

Date of Meeting: October 23-24, 1959

Date of Memo: October 14, 1959

Memorandum No. 1a

Subject: Uniform Rule of Evidence 27 (Physician-Patient Privilege).

The attached material relates to Rule 27 (Physician-Patient privilege). It is ready to send to the Bar Committee. However, before sending it to the Bar Committee, the Staff would like to present to the Commission the question of whether the privilege should apply in "a civil action or proceeding." There are some cases in California that indicate, for example, that a proceeding to have a person determined to be competent is a "special proceeding" rather than a "civil action." While a court would probably determine that "civil action" includes special proceedings of a civil nature, the question is presented to the Commission as to whether the words "or proceeding" should be inserted at appropriate places in the Uniform Rule as revised by the Commission.

It may develop when we have covered all the Uniform Rules that we will want to provide by a general definition that the word "action" includes "special proceedings." However, at this time it is suggested that the question be determined for each rule as we cover it.

I have sent on to the Bar Committee revised rule 26 (attorney-client privilege), together with the memorandum explaining the revised rule.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Note: This is Uniform Rule 27 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike-out material for deleted material.

RULE 27. PHYSICIAN-PATIENT PRIVILEGE.

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

(a) "Confidential communication between physician and patient"

means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) "Holder of the privilege" means (i) the patient when he is competent, (ii) a guardian 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, for the sole purpose of securing preventive, palliative [7] or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician [7] or submits to an examination by a physician [7] .

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

(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 [~~ex-in-a-prosecution-for-a-misdemeanor~~] to refuse to disclose, and to prevent a witness from disclosing, a communication [;] if he claims the privilege and the judge finds that:

(a) The communication was a confidential communication between patient and physician [;] ; and

(b) The patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor [;] ; and

(c) The witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or [~~his-agent-or-servant~~] a representative, associate or employee of the physician; and

(d) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege [for-him] by the holder of the privilege or (iii) if the patient is living and no other person claims the

privilege and the privilege has not been waived under rule 37, the person who was the physician at the time of the confidential communication.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician ~~[(a)]~~ upon an issue of the patient's condition in:

(a) An action to commit him 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. [~~,-ex-in~~]

(b) An action in which the patient seeks to establish his competence. [~~ex-in~~]

(c) An action to recover damages on account of conduct of the patient which constitutes a felony. [~~riminal-offense-other-than-a-mis-demeanor,-ex~~]

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

(a) ~~[(b)-upon]~~ An issue as to the validity of a document as a will of the patient. [~~,-ex-(a)-upon~~]

(b) An issue between parties claiming by testate or intestate succession or intervivos transaction from a deceased patient.

~~[(4)]~~ (5) There is no privilege under this rule in an action, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which the condition of the patient is an element or factor of the claim, or counter claim, cross-complaint or affirmative defense, of the patient or of 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.

[~~(5)~~] (6) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office [r] unless the statute, charter, ordinance, administrative regulation or other provision requiring the report or record specifically provides that the information shall not be disclosed.

[~~(6)~~] (7) No person has a privilege under this rule if the judge finds that [~~sufficient evidence, aside from the communication has been introduced to warrant a finding that~~] the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort [r] or to escape detection or apprehension after the commission of a crime or a tort.

[~~(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.]~~

9/15/59

RULE 27 (PHYSICIAN PATIENT PRIVILEGE) AS REVISED BY THE
COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 27,
relating to the physician-patient privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical
order.

Definition of "holder of the privilege." The definition of
"holder of the privilege" contained in the Uniform Rule has been rephrased
in the revised rule to conform to the similar definition in revised
rule 26. Note that under this definition, a guardian of the patient
is the holder of the privilege if the patient is incompetent. This
differs from the Uniform 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.

An incompetent patient becomes the holder of the privilege when
he becomes competent.

The personal representative of the patient is the holder of the
privilege when the patient is dead. He may claim the privilege on behalf of

the deceased patient. This may be a change in the existing California law. Under the 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, the Commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

This definition of "holder of the privilege" should be considered with reference to subparagraphs (c) and (d) of paragraph (2) of the revised rule (specifying who can claim the privilege) and rule 37 (relating to waiver of the privilege).

Definition of "patient." Two unnecessary commas have been deleted from the Uniform Rule.

The Commission approves the requirement of the Uniform Rule that the patient must consult the physician for the sole purpose of diagnosis preliminary to treatment or treatment in order to be within the privilege.

Definition of "physician." A necessary comma has been inserted after the words "person authorized." Compare with Uniform Rule 26(3)(c).

The Commission approves the provision of the Uniform Rule which defines "physician" to include a person "reasonably believed by the patient to be authorized" to practice medicine. If we are to recognize this privilege, we should be willing to protect patients from reasonable mistakes as to unlicensed practitioners.

GENERAL RULE

The substance of the "general rule" is set out in the revised rule as paragraph (2).

