

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

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 "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.¹ In 1956 the Legislature authorized and 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 VIII of the Uniform Rules of Evidence, consisting of Rules 62 through 66 relating to hearsay evidence, was published in August 1962. The Commission's tentative recommendation on Article V 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 proceeding, or (2) an exemption from the duty to testify about certain specific matters--as in the case of the privilege of anyone to refuse to testify about incriminating matters, 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 confidences.

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 may be sacrificed in order to provide that needed secrecy. The investigation of truth and the dispensation of justice, however, demand the restriction of the privileges that are granted within the narrowest limits required by principle; for every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice. On the other hand, when it is necessary to grant a privilege in order to protect some interest vital to society, the privilege granted must be broad enough to be effective--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 governmental secrets. Some of the remaining California law concerning privileges is found in the Constitution and in statutes scattered through the codes. The statutory and constitutional law relating to privileges, however, is 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 or not a particular exception exists in California can be determined in some instances only after hours of

painstaking research and in other instances 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. Further, the existing law is in some instances out of harmony with modern conditions. The 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 anyone from overhearing his statements and, hence, consideration should be given to extending some privileges to protect against this danger. The, 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 as the law in California.¹ 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.

¹ 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 URE privilege rules. In some cases the suggested changes go only to language. For example, in some instances, the Commission discovered that different language is used in different URE rules when precisely the same meaning is intended in both rules. The Commission has eliminated these unnecessary differences in order to assure uniformity of interpretation where uniformity is desired. 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 existing California law.

In the material which 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 recommendation of the Commission and explaining those revisions that are

not purely formal or otherwise self-explanatory.

For a detailed analysis of the various URE rules and the California law relating to privileges, see the research study beginning on page 000. This study was prepared by the Commission's research consultant, Professor James H. Chadbourn of the Harvard Law School.

RULE 23. PRIVILEGE OF DEFENDANT

(1) ~~[Every-person-has]~~ A defendant in ~~[any]~~ a criminal action or 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 or 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

The constitutional privilege against self-incrimination guaranteed by Article I, Section 13 of the California Constitution, gives rise in practice to two distinct privileges. First, the accused in a criminal case has a privilege not to be called as a witness and not to testify.

7/5/63

Rule 23

This privilege is recognized in Rule 23. Second, every person, whether or not accused of a crime, has a privilege when testifying to refuse to give information that might tend to incriminate him. This privilege is contained in Rules 24 and 25.

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

Subdivisions (1) and (2) of Revised Rule 23 restate without substantive change the existing California law. 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 contained in Rule 28 as revised by the Commission. Revised Rule 28 grants to a person in any case a privilege which is the substantial equivalent of that provided by subdivision (2) for a defendant in a criminal case, that is, the privilege to prevent either a present or former spouse from testifying to confidential communications made during their marriage. Exceptions, too, have been included in Rule 28 which are the substantial equivalent of the exceptions provided in subdivision (2).

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.

RULE 24. DEFINITION OF INCRIMINATION

A matter will incriminate a person within the meaning of these rules if it constitutes, or forms an essential part of, or, taken in connection with other matters [~~disclosed~~], is a basis for a reasonable inference of, such a [~~violation-of~~] crime or public offense under the laws of this State or of the United States as to subject him to liability to [~~punishment-therefor~~] conviction thereof, unless he has become [~~for-any-reason~~] permanently immune from [~~punishment~~] conviction for such [~~violation~~] crime or public offense.

COMMENT

The substance of the URE rule is approved by the Commission. However, the revised rule also provides protection against possible incrimination under a federal law, but not a law of another state or foreign country. 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.

The word "disclosed" has been deleted from the URE rule. The witness may be aware of other matters which have not been "disclosed" but which, when taken in connection with the information sought, is a basis

for a reasonable inference of such a crime or public offense as to subject him to liability to conviction thereof.

The Commission has substituted "crime or public offense" for "violation" and "conviction" for "punishment" in order to make clear (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. These revisions declare the existing California law. It is uncertain whether the URE rule was intended to change the law, and the revisions made will avoid any ambiguity in this regard.

RULE 25. SELF-INCRIMINATION; EXCEPTIONS.

Subject to Rule[~~s~~] 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, except that under this rule [~~7~~] :

[~~(a)-if-the-privilege-is-claimed-in-an-action~~]

(1) The matter shall be disclosed if the judge finds that the matter will not incriminate the witness. [~~;-and~~]

[~~(b)~~] (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 [~~7~~] 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.

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

[~~(d)~~] (5) 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 [~~7-by-the applicable-rules-of-the-substantive-law7~~] some other person or a corporation [~~7~~] or other association or organization, 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-retain
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-retain,
report-or-disclose;-and]~~

(6) No person has the privilege to refuse to obey an order made by
a court 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
a business, calling or profession when such order is made in the aid of
such supervision or regulation.

[(g)] (7) Subject to Rule 21, a defendant in a criminal action or
proceeding who [voluntarily] testifies in the action or proceeding upon
the merits before the trier of fact [does-not-have-the-privilege-to-refuse
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 action or proceeding,
a witness who, without having claimed the privilege under this rule,

testifies in an action or proceeding before the trier of fact with
respect to a transaction which incriminates him does not have the
privilege under this rule to refuse to disclose in such action or
proceeding any matter relevant to the transaction.

COMMENT

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 Rule 23, which is the privilege of a defendant in a criminal case to refuse to testify at all. As in the case of 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 Rule 25.

