rule 23 because its language would permit inferences to be drawn from an exercise of the defendant's privilege to refuse to testify in a criminal case. The California Constitution, in Section 13 of Article I, provides that the failure or refusal of a defendant in a criminal case to explain or deny the evidence against him may be considered by the court or jury whether or not the defendant testifies. And the California cases have made it clear that it is the defendant's failure to explain or deny the evidence against him, not his exercise of any privilege, that may be commented upon and considered. See e.g., People v. Adamson, 27 Cal.2d 478, 488, 165 P.2d 3,8 (1946), aff'd, 332 U.S. 46 (1947). Unfavorable inferences, if any, may be drawn only from the evidence in the case against him. No inferences may be drawn from the exercise of privilege.

Subdivision (3) has been added to Revised Rule 39 in order to provide a rule for civil cases equivalent to that applicable in criminal cases under subdivision (2). Subdivision (3) apparently declares the existing California law that is applicable to civil cases when a party invokes a privilege and refuses to deny or explain evidence in the case against him. See discussion in the Study, infra at 000-000 and 000-000. Language in some cases may indicate that the present rule in civil cases is broader and that inferences may be drawn from the claim of privilege itself. If that is the present rule, it will be changed by subdivision (3).

Subdivisions (1) and (3) together may modify the existing California law to some extent. In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in an exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. See People v. Snyder, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958), overruling or disapproving several cases there cited. Revised Rule 39 will, in effect, overrule this holding in the Nelson case, for subdivision (1) declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue, and subdivision (3) provides only that subdivision (1) does not preclude the drawing of unfavorable inferences against a person because of his failure to explain or deny the evidence against him. The status of the rule in the Nelson case has been in doubt because of the recent holdings in criminal cases, and Revised Rule 39 will eliminate any remaining basis for applying a different rule in civil cases.

RULE 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Rule 27.5.

COMMENT

Revised Rule 40 states the existing California law. See People v. Gonzales, 56 Cal. App. 330, 204 Pac. 1088 (1922), and discussion of similar cases cited in the Study, infra at 000 note 5.

RULE 40.5. SAVINGS CLAUSE

Nothing in this article shall be construed to repeal by implication any other statute relating to privileges.

COMMENT

No comparable provision is contained in the Uniform Rules. However, Proposed Rule 40.5 is both necessary and desirable to clarify the effect of this article.

Some of the existing statutes relating to privileges are recommended for repeal. Other statutes on this subject, however, are continued in force. See, e.g., Penal Code Sections 266h and 266i, making the marital communications privilege inapplicable in prosecutions for pimping and pandering, respectively. Hence, Proposed Rule 40.5 makes it clear that nothing in this article makes privileged any information declared by statute to be unprivileged or makes unprivileged any information declared by statute to be privileged.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of the existing statutes on privileges which should be revised or repealed in light of the Commission's tentative recommendation concerning Article V (Privileges) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may provide a somewhat narrower or broader privilege than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule, although in a given case it may provide a broader or narrower privilege than the existing law.

Business and Professions Code

Section 2904 provides:

> 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.

This section should be repealed. It is superseded by Proposed Rule 27.3.

Code of Civil Procedure

Section 1747. This section should be revised to conform to the Uniform Rules. The revision merely substitutes a reference to Rule 34, which supersedes Section 1881(5), and makes no substantive change. The revised section would read as follows:

1747. Notwithstanding the provisions of Section 124 of the Code of Civil Procedure, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed [~~made-to-such-officer-in-official confidence~~] to be official information within the meaning of [~~sub-division-5,-Section-1881-of-the-Code-of-Civil-Procedure~~] Rule 34 of the Uniform Rules of Evidence.

The files of the conciliation court shall be closed. The petition, supporting affidavit, reconciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the conciliation court.

Section 1880. This section should be revised to read:

1880. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

~~3.--Parties-or-assignors-of-parties-to-an-action-or-proceeding, or-persons-in-whose-behalf-an-action-or-proceeding-is-prosecuted,-against an-executor-or-administrator-upon-a-claim,-or-demand-against-the-estate of-a-deceased-person,-as-to-any-matter-or-fact-occurring-before-the-death of-such-deceased-person.~~

Subdivision 3 of Section 1880 is the California version of the so-called Dead Man Statute. Dead Man Statutes provide that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. These statutes appear to rest on the belief that to permit the survivor to testify in the proceeding would be unfair because the other party to the transaction is not available to testify and, hence, only a part of the whole story can be developed. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally. See generally Moul v. McVey, 49 Cal. App.2d 101, 121 P.2d 83 (1942); Recommendation and Study Relating to the Dead Man Statute, 1 CAL. LAW REVISION COMM'N, REP. REC. & STUDIES, Recommendation and Study at D-1 (1957).