The following modifications of the Uniform Rule have been made in the revised rule:

(1) The "general rule" has specifically been made subject to rule 37 (waiver) and paragraph (7) of Uniform Rule 27 has been omitted as unnecessary. Making the general rule subject to rule 37 conforms to the language of rule 26 (attorney-client privilege) and makes it clear that rule 37 is applicable.

(2) The language of the introductory exception to the Uniform Rule has been revised to delete the unnecessary references to specific paragraphs of the rule.

(3) Under the revised rule, the privilege is applicable only in civil actions. The Commission rejects that portion of the Uniform Rule that extends the privilege to a prosecution for a misdemeanor. The existing California statute restricts the privilege to a civil action and the Commission is unaware of any criticism of the existing statute. 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.

(4) In subparagraph (c) of paragraph (2) of the revised rule, the phrase "a representative, associate or employe of the physician" has been substituted for "his agent or servant." This change makes rule 27 conform to the phrase used in rule 26.

(5) Subparagraph (d) of paragraph (2) of the Uniform Rule has been revised to conform to Uniform Rule 26 insofar as who may claim the privilege is concerned. This revision will allow the physician to claim the privilege on behalf of patient when all of the following conditions exist: (1) the patient is alive; (2) no other person claims the privilege; and (3) the privilege has not been waived. The Commission believes that in this case the Uniform Rule is not clear but that the Uniform Rule might be construed to mean that the physician is a person "authorized to claim the privilege for" the holder of the privilege.

EXCEPTIONS

The revised rule incorporates the substance of the exceptions provided in the Uniform Rule with the following modifications and additions:

(1) The exceptions have been rephrased and tabulated to improve readability.

(2) The exception provided in paragraph (3)(a) is broader than the Uniform Rule and will cover not only commitments of mentally ill persons, mentally deficient persons and other similar persons, but will also cover such cases as the appointment of a conservator under Probate Code § 1751. In these cases, the Commission believes the privilege should not apply.

(3) The provision of the Uniform Rule that there is no privilege in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor has been rephrased but not changed in substance. Although the revised rule denies the physician-patient privilege in a prosecution for a misdemeanor, the Commission does not believe that the patient should be denied his privilege in a civil action against him for damages on account of conduct which it is

alleged constituted a misdemeanor.

(4) The Uniform Rule provides that there is no privilege upon an issue between parties claiming by testate or intestate succession from a deceased patient. The Commission has extended this exception to include also inter vivos transactions. This is consistent with Uniform Rule 26(2)(b).

(5) The Uniform 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 does not extend the patient-litigant exception this far but instead provides that the privilege does not exist in an action in which the condition of the patient is an element or factor of the claim "or counter claim, cross-complaint or affirmative defense" of the patient. The Commission's revised rule will protect the patient in the following case. Divorced husband (P) brings a proceeding against his ex-wife (D) to gain custody of child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls psychiatrist who is treating D. Under the Uniform Rule it appears that D's objection to the psychiatrist's testimony would be overruled; but the contrary is the case under the revised rule. The Commission does not believe that a plaintiff should be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action.

(6) The revised rule provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (Wrongful Death Statute). The Uniform Rule does not contain this provision. Under the existing California statute, a person authorized to bring a wrongful death action may consent to the testimony by the physician. There is no logical

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 the case where a wrongful death action is brought. Under the Uniform Rule and under the revised rule, if the patient brings the action, the condition of the patient is an element of the claim and no privilege exists. The revised rule makes the same rule applicable in wrongful death cases.

The revised rule provides 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.

(7) The provision of the Uniform Rule providing that the privilege does not apply as to information required by statute to be reported to a public officer or recorded in a public office has been extended to include information required by "charter, ordinance, administrative regulations or other provisions." 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.

(8) A necessary comma has been inserted and an unnecessary comma has been deleted from paragraph (6) of the Uniform Rule (paragraph (7) of the revised rule). The Commission approves the provision of the Uniform Rule which makes the privilege not applicable where the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission

of a crime or a tort. The Commission does not believe that this provision will impose any undue difficulty for a patient consulting with his physician. The Commission believes that the contrary is true in the case of the lawyer-client relationship. Consequently, the Commission has limited this exception to crime or fraud in rule 26 as far as the lawyer-client privilege is concerned but has adopted the Uniform Rule in the case of the physician-patient privilege.

The Uniform Rule requires that the judge must find that "sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort." The Commission has not retained this requirement that as a foundation for the admission of such evidence there must be a prima facie showing of criminal or tortious activities. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes that the foundation requirement is too stringent and prefers that the question (as to whether the services of the physician were sought or obtained to enable or aid anyone in a crime or tort) be left to the judge for determination under the provisions of Uniform Rule 8.

(9) Paragraph (7) of the Uniform Rule has been deleted. This paragraph is not necessary since the same matter is covered by rule 37. Rule 27 has been made subject to rule 37 in the revised rule by a specific provision in revised rule 27(2)

EAVESDROPPER EXCEPTION

Uniform Rule 27 does not abolish the eavesdropper exception so far as the physician-patient privilege is concerned. This exception is a traditional one and the Commission does not believe that the physician-patient privilege should be extended to provide protection against eavesdroppers.