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. The extent to which exemptions should be granted from the duty to testify in proceedings other than judicial is a problem that must be resolved for all privileges, not only the self-incrimination privilege. It seems unwise to include language in Rule 25 making it applicable in other proceedings when similar language does not appear in the other rules, for that would tend to imply that the other privileges do not apply in nonjudicial proceedings. URE Rule 2^{*} provides

* Rule 2 will be the subject of a later study and recommendation by the Commission. The rule as contained in the URE is as follows:

"RULE 2. Scope of Rules. Except to the extent to which they may be relaxed by another procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court in which evidence is produced."

that the URE deals only with matters of evidence in proceedings conducted by or under the supervision of courts. Hence, the Commission's recommendations deal only with the extent to which privileges should be applicable in judicial proceedings. The extent to which these privileges will be recognized by various governmental bodies, officers and agencies that have the power to issue subpoenas and compel testimony for investigative, legislative or administrative purposes is left by these rules to be worked out by the courts under the general language of the Constitution and such other statutes as may exist upon the subject.

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

Subdivision (1) of the revised rule restates the existing California law. The words "if the privilege is claimed in an action" have been omitted from subdivision (1) of the revised rule--subdivision (a) of the URE rules--because the rule as revised by the Commission applies only in judicial proceedings.

Subdivisions (2), (3) and (4) of the revised rule also declare existing California law. Subdivision (3) has been added to make clear that the 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 (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 reaffirms existing law insofar as it denies the privilege to an individual who would be personally incriminated by surrendering his possession of public documents or books of a private organization. Although there apparently are no California cases 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), which has been substituted by the Commission for the provisions of subdivisions (e) and (f) of the URE rule, expresses the extent to which required records can be compelled to be produced under what appears to be the existing law. Subdivisions (e) and (f) of the URE rule are disapproved by the Commission because they would, in effect, deprive many persons of the protection of the privilege against self-incrimination. The cases interpreting the privilege against self-incrimination have held only that officials and persons engaging in regulated activities may be disciplined for refusal to disclose information relating to their regulated activity that is required by law to be disclosed; but the cases have not held that such persons lose their privilege against self-incrimination as a result of statutes requiring such disclosure.

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). Subdivision

(g) of the URE rule conflicts with Section 13, Article I of the California Constitution as interpreted by the California Supreme Court.

The Commission has included a specific waiver provision in subdivision (8) of 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 Rule 25. Thus, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. Note that the waiver of the privilege against self-incrimination under subdivision (8) of Revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit the waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the privilege in a subsequent case even though he waived it in a previous case. The extent of the waiver of the privilege by the defendant in a criminal case is indicated by subdivision (7) of the revised rule.

7/8/63

RULE 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

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

(b) "Confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those 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 if dissolved.

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

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

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

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is

no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The lawyer who received or made a communication subject to the privilege under this rule shall claim the privilege for the client whenever
(a) he is authorized to claim the privilege under paragraph (c) of sub-
division (2) of this rule and (b) he is present when the communication is
sought to be disclosed.

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

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

(b) As to a communication relevant to an issue between parties all
of whom claim through the client, regardless of whether the respective
claims are by testate or intestate succession or by inter vivos trans-
action. ~~[, -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. ~~[, -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 deceased client, purporting to affect an interest in property.

(5) [~~to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer 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 action or proceeding between such clients.

COMMENT

This rule sets forth the attorney-client privilege which is 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 proposed 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.

The definition of "client" has been revised to make 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.

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 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 Commission's 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 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.

"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 language used to define the term is taken from the substantive portions of URE Rule 26 and from the comparable definition in Rule 27. 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 accordance with existing California law, the communication must be in the course of the lawyer-client relationship and must be confidential. Confidential communications include those made to third parties, such as physicians or similar experts, for the purpose of transmitting such information to the lawyer. 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 clear that these communications, too, are confidential and within the scope of the privilege despite the presence of the third party. This much of the definition restates existing California law. 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 because of his concern for the welfare of the client or his 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.

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) of the revised rule, and under subdivision (1)(c)(ii) of the revised rule, the guardian of the client is the holder of the privilege if the client is incompetent. Under these two provisions 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 and 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 decisions have discussed it.

Under subdivision (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; hence, the privilege 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 Commission believes that the URE provision is 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 interests or to the interests of his estate.

Under subdivision (1)(c)(iv), the successor, assign or trustee in dissolution in 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 the Revised Rule 26, specifying who can claim the privilege, and Rule 37, relating to waiver of the privilege.

The Commission approves the provision of the URE rule which 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.

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 a particular lawyer he is consulting recognizes the privilege or not. He should be entitled to assume that the lawyer he is consulting will maintain his confidences to the same extent as would a lawyer in California. The existing California law in this regard is uncertain.

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 might be used where the same meaning is intended.

Revised Rule 26, as well as the original URE rule, is based upon the premise that the privilege must be claimed by some person who is authorized to claim the privilege. If there is no claim of privilege by some 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 Rule 36.5 a judge can, on his own motion, exclude a confidential attorney-client communication on behalf of an absent holder.

As 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 while no one has authority to waive the privilege. Although there seems to be good reason for maintaining the privilege while the estate is being administered--particularly if the estate is involved in litigation--there seems to be little reason to preserve secrecy at the expense of justice after the estate is wound up and the representative

(discharged. As the client no longer has any tangible interest to be protected by the recognition of the privilege, the better policy seems to be expressed in the URE and the revised rule which terminates the privilege upon the discharge of the client's personal representative.

