3/31/67

Memorandum 67-30

Subject: Study 63 - Evidence Code

Swan Song

As I enter the last days of my employment with the Law Revision Commission, I find that it is not easy to shed the responsibilities that have been mine--and ours--during the last seven and one-half years. My work with the Law Revision Commission has been rewarding and challenging. We have encountered some difficult problems, and we have made some significant achievements. I have thoroughly enjoyed the experience of meeting problems presented to us, of sharing with you the difficulties of finding solutions to these problems, and of assisting in the effort to see that our solutions are effectuated. The somewhat rough and tumble give and take of the Commission meetings seem somehow to give off more light than heat and contribute immeasurably to the quality of the Commission's work. I will miss this, and I will miss my association with each of you. I hope that we can find occasion to renew our relationships in the future.

Before shedding my responsibilities entirely, I would like to make some comments on some subjects that are before you now inasmuch as it seems unlikely that I will be able to discuss these matters with you when they appear on your agenda.

Evidence

We enclose a copy of the Evidence Code with official comments so that you can have the text of the code available when you consider this memorandum.

I have been reading the mimeographed draft of the CEB book on California trial objections by Edwin A. Heafey of Oakland. He has pointed

out some "bugs" in the Evidence Code that the Commission should consider. I will note them here in the hope that you may consider them at some time in the future.

The first problem relates to Evidence Code Section 916 and its application to situations where a privilege is jointly held. Section 916 requires the judge to invoke the privilege if no person authorized to invoke the privilege is present. In the case of a privilege held jointly by two persons--such as the marital communication privilege--the situation may occur where one holder of the privilege is present and willing to waive the privilege, but the other holder is not present and does not wish to waive the privilege and does not wish to have the privileged information revealed. Nevertheless, under Section 916, the judge apparently cannot invoke the privilege for the absent holder. This is because the judge's authority under Section 916 arises only if "there is no party to the proceeding who is a person authorized to claim the privilege."

Similarly, lawyers, physicians, and psychotherapists can violate their duty to invoke the privilege of their clients and the judge cannot rely on Section 916 to compel them to observe the privilege. Again, this is because Section 916 authorizes the judge to invoke the privilege only if "there is no party to the proceeding who is a person authorized to claim the privilege." As each of these consultants is a person authorized to invoke the privilege, Section 916 is inapplicable.

Perhaps Section 916 should not be revised. You should, however, specifically consider whether there should be any provision in Section 916 dealing with these situations where there is an absent holder and a

person present who is authorized, but unwilling, to invoke the privilege.

Many of the exceptions to the physician-patient and psychotherapist-patient privileges begin with words somewhat similar to the following: "There is no privilege under this article in a proceeding . . . ." You should consider whether the exceptions should be so broadly worded. There can be no doubt that we intended such broad exceptions in Evidence Code Sections 998 and 1007 relating to criminal and administrative disciplinary proceedings. But there is a serious question as to whether such a broad exception was intended in Sections 999, 1004, 1005, 1023, and 1025. In these last cited sections, did the Commission intend that there be no physician-patient or psychotherapist-patient privileges recognized for non-party witnesses? Or did the Commission intend only that the party involved should have no privilege under these articles? Literally, the Evidence Code states that no one has a physician-patient or psychotherapist-patient privilege in the described proceedings.

There are some interpretive difficulties with the lawyer-client privilege that are similar to those pointed out in regard to the physician-patient and psychotherapist-patient privileges. In Sections 957, 959, 960, and 961, was it the intention to create exceptions for statements of the deceased client, or was it the intention to create an exception for statements of other persons interested in the same matter? The sections are worded broadly enough to permit a court to hold unprivileged statements between other clients and their lawyers when such statements are relevant to the validity of a will of a deceased client, the intention or competence of a deceased client, or an issue between parties claiming through a deceased client.

The privileges of a spouse not to be called as a witness by a party adverse to the other spouse and not to testify against the other spouse were apparently drafted with only two-party litigation in mind. As a result, the application of these privileges provisions is somewhat complex, and perhaps irrational, in multi-party litigation. Forgetting for the moment the privilege not to be called as a witness, the privilege not to testify against the other spouse apparently is intended to prevent the elicitation of testimony from the witness-spouse that is intended to be used against the party-spouse. The privilege does not prevent the witness spouse from being forced to testify against another party in the action. However, if the witness spouse testifies at all, the witness spouse has waived all privileges against testifying in the action. It does not matter that the testimony related to issues between other parties; under Section 973 the privilege is gone when the spouse testifies at all in a proceeding to which the other spouse is a party. Moreover, in multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation the witness spouse has no privilege not to be called and has no privilege to refuse to testify. Yet, after the witness spouse has testified, all marital testimonial privileges are waived for the remainder of the proceeding. Thus, the code literally provides that a witness spouse can be compelled to waive the privilege.