Subdivision 3, which is part of a statute section containing the rules relating to the incompetency of infants and insane persons, would appear to be a provision relating to competency. But this subdivision has, in effect, become a rule of privilege, for the courts have permitted the executor or administrator to waive the benefit of the subdivision. See, e.g., McClenahan v. Keyes, 188 Cal. 574, 206 Pac. 454 (1922). Hence, this subdivision is considered in connection with the other rules of privilege. The remaining subdivisions of the section will be considered when the URE rules relating to competency of witnesses (Article IV.) are considered.

In 1957, the Commission recommended the repeal of the Dead Man Statute and the enactment of a statute providing that in certain specified types of actions written or oral statements of a deceased person made upon his personal knowledge were not to be excluded as hearsay. See Recommendation and Study relating to The Dead Man Statute, 1 Cal. Law Revision Comm'n, Rep., Rec. & Studies, Recommendation and Study at D-1 (1957). The 1957 recommendation has not been enacted as law. For the legislative history of this measure, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES IX (1957).

Although the Dead Man Statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial number of cases. As the Commission's 1957 recommendation and study demonstrates, the statute balances the scales of justice unfairly in favor of decedents' estates. See, e.g., 1 Cal. Law Revision Comm'n, Rep., Rec. & Studies at D-6, D-43 to D-45 (1957). Moreover, it has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered. For these reasons, the Commission again recommends that the Dead Man Statute be repealed.

However, repeal of the Dead Man Statute alone would tip the scales unfairly against decedents' estates by subjecting them to claims which could

have been defeated, wholly or in part, if the decedent had lived to tell his story. If the living are to be permitted to testify, some steps ought to be taken to permit the decedent to testify, so to speak, from the grave. This can be done by relaxing the hearsay rule to provide that no statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding against an executor or administrator upon a claim or demand against the estate of such deceased person. This hearsay exception is more limited than that recommended in 1957 and will, it is believed, meet most of the objections made to the 1957 recommendation. Accordingly, the Commission recommends that the following additional subdivision be added to Rule 63 as revised by the Commission and set out in the tentative recommendation on the Hearsay Evidence Article of the URE (4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 307-353 (1963)):

> RULE 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:
>
> * * * * *
>
> (5.1) When offered in an action or proceeding brought against an executor or administrator upon a claim or demand against the estate of a deceased person, a statement of the deceased person if the judge finds it was made upon the personal knowledge of the declarant.

<u>Section 1881</u> provides:

> 1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife; or in a hearing held to determine the mental competency or condition of either husband or wife.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

3. A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided further, that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material

in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

6. 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.

This section should be repealed. Subdivision 1 of Section 1881 is superseded by Rules 27.5 and 28; subdivision 2 is superseded by Rule 26; subdivision 3 is superseded by Rule 29; subdivision 4 is superseded by Rule 27; subdivision 5 is superseded by Rules 34 and 36.

No provision comparable to subdivision 6--the newsman's privilege--is included in the Uniform Rules as proposed by the Uniform Commissioners or as revised by the Law Revision Commission. The Commission has concluded that there is no justification for retaining this privilege. See the Study, *infra* at 000-000.

Section 2065 provides:

2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the

very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

Section 2065 should be repealed. Rule 7[1] supersedes the first clause in this section. Insofar as this section permits a witness to refuse to give an answer having a tendency to subject him to punishment for a felony it is superseded by Revised Rules 24 and 25, dealing with the self-incrimination privilege.

The language relating to an answer which would have a tendency to degrade the character of the witness is unnecessary. The meaning of this language seems to be that, whereas a witness must testify to nonincriminating but degrading matter that is relevant to the merits of the case,[2] nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However, this privilege seems to be largely--if not entirely--superfluous. Code of Civil Procedure Section 2051 provides that a witness may not be impeached "by evidence of particular wrongful acts." Manifestly, to the extent that the degrading matter referred to in Section 2065 is "wrongful acts," Section

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[1]Rule 7 is the subject of a separate study and recommendation by the Commission. The rule as contained in the URE is as follows:

RULE 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules. Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

[2] Clark v. Reese, 35 Cal. 89 (1869)(breach of promise to marry; defense that plaintiff had immoral relations with X; held X must answer to such relations, though answer degrading); San Chez v. Superior Court, 153 Cal. App.2d 162 (1957)(separate maintenance on ground of cruelty; defendant required to answer as to cruelty, albeit degrading).