The words "if he is the witness" have been deleted from subdivision (2) of the revised rule because they impose a limitation which is neither necessary nor desirable. Inasmuch as these rules apply in any type of judicial 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 at a trial whereas the existence of privilege would make 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 Commission believes the privilege, where applicable, should be available against any witness. Hence, the limitations of these paragraphs have been deleted as unnecessary and undesirable.

Paragraph (c) of URE Rule 26(1) was drafted by the Commissioners on Uniform State Laws to make clear that the lawyer-client privilege can be asserted to prevent eavesdroppers from testifying concerning the confidential communications they have intercepted. Although this paragraph has been deleted from the revised rule, its substance has been retained by the provision of subdivision (2) that the privilege may be claimed to prevent anyone from testifying to a confidential communication.

Probably, this will change the existing California law. Whether or not California law is changed, 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. 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.

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. The holder of the privilege is the

person designated in the definition contained in subdivision (1)(c) of the revised rule. Under paragraph (b) of revised subdivision (2), specific provision is made for persons to claim the privilege who are authorized to do so by the holder. 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 the privilege may be claimed by "the client in person or by his lawyer." Under subdivision (3) of the revised rule the lawyer must claim the privilege on behalf of the client unless otherwise instructed by the holder of the privilege or his representative. Subdivision (3) is included to prevent any implication from arising 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.

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. Each is, however, recognized to some extent by judicial decision.

Paragraph (a) of subdivision (4) provides that the privilege does not apply where the judge finds 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 to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. 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).

Note that revised subdivision (4)(a) does not require that the judge be convinced that the communication was made for an illegal or fraudulent purpose. The original URE version merely requires the judge to find that there is sufficient evidence, apart from the communication, to warrant a finding that the legal service was sought for a fraudulent or illegal purpose. The Commission has substituted the requirement that the judge find that there is reasonable grounds to believe that this was the purpose for the communication. This, too, seems to be a statement of the existing law. The Commission's revision retains the substance of the URE rule in this regard but expresses it in somewhat clearer language. This paragraph also requires the judge to make the determination of the purpose

of the communication from evidence apart from the communication itself. Actually, he must make all rulings on the applicability of the privilege or the exceptions thereto on the basis of evidence apart from the communication itself. Under either the URE or under existing law, the judge may not compel revelation of the communication asserted to be privileged in order to determine whether or not it is privileged, for such a coerced disclosure would itself violate the privilege. Nonetheless, it seems desirable to emphasize the requirement in connection with this paragraph.

Subdivision (4)(b) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through the 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 is not within the exception. The URE includes inter vivos transactions within the exception and the Commission approves this change. 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 and, since claimants in privity with the estate claim to protect the client's interests, there is no reason to recognize the privilege in litigation between such claimants. 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 intervivos transaction.

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. The exception is approved because

7/5/63

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 exception stated in subdivision (4)(d) has been confined to the type of communication which 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. Although the attesting witness exception stated in paragraph (d) is limited to information concerning which one would expect an attesting witness to testify, there is some merit in the exception for dispositive instruments because one would normally expect a client to 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 (5) of the revised rule--the joint client exception--states existing California law. 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 [7] :

(a) "Confidential communication between patient and physician [~~and patient~~]" means [~~such~~] information transmitted between a patient and his physician [~~and patient~~], including information obtained by an examination of the patient, [~~as is transmitted~~] in the course of that relationship and in confidence [~~and~~] by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in 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) "Holder of the privilege" means (i) the patient when he is competent, (ii) a guardian or conservator of the patient when the patient is incompetent and (iii) the personal representative of the patient if the patient is dead. [~~The patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient;~~]

(c) "Patient" means a person who [7] consults a physician or submits to an examination by a physician for the [~~sole~~] purpose of securing a diagnosis or preventive, palliative [7] or curative treatment [~~7, or a diagnosis preliminary to such treatment~~] of his physical or mental condition. [~~7, consults a physician, or submits to an examination by a physician;~~]

(d) "Physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in [the] any state or [jurisdiction-in-which-the-consultation-or-examination-takes-place;] nation.

(2) Subject to Rule 37 and except as otherwise provided [by-paragraphs-(3),-(4),-(5)-and-(6)-of] in this rule, a person, whether or not a party, has a privilege in a civil action or proceeding [or-in-a-prosecution-for-a-misdemeanor] to refuse to disclose, and to prevent [a-witness] another from disclosing, a communication [;] if he claims the privilege and the judge finds that [(a)] the communication was a confidential communication between patient and physician [;] and [(b)--The-patient-or-the-physician-reasonably-believed-the-communication-to-be-necessary-or-helpful-to-enable-the-physician-to-make-a-diagnosis-of-the-condition-of-the-patient-or-to-prescribe-or-render-treatment-therefor,-and-(c)--The-witness-(i)-is-the-holder-of-the-privilege-or-(ii)-at-the-time-of-the-communication-was-the-physician-or-a-person-to-whom-disclosure-was-made-because-reasonably-necessary-for-the-transmission-of-the-communication-or-for-the-accomplishment-of-the-purpose-for-which-it-was-transmitted-or-(iii)-is-any-other-person-who-obtained-knowledge-or-possession-of-the-communication-as-the-result-of-an-intentional-breach-of-the-physician's-duty-of-non-disclosure-by-the-physician-or-his-agent-or-servant-and-(d)-the-claimant] that the person claiming the privilege is:

(a) The holder of the privilege, or

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

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

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

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

(a) [({6})--No-person-has-a-privilege-under-this-rule] If the
judge finds [that-sufficient] from evidence [7] apart from the
communication itself [has-been-introduced-to-warrant-a-finding-that]
that there is reasonable ground to believe the services of the
physician were sought or obtained to enable or aid anyone to commit
or plan to commit a crime or a tort [7] 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 all of whom
claim through the patient, regardless of whether the claims are
by testate or intestate succession or by inter vivos transaction.
[from-a-deceased-patient-].

(c) As to a communication relevant to an issue of breach of duty by the physician to his patient or the patient to his physician.

(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 [open] 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 deceased patient, purporting to affect an interest in property.

(f) [open-an-issue-of-the-patient's-condition] In an action or proceeding to commit [him] the patient or otherwise place him or his property, or both, under the control of another or others because of his alleged mental [incompetence] or physical condition. [,-er]

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

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

(i) [(4)--There-is-no-privilege-under-this-rule] In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the condition of the patient [is-an-element-or-factor-of-the-claim-or defense-of] has been tendered by the patient or [ef] by any party claiming through or under the patient or claiming as a beneficiary

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

(j) [~~(5)--There is no privilege under this rule~~] As to information which the physician or patient is required to report to a public official or as to information required to be recorded in a public office [,] 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.

The Commission has revised the definition of confidential communication to include language taken from the original version of URE Rule 26. As revised, the definition requires that the information be transmitted between a patient and his physician in the course of the physician-patient relationship and in confidence. 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 statements 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.

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. If this is the existing California law, it will be changed for 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).

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

7/5/63

-41-

#27

within the privilege. This requirement does not appear to be in the existing California law. Since treatment does not always follow diagnosis, the Commission believes 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 patient might visit a physician for the purpose of obtaining a report of his condition for insurance purposes and also to obtain treatment from the physician for his condition. Statements made by the patient during the course of the visit would seem to be as deserving of protection as statements made by another person whose sole purpose was to obtain treatment.

The Commission approves the provision of the URE rule which 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. If we are to recognize this privilege, we should be willing to protect the patient from reasonable mistakes as to unlicensed practitioners. Moreover, the Commission recommends that the privilege be made 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.

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 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 the revised rule, the privilege is applicable only in civil actions and proceedings. The URE rule would have extended the privilege to a prosecution for a misdemeanor. The existing California statute restricts the privilege to a civil action or proceeding and the Commission is unaware of any criticism of the existing practice. In addition, if the privilege is applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, 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 an accused 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 Rule 26, 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.

(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) has been added to the revised rule, and it 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.

The exceptions to the physician-patient privilege have been gathered together in subdivisions (4) and (5). 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 appear in this rule in the same order in which comparable exceptions appear in Rule 26.

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, 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 their legal problems or 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 Commission believes that 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 go a long way toward destroying the effectiveness of the privilege. Whether this exception exists in California law has not been determined; but it might be recognized in an appropriate case in view of the similar court-created exception to the lawyer-client privilege.

The language of subdivision (4)(b) of the revised rule has been revised to conform to the language of the comparable exception in Rule 26. The requirement that the patient be deceased has been omitted. The Commission sees no reason for insisting upon the prior decease of the patient here when no similar insistence is made upon the prior decease of the client in subdivision (4)(b) of revised Rule 26.

Subdivision (4)(c) has been added to the revised rule. It expresses an exception similar to that found in subdivision (4)(c) of Rule 26. If a patient makes a charge of breach of duty against a doctor, he should not be privileged to withhold from the doctor evidence material to the doctor's defense.

In subdivision (4)(d) and (e) of the revised rule, the URE rule exception relating to the validity of a will is broadened so that there is now 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 deceased patient. Where this kind of issue arises in a lawsuit, the communications of the person executing the instrument to his physician become extremely important. The Commission does not believe that permitting these statements to be introduced in evidence after the patient's death will 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.

The exception provided in subdivision (4)(f) of the revised rule is broader than the URE rule and will cover not only commitments of mentally ill persons but will also cover 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 which the court needs in order to act properly for his welfare. There is no similar exception in existing California law.

Language has been added to subdivision (4)(g) of the revised rule to distinguish the proceedings referred to from commitment proceedings covered by the exception stated in subdivision (4)(f). This exception, too, is new to California law; but a patient should not be permitted to place his condition in issue by bringing such a proceeding and, at the same time, exercise a privilege to withhold from the court the most vital evidence relating to his condition.

The URE rule, in subdivision (3), provides an exception for civil actions to recover damages for felonious conduct on the part of the patient. As revised, the exception is found in subdivision (4)(h) and makes the privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. There is no comparable exception in existing California law. 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 privilege as revised 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. 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 the evidence should not depend on the order in which the 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.

The URE rule provides that there is no privilege in an action in which the claim of the patient is an element or factor of the claim "or defense" of the patient. The revised rule--subdivision (4)(i)--does not extend the patient-litigant exception this far but instead provides that the privilege does not exist in an action or proceeding in which an issue concerning the condition of the patient has been tendered by the patient. The Commission does not believe that a plaintiff should 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 evidence relevant to the issue from the opposing party through the exercise of the physician-patient privilege. A limited form of this exception is recognized in existing California law. Under the existing law, the privilege is inapplicable in personal injury actions. 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)(i)--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. There is no reason why the rules of evidence should be different as far as testimony by the physician is concerned in a case where the patient brings the action and a case where wrongful death action

is brought. Under the URE rule and under the revised rule, if the patient brings the action, the issue of his condition has been tendered by the patient and no privilege exists. The revised rule makes the same rule applicable in wrongful death cases.

The revised rule--subdivision (4)(i)--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 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.

The provision of the URE rule providing that a 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)(j) 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, for inasmuch as the information is required to be reported and is public no valid purpose is served by preventing its introduction in evidence when it is relevant.

RULE 27.5. PSYCHOTHERAPIST -PATIENT PRIVILEGE

(1) As used in this rule:

(a) "Confidential communication between patient and psychotherapist" means information transmitted between a patient and his psychotherapist, including information obtained by an examination of the patient, in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those 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, (ii) a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code, or (iii) a person licensed or certified as a psychologist in another state or jurisdiction if the requirements for obtaining a license or certificate in such state or jurisdiction are substantially the same as under

Article 4 (commencing with Section 2940) of Chapter 6.6 of Division 2 of the Business and Professions Code.

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

(a) The holder of the privilege, or

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

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

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

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable ground to believe the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

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

(c) As to a communication relevant to an issue of breach of duty by the psychotherapist to his patient or the patient to his psychotherapist.

(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 deceased patient, purporting to affect an interest in property.

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

(g) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the mental or emotional condition of the patient has been tendered by the patient or by any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

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

(i) As to information which the psychotherapist or patient is required to report to a public official or as to information required to be recorded in a public office unless the statute, charter, ordinance, administrative

regulation or other provision requiring the report or record specifically provides that the information shall not be disclosed.

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

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 consulting 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. The Commission has received reports from several sources indicating that many persons who need treatment refuse such treatment from psychiatrists because the psychiatrist is unable to assure the confidentiality of their communications. Other psychiatrists do not retain documentary material concerning their patients because they know that such documents can be obtained by subpoena. Unfortunately, many of these persons who decline treatment are seriously disturbed and constitute threats to other persons in the community. Accordingly, the Commission recommends that a new privilege be established which 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 from some cases where such evidence would be crucial, the Commission is of the opinion that the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

Rule 27.5 is designed to provide this additional privilege. The Commission has combined this privilege with that provided in the Business and Professions Code for psychologists. The new privilege will be one for psychotherapists generally.

In subdivision (1)(d), "psychotherapist" is defined as a certified psychologist or any medical doctor. The Commission decided not to confine the privilege to those medical doctors whose practice is limited to psychiatry because it recognized that many medical doctors who do not specialize in the field of psychiatry do practice psychiatry to a certain extent. In some instances, this is because the patient cannot afford to go to a specialist. In other instances, this is because the line between organic and psychosomatic illness is indistinct and a physician is often called upon to treat both physical and mental or emotional conditions at the same time. Then, too, 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 Commission believes the psychotherapist privilege should be applicable if the patient is seeking diagnosis or treatment of his mental or emotional condition.

Generally, the new privilege follows the physician-patient privilege and the comments made under Rule 27 will apply to the provisions of Rule 27.5. The following differences, however, should be noted:

The psychotherapist-patient privilege applies in all proceedings, criminal or civil. The physician-patient privilege, however, applies only in civil proceedings. Under the provisions of subdivision (4)(j), however, the psychotherapist privilege does not apply when the evidence is offered by the defense in a criminal proceeding. For example, if a person had confessed a crime to a psychiatrist and another person were being tried for the offense, the psychiatrist could be compelled to testify concerning the confession if it were otherwise admissible.

*Under existing law, such confession would be inadmissible hearsay. Under the Commission's tentative recommendation relating to hearsay evidence, however, such confession would be admissible as a declaration against penal interest under Revised Rule 63(10).

When the evidence which would otherwise be subject to the privilege created by this rule is material to the defense of a defendant in a criminal case, the interest to be served in permitting the evidence to be revealed in order to prevent injustice is more important than whatever impediments this exception might create to the psychotherapist-patient relationship.

There are some minor differences between the exceptions to the physician-patient privilege and the exceptions to the psychotherapist-patient privilege. For example, in subdivision (4)(b) of Rule 27.5 an exception is created between parties all of whom claim through a deceased patient. The comparable exception in Rule 27 does not require that the patient be deceased. Because the communications of a patient to a psychotherapist are likely to be peculiarly relevant to issues between parties claiming through the patient, and because patients of psychotherapists are peculiarly sensitive to maintaining the confidential nature of their communications, the Commission believes that to permit such communications to be introduced in evidence during a patient's lifetime would unduly inhibit communications from the patient to his psychotherapist.

Again, there is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient, but there is no similar exception in the psychotherapist-patient privilege. The Commission believes that 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, there is nothing in this rule which would prohibit the psychotherapist from communicating such information to the appropriate authorities. The privilege applies only in judicial proceedings, and, in any event, the privilege technically is merely an exemption from the general duty to testify in a proceeding in which testimony can ordinarily be compelled to be given. Thus, the psychotherapist may protect his patient by bringing his condition to the attention of those who may take appropriate action. The privilege would, however, prevent the psychotherapist from testifying in the ensuing commitment proceedings.

The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. No similar exception is provided in the psychotherapist-patient privilege. The reason for the exception in the physician-patient privilege is that the physician-patient privilege does not apply in any criminal proceedings. Therefore, an exception is also created for civil cases involving the identical conduct. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no exception in civil actions involving the patient's criminal conduct.

The psychotherapist-patient privilege, in subdivision (4)(h), has an exception if the psychotherapist is appointed to act as such by order of the court. Where the relationship of psychotherapist and patient is created by court order, the Commission does not believe that there is a sufficiently confidential relationship to warrant extending the privilege to the 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.

7/5/68

Rule 27.5

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~~
~~constituted-the-communication]~~, whether or not a party, has a privilege
during the marital relationship and afterwards ~~[which-he-may-claim-whether-~~
~~or-not-he-is-a-party-to-the-action]~~, to refuse to disclose and to prevent ano-
ther ~~[the-spouse]~~ from disclosing a communication [a-fraud-by] if he claims
the privilege and the judge finds that 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) If the judge finds ~~[that-sufficient]~~ from evidence ~~[, -aside]~~
apart from the communication ~~[, -has-been-introduced-to-warrant-a-finding~~
~~that]~~ itself that there is reasonable ground to believe the communication
was made, in whole or in part, to enable or aid anyone to commit or plan
to commit a crime or ~~[a-act]~~ to perpetrate or plan to perpetrate a fraud.

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

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

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

In ~~[a-criminal]~~ an action or proceeding in which ~~[the-accused]~~ a party offers evidence of a communication between him and his spouse.

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

(f) In a 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) 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.

(h) If the communication when made was intended to be transmitted to a third person.

(i) If either spouse at the time the communication was made knew that the communication was being made within the hearing of a third person.

~~[(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.

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 non-testifying 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." It is likely, however, that the statute would be construed to grant the privilege to both spouses. The Commission prefers the view that both spouses are the holders of the privilege and that 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 and the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse.

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. 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. The Commission prefers the existing California law and has revised that portion of the URE rule that would abolish the post-coverture privilege. 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.

The URE rule provided 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. The change is desirable, for no one should be able to use the fruits of such wrongdoing for his own advantage by using them as evidence in court. Subdivision (2)(g) of the revised rule, however, retains the provision of existing law that permits a third party to whom one of the spouses has revealed a confidential communication to testify concerning it.

The words "in confidence" have been deleted from subdivision (1) of the revised rule, but the requirement of confidentiality has been retained in more precise form as exceptions in subdivision (2)(h) and (i). Under existing law, a marital communication is presumed confidential and privileged, but its confidential and privileged nature may be negated by a showing that it was made within the hearing of a third person or that it was intended to be

transmitted to a third person. The revision is in accord with existing law, for it merely requires the claimant to show that the communication was a marital communication, but the proponent of the evidence may then show that an exception is applicable.

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 Rule 28 and Rule 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) may create a post-coverture privilege, although this is not altogether clear. In any event, the Commission's 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.

The exceptions provided in Rule 28 are for the most part 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. The exceptions have been reorganized so that they appear in the same order in which the exceptions appear in the other communication privileges.

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 a crime or a tort. The Commission has not

adopted this extension of the scope of the exception. 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 by the Commission 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) of subdivision (2) have been added in the revised rule. These paragraphs express an exception contained in the existing California law. Commitment and competency proceedings are undertaken for the benefit of the subject. 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 that spouse or the other to invoke a privilege to prevent information vital to the court's determination from being presented to the court.

The exception in subdivision (2)(d) 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 person is a party to a lawsuit 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 vindicate the rights or establish the defense of the other spouse. The URE rule would have applied the exception only in criminal cases. But there is no sound reason for not extending the exception to civil cases as well. This extension of the exception makes the URE exception for litigation between the spouses redundant.

Subdivision (2)(e) of the revised rule restates with minor variations an exception that is recognized under existing California law. 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.

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.

RULE 29. PRIEST-PENITENT PRIVILEGE

(1) As used in this rule [7] :

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

(b) "Penitential communication" means a [~~confession-of-culpable conduct-made-secretly-and-in-confidence-by-a-penitent-to-a-priest-in-the course-of-discipline-or-practice-of-the-church-or-religious-denomination-or organization-of-which-the-penitent-is-a-member~~] communication made in the presence of no third persons 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) "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 which he may claim to refuse to disclose, and to prevent [~~a-witness~~] the priest 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 which he may claim to refuse to disclose a penitential communication

COMMENT

Rule 29 sets forth the privilege that is now granted by California law in subdivision 3 of Code of Civil Procedure Section 1861.

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. The rule has been revised in several respects in order to give adequate expression to this policy.

Thus, 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"; and, 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 Commission has revised the rule 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. The revised rule differs from existing California law in that the present statute gives a penitent only a privilege 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 another from disclosing the privileged statement and 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 need not claim the privilege, and if the penitent is deceased, incompetent or absent the evidence may be admitted. This may change 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 for the deceased murderer 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 (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's religious belief were properly sustained. Thus, the existing California law declares that the evidence stated by Rule 30 to be privileged is incompetent for impeachment purposes, while the 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 is really what evidence is competent on the issue of credibility, and the Commission will recommend a rule covering the question of religious belief when URE Rules 20-22, which deal with evidence as to credibility, are studied.

RULE 31. POLITICAL VOTE

Every 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

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." Since the policy of ballot secrecy extends only to legally cast ballots, the California cases and Rule 31 recognize that there is no privilege as to the manner in which an illegal vote has been cast. The Commission approves Rule 31 since it expresses a desirable policy and would codify existing case law.