Part of the problem seems to stem from the breadth of the waiver provision in Section 973(a). Perhaps some modification along the following lines would eliminate part of the problem:

> Unless erroneously compelled to do so, a married person who testifies <u>for or against his spouse</u> in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

The privilege not to be called as a witness raises some further complications in multi-party litigation or in litigation involving the interests of both spouses. Apparently the privilege may be asserted in multi-party litigation even though the privilege could not be asserted if the dispute between each pair of adverse parties was litigated separately. The privilege apparently authorizes the non-party spouse to refuse to give testimony for any party adverse to the party spouse even though the testimony sought would relate to a part of the case totally unconnected with the party spouse. If the spouses are co-plaintiffs or are co-defendants and the action of each is not considered to be "for the immediate benefit" of the other spouse, apparently neither party can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case. Moreover, Mr. Heafey takes the position that the adverse party cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition is a violation of the privilege. There could be no adverse consequences imposed upon the spouses for failure to make discovery in this fashion because discovery reaches only unprivileged information. Of course, where an action is defended or prosecuted by one spouse for the immediate benefit of the other spouse, either spouse may be called to testify against the other. It has been pointed out above that the privilege not to be called does not protect the witness spouse from being called by a party who is not adverse to the party spouse.

I have some question as to whether we ever intended the privilege not to be called to be applicable except when the testimony to be elicited was intended to be used against the other spouse. Yet where multiple

parties are involved, this cannot be determined at times until the questions are asked. The privilege not to be called is violated when the witness is called. The error occurs at that time and not when the judge overrules the claim of privilege (although that would be an error too).

It seems to me that the difficulties with this privilege could be eliminated by the elimination of the privilege not to be called. We included this privilege because the case of People v. Ward, 50 Cal.2d 702, 328 P.2d 777 (1958), held that it was an error for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury. Our change in the nature of the testimonial privilege prevents this situation from again arising. The privilege is no longer that of the party spouse. The privilege is that of the witness spouse. Perhaps there may be some prejudice to a party spouse when the other spouse declines to testify against him at the request of an adverse party, but the witness' reliance on a privilege does not create the impression that the defendant is concealing evidence in the same way that the defendant's exercise of the former privilege did. Moreover, I have some doubt as to whether the exercise of this privilege by the witness spouse is that damaging to the party spouse. Mr. Heafey also points out in several places in his draft that the flagrant and repeated forcing of a person to invoke a privilege that counsel knows will be invoked may be misconduct regardless of the privilege involved. It seems to me that the seriousness of the misconduct and its effect upon the trial ought to be evaluated by the judge in each particular context. If an attorney represents a party whose spouse may be called as a witness, he can make sure that the opposing counsel and the judge are well aware of

the fact that the witness spouse's privilege will be invoked. The judge, thus, prior to trial may take such action as may be necessary to prevent any serious misconduct in front of the jury.

Mr. Heafey also raises a question concerning interpretation of Section 973(b). That subdivision provides that there is no marital testimonial privilege in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse. He points out that the prior case law is somewhat uncertain concerning the scope of this exception as it existed prior to the Evidence Code. There is at least one case--Stein v. Superior Court, 174 Cal. App.2d 21, 344 P.2d 406 (1959)--that held that there was no waiver of the privilege merely because the spouses were involuntarily joined as defendants. The spouses had to seek affirmative relief to make the privilege inapplicable. Under this view, if a wife is sued for injuries arising out of an automobile accident involving a vehicle owned by the husband and driven by the wife, the wife can refuse to testify on deposition or under Section 776 on the ground that her testimony will necessarily be against her husband as the owner of the vehicle. I have some doubt that as a policy matter a married person should have a privilege not to testify under Section 776 whenever the litigation affects the liability of his spouse as well as himself. On the other hand, I have some doubt that the privilege should be waived whenever the party spouse's liability, if any, is a liability that may be satisfied out of the community property. If the involvement of the community property worked a waiver of the privilege, there would be virtually no privilege left in civil litigation involving monetary liability. Perhaps Section 973(b) should

be modified to indicate that the term "immediate benefit" in Section 973(b) refers to the situation where affirmative relief is sought for the benefit of both spouses (including the community property) or the liability of the other spouse is necessarily dependent upon the liability of the party spouse as in the vehicle owner-permissive driver situation. Perhaps the distinction that I am searching for is one depending on whether the community property subject to the control of the other spouse is involved in the action. If a party spouse is defending the action for the immediate benefit of the community property subject to the control of the other spouse, then neither should have a privilege not to testify under Section 776. Whether or not these are the proper principles, I suggest that you consider specifically whether some clarification should be attempted or whether the matter should be left to the courts.

The foregoing are somewhat minor defects or ambiguities in the code. I call them to your attention here merely to preserve a record of them so that in your continuing oversight of the Evidence Code you may specifically consider these particular matters.

Respectfully submitted,

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Assistant Executive Secretary