2051 makes this portion of Section 2065 unnecessary. (The "wrongful acts" rule of Section 2051 would be continued in effect by Uniform Rule 22(d).) Moreover, since the witness is protected against impeachment by evidence of "wrongful acts," though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the "degrading matter" privilege. For criticisms of this privilege, see 3, 8 Wigmore §§ 984, 2215, 2255; McGovney, Self-Incriminating and Self-Disgracing Testimony, 5 Iowa Law Bull. 174 (1920). This privilege seems to be seldom invoked in California opinions and, when invoked, it arises in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2051, or by virtue of both. See, for example, the following cases: People v. T. Wah Hing, 15 Cal. App. 195, 203 (1911)(Abortion case in which the prosecuting witness is asked on cross-examination who was father of child; held, immaterial--and, if asked to degrade, "equally inadmissible"); People v. Fang Chung, 5 Cal. App. 587 (1907)(defendant's witness in statutory rape case asked whether the witness was seller of lottery tickets and operator of poker game; held, improper, inter alia, on ground of Section 2065. Note, however, the additional grounds for exclusion, viz., immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision); People v. Watson, 46 Cal.2d 818 (1956)(homicide case involving cross-examination as to defendant's efforts to evade military service; held, irrelevant and violative of Section 2065). Hence, this portion of Section 2065 is superfluous now; it would likewise be superfluous under the Uniform Rules.

The remainder of this section is superseded by Rules 21 and 22,[3] dealing fully with the subject of a witness' credibility.

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[3] Rules 21 and 22 are the subject of a separate study and recommendation by the Commission. The rules as contained in the URE are as follows:

RULE 21. Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

RULE 22. Further Limitations on Admissibility of Evidence Affecting Credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

Government Code

Section 11513. This section should be revised to read:

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to 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. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the [same] extent that they are [~~now or hereafter may~~] otherwise required by statute to be recognized [~~in civil actions~~] at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

This revision is necessary because under this tentative recommendation, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

Health and Safety Code

Section 3197. This section should be revised to conform to the Uniform Rules. The revision merely substitutes a reference to Rules 23.5, 27, and 28, which supersede subdivisions 1 and 4 of Section 1881, and makes no substantive change. The revised section would read as follows:

> 3197. In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, and [~~the-provisions-of-subsections-1-and-4-of-Section-1881-of-the-Code of-Civil-Procedure-shall-not-be~~] Rules 27.5, 27, and 28 of the Uniform Rules of Evidence are not applicable to or in any such prosecution or proceeding.

Penal Code

Section 270e. This section should be revised to conform to the Uniform Rules. The revision makes no substantive change. The revised section would read as follows:

> 270e. No other evidence shall be required to prove marriage of husband and wife, or that a person is the lawful father or mother of a child or children, than is or shall be required to prove such facts in a civil action. In all prosecutions under either Section 270a or 270 of this code [~~any-existing-provisions-of-law-prohibiting the-disclosure-of-confidential-communications-between-husband-and wife-shall~~] Rules 27.5 and 28 of the Uniform Rules of Evidence do not apply, and both husband and wife shall be competent to testify to any and all relevant matters, including the fact of marriage and the parentage of a child or children. Proof of the abandonment and nonsupport of a wife, or of the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such abandonment and nonsupport or omission to furnish necessary food, clothing, shelter or medical attendance is wilful. In any prosecution under Section 270, it shall be competent for the people to prove nonaccess of husband to wife or any other fact establishing nonpaternity of a husband. In any prosecution pursuant to Section 270, the final establishment of paternity or nonpaternity in another proceeding shall be admissible as evidence of paternity or nonpaternity.

8/6/63

Section 688. This section should be revised to delete language that is superseded by Rules 23, 24, and 25. The revised section would read as follows:

688. 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 1322 provides:

1322. Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section 270 and 270a of this code or under any provisions of the "Juvenile Court Law."

This section should be repealed. It is superseded by Proposed Rule 27.5.

Section 1323 provides:

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 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.

This section should be repealed. It is superseded by Rules 23(1), 25(7), and 39(2).

Section 1323.5 provides:

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.

This section should be repealed. It is superseded by Rule 23, which retains the only effect the section has ever been given--to prevent the prosecution from calling the defendant in a criminal action as a witness. See People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Whether Section 1323.5 provides a broader privilege than Rule 23 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before the grand jury or at a coroner's inquest is not technically a person "accused or charged," and Section 1323.5 would appear not to apply to such proceedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under the tentative recommendation, for his claim of privilege cannot be shown to impeach him or to draw inferences against him in a subsequent civil or criminal proceeding.