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

RULE 32. TRADE SECRET

The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons 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 the 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.*

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 Commission approves the recognition of the privilege in the revised rules together with the limitation that the privilege does not apply if it would tend to conceal fraud or otherwise work injustice. The Commission recognizes that the limits of the privilege are uncertain and will have to be worked out through judicial decisions.

*Willson v. Superior Court, 66 Cal. App. 275 (1924) (trade secret held not subject to privilege because of plaintiff's need for information to establish case against the person asserting the privilege).

RULE 33. NATIONAL SECRET [ef-state]

(1) As used in this rule, "national secret [ef-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] the disclosure of which would endanger the security of the United States and which has been classified as requiring protection in the interests of national defense pursuant to the authority of the President of the United States.

(2) A person [witness] has a privilege to refuse to disclose a matter on the ground that it is a national secret [ef-state] and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not a national secret [ef-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

URE Rule 33 grants a privilege for secrets of state. Unlike URE Rule 34, which unless a statute prohibits disclosure requires the judge to determine that disclosure would be harmful to the interests of government before the privilege is applicable, URE Rule 33 provides that the information sought to be disclosed is privileged if it relates to certain subject matter. Moreover, the privilege applies when claimed unless the proponent of the evidence can show that the information sought does not relate to the defined subject matter.

No privilege of this sort is now recognized by California statutes. Under existing law, governmental secrets of the State and its subdivisions are protected either by specific statutes or by the general provisions of subdivision 5 of Code of Civil Procedure Section 1881; and Section 1881, like Rule 34, requires a determination that the public interest would suffer by disclosure before the privilege applies.

There appears to be no reason for creating a broad privilege such as that defined by URE Rule 33 for the secrets of this State and its subdivisions. Accordingly, the Commission has limited the rule to apply to secrets of the national government.

The definition in subdivision (1) has been revised in order to make the information subject to the privilege more specific. Inasmuch as agencies of the United States government have classified all information that requires protection in the interests of national defense pursuant to the provisions of Executive Order No. 10501 of the President of the United States, the revised rule requires that information subject to this privilege be so classified. A local judge should not have the power to determine that information is vital to national security if the national government itself has not deemed the information sufficiently vital to warrant classification.

The definition also requires the information to be of such a nature that its disclosure would endanger the security of the United States. Thus, sole discretion as to the information that is subject to the privilege is not left to the executive branch of the national government. The judge is permitted to overrule a claim of privilege if the proponent of the evidence can establish that revelation of the classified information would not endanger national security.

RULE 34. OFFICIAL INFORMATION

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

(a) "Official information" means information not open or theretofore officially disclosed to the public [~~relating-to-the-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~~] and includes but is not limited to information as to the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of the United States or of a public entity in this State to (i) a law enforcement officer or (ii) a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or (iii) another person for the purpose of transmittal to such officer or representative.

(b) "Public employee" means an officer or employee of the United States or an officer or employee of a public entity in this State.

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

(2) A [witness] person has a privilege to refuse to disclose, and to prevent another from disclosing, a matter on the ground that it is official information [~~, -and-evidence-of-the-matter-is-inadmissible,~~] if the judge finds that the matter is official information [,] and that:

(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~~] is against the public interest because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if the chief officer of the department of government administering the subject matter which the information concerns has consented that it be disclosed in the action or proceeding.

(3) If in a criminal action or proceeding a public entity in this State refuses to disclose or to permit disclosure of information on the ground that it is privileged under this rule, the judge shall make an order or finding of fact adverse to the people of the State upon any issue in the case to which the privileged information is material.

COMMENT

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 would apparently change the present rule that the government can exercise the official information privilege in criminal cases only under onerous circumstances if the privileged information is material to the defense on any issue, for URE Rule 34 provides that official information is privileged if its revelation would be harmful to the interest of 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 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.

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.

Because the identity of an informer is but one kind of official information, the Commission has revised Rule 34 to include the informer privilege. The revised rule eliminates the inexplicable differences between the official information privilege and the informer privilege as proposed in the URE. Under the revised rule, the admissibility of all official information 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.

The phrase "relating to the internal affairs of this State or of the United States" has been deleted from subdivision (1)(a) of the rule in order to broaden its coverage to include the official information in the possession of local entities in California. The term "public employee," defined in subdivision (1)(b), has been substituted for "public official of this State or of the United States" in order to make 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.

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 34, 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 could be construed to apply to informers who furnish information indirectly, but the revised language eliminates any ambiguity that may exist in this regard.

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 somewhat 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 are the more serious. The Commission recognizes that a statute cannot establish hard and fast rules to guide the judge in this process of balancing the 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) expresses the rule 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."* In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence, and 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. 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.

There is no provision comparable to subdivision (3) in Revised Rule 33. Revised Rule 33 pertains only to secrets of the United States Government. The people of the State of California should not be prejudiced in their prosecution of criminal cases because a privilege is exercised by or on behalf of the national government or, for that matter, by or on behalf of anyone else.

* United States v. Reynolds, 345 U.S. 1, 12 (1953).

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) the 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) the court may compel a grand juror to disclose the testimony given before the grand jury when the witness who gave such testimony is being tried for perjury in connection therewith.

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

[A-witness-has-a-privilege-to-refuse-to-disclose-the-identity-of-a-person who-has-furnished-information-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-(a)-the-identity-of-the-person-furnishing-the-information has-already-been-otherwise-disclosed-or-(b)-disclosure-of-his-identity-is essential-to-assure-a-fair-determination-of-the-issues.]

