#34 8/21/64

Memorandum 64-64

Subject: Study No. 34(L) -- Uniform Rules of Evidence (Evidence Code--Division 8--Privileges)

When the privileges Division of the Evidence Code was approved for printing, the staff was directed to examine the legislation recently reported favorably by the Senate Judiciary Committee of the United States Congress relating to the disclosure of information in the hands of the government to the public. It was thought that this legislation might provide a useful standard for defining "public interest" in the official information and identity of the informer privileges.

We have examined the legislation and we do not believe that it contains any suggestions that would result in improvement of the pertinent sections of the Evidence Code.

For your information we attach as Exhibit I (pink pages) an extract from the Judiciary Committee Report relating to the pertinent bill, S 1666

We have no questions of policy to raise in connection with the Privileges Division. We may make a few technical editorial changes, but we do not believe that they require Commission consideration.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Exhibit [illegible] S. 1666 (86th Cong. 2d Sess.)

WHAT S. 1666 WOULD DO

S. 1666 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld. It also provides a different set of standards in the three different subsections that deal with different types of information.

(2) It eliminates the test of *who* shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain right to privacy and a need for confidentiality in some aspects of Government operations and these are protected as specifically as possible; but outside these limited areas, all citizens have a right to know.

(3) The revised section 3 gives to any aggrieved citizen a remedy in court.

AGENCY COMMENTS TO S. 1666

The Government agencies in their comments, both oral and written, which are on file with the committee, pointed to a number of types of Government files which were not exempted from disclosure but which, they believe, should be exempted and which are covered by the amendments proposed herein. A fairly detailed description of the bill, as amended, follows:

DESCRIPTION OF SUBSECTION (a)

Subsection (a) deals entirely with publication of material in the Federal Register. This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of *too much* publication rather than *too little*.

There are, however, some changes. The vague and objectionable standard of "public interest" has been replaced by "national security," so that, under the revised subsection, the requirement for publication would have only two exceptions:

> (1) any function of the United States requiring secrecy for the protection of the national security, or (2) any matter relating solely to the internal management of an agency * * *.

There are a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.

There is also a provision, suggested by a number of agencies, for incorporation of other publications by reference in the Federal Register. This may be helpful in reducing the bulky present size of the Register.

The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added for several reasons. The old sanction was inadequate and unclear. The new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights. This gives added incentive to the agencies to publish the required material.

The following technical changes were also made with regard to subsection 3(a).

The phrase "* * * but not rules addressed to and served upon named persons in accordance with law * * *" was stricken because section 3(a) as amended only requires the publication of rules of general applicability.

"Rules of procedure" was added to remove an uncertainty. "Descriptions of forms available" was added to eliminate the need of publishing lengthy forms.

The new subsection 3(a)(2)(D) is an obvious change, added for the sake of completeness and clarity.

DESCRIPTION OF SUBSECTION (b)

Subsection (b) of S. 1666 [as subsec. (b) of sec. 3 of the Administrative Procedure Act] deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available.

There are three categories of exceptions. The first two are similar to those in subsection (a), and relate to matter which (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; or (2) relates solely to the internal personnel rules and practices of any agency. It will be noted that these exemptions are similar to those in subsection (a), but more tightly drawn.

Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.

With the above three exceptions, agencies must make available for public inspection and copying all final opinions (including concurring and dissenting opinions); all orders made in the adjudication of cases; and those rules, statements of policy, and interpretations which have been adopted by the agency, which affect the public, and which are not required to be published in the Federal Register.

There is a provision for the deletion of certain details in orders and opinions to prevent "a clearly unwarranted invasion of personal privacy." The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.

Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably

with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion, which the agency knows about, but which has been unavailable to the citizen simply because he had no way in which to discover it. However, considerations of time and expense cause this indexing requirement to be made prospective in application only.

Subsection (b) contains its own sanction that orders, opinions, rules, etc., which are not properly indexed and made available to the public may not be relied upon or cited as precedent by an agency.

There are also a number of technical changes in section 3(b).

The phrase "* * * and copying * * *" was added because it is frequently of little use to be able to inspect orders, rules, or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

The addition of "* * * concurring and dissenting opinions * * *" is added to insure that, if one or more agency members dissent or concur, the public as well as the parties should have access to these views and ideas.

The enumeration of orders, rules, etc., defines what materials are subject to section 3(b)'s requirements. The "unless" clause was added to provide the agencies with an alternative means of making these materials available through publication.

DESCRIPTION OF SUBSECTION (c)

Subsection (c) deals with "agency records" and would have almost the reverse result of present subsection (c) which deals with "public records." Whereas the present subsection 3(c) of the Administrative Procedure Act has been construed to authorize widespread withholding of information, subsection 3(c) of S. 1666 requires its disclosure except in certain enumerated categories. The first three of these exceptions are the same as those in subsection (b).

The fourth exception is for "trade secrets and other information obtained from the public and customarily privileged or confidential". This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses.

Exception No. 5 would exempt "intraagency or interagency memoranda or letters dealing solely with matters of law or policy." This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out "in a goldfish bowl." Govern-

ment officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and coworkers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The committee is of the opinion that the Government cannot operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature.

Exception No. 6 contains an exemption for "personnel files, medical files, and similar matter, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As with "trade secrets," before the receipt of agency comments and before the hearings, there was a belief that there was specific statutory authority in most cases to cover such things as personnel files, medical files, etc. However, it was discovered that such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., had great quantities of files, the confidentiality of which was maintained by rule but without statutory authority. There is a general consensus that these "personnel files" should not be opened to the public, and the committee again decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption will be held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."

Exception No. 7 is an exemption for "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." It was believed that most agencies had