COMMENT

The substance of URE Rule 36 has been incorporated in Revised Rule 34.
See the comment to Rule 34.

RULE 36.5. CLAIM OF PRIVILEGE BY JUDGE

The judge may exclude, on his own motion, evidence that is privileged under this article when the holder of the privilege is neither a party nor the person from whom the evidence is sought; but he may not do so if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

COMMENT

This rule does not appear in the URE. A similar provision does appear, however, in the Model Code of Evidence. 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 when he is not available to protect his own interest. For example, under Rule 26 a third party--perhaps the lawyer's secretary--may have been present when a confidential communication was made. In the absence of the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Rule 36.5. Rule 36.5 permits a judge to claim the privilege for the absent holder.

Rule 36.5 apparently is declarative of the existing California law.

RULE 37. WAIVER OF PRIVILEGE

37. 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 to 29, inclusive, 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 an action or proceeding in which a holder has the legal standing and opportunity to claim the privilege or by any other words or conduct indicating a holder's consent to the disclosure.

(2) Where two or more persons are the holders of a privilege provided by Rules 26, 27, 27.5 or 28, the privilege with respect to a communication is not waived by a particular holder 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 or another person with the consent of another 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 other privilege.

(4) A disclosure in confidence of a communication that is protected by a privilege provided by Rule 26, 27 or 27.5, 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

Rule 37 covers in some detail the matter of waiver of privileges. Rule 37 applies to all of the privileges. The Commission has revised the rule so that it applies only to the communication privileges, Rules 26 through 29.

Rules 23 through 25, Rule 31 and Rules 33 through 36 contain their own waiver provisions. Hence it is unnecessary to make Rule 37 applicable to these privileges.

It is 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, it is unnecessary to make a specific rule of waiver applicable.

Revised Rule 37 omits the provision of the URE rule that a privilege is waived if the holder has contracted to waive it. Under the rule as revised, 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.

Under URE Rule 37 a waiver by any person while the holder of the privilege waives the privilege for all holders of the privilege. The Commission has added subdivision (2) to change this provision of the URE. Under the revised rule a waiver of the privilege by a joint holder of the privilege does not operate to waive the privilege for any of the other holders of the privilege. As revised, Rule 37 declares the existing California law in this regard.

The Commission has revised the language of the URE rule to state more clearly the manner in which waiver is accomplished. The Commission has also added subdivision (3) to make clear, for example, that 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.

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) has been added to Rule 37 to cover situations such as one where an attorney relates a confidential communication from a client 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. Communications such as these, when made in confidence, should not operate to destroy the client's privilege even when they are made with the client's consent. Here, again, the client has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to the attorney despite the necessary further disclosure.

The revised rule 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 consent to disclosure. This seems to be the existing California law, although there is at least one case* which is out of harmony with this rule.

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." The

*People v. Kor, 129 Cal. App.2d 436, 277, P.2d 94 (1954).

Commission has eliminated this requirement 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. 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 keep it out of evidence in a court when it is needed there in order to enable a court to do justice.

RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure or to prevent another from making the disclosure, but [was] nevertheless the disclosure was required to be made [make-it].

COMMENT

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 Rule 38, the evidence is inadmissible against the holder in any later proceeding. Rule 37 provides that such a coerced disclosure does not waive a privilege, but does not provide specifically that the prior disclosure is inadmissible.

URE Rule 38 does not make provision for 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; although there is little case authority upon the proposition.

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES

(1) Subject to paragraphs (2) and (3) of this rule [~~,-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 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 such action or proceeding. [~~In these 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 such action or proceeding.

(2) In a criminal action or 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 action or proceeding, the failure of a party 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.

COMMENT

The Commission has moved subdivision (4) of URE Rule 23 into Rule 39 so that the entire subject of comment upon the exercise of privilege might be covered in the same rule. 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. The Commission has revised the URE rule to make clearer the restrictions upon the trier of fact and to require, rather than 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.

The nature of the instruction required to be given is also stated more specifically in the revised rule. The language of the URE rule "in support of such privilege" is somewhat ambiguous.

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 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. 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 (2) of revised Rule 39 has been substituted for URE Rule 23(4) to retain the existing California law.

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) 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.

Subdivisions (1) and (3) together may modify the existing California law to some extent. In Nelson v. So. Pac. Co.* 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. 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 party 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.

* 8 Cal.2d 648(1937).

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.]~~

COMMENT

The Commission declines to recommend Rule 40 inasmuch as it is not a rule of evidence and merely states the existing California law which will remain in effect if Rule 40 is not adopted.

RULE 40.1. SAVINGS CLAUSE

Rule 40.1. Nothing in this article shall be construed to repeal by implication any other provision of law relating to privileges.

COMMENT

No comparable provision is included in the URE, but the Commission has added this provision to make it clear that this article and the existing code provisions dealing with what evidence is privileged are to be treated as cumulative.

Many of the existing statutes providing rules that determine when evidence is privileged will, of course, be repealed when the URE is enacted. The Commission hereinafter recommends the repeal of all present code provisions which provide general rules relating to privilege and which are either inconsistent with or substantially coextensive with this article. The statutes that will not be repealed when the URE are enacted are, for the most part, narrowly drawn statutes which make a particular privilege inapplicable under specifically limited circumstances. This savings clause will make it clear that these statutes are not impliedly repealed by the provisions of this article.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

[To be prepared after the July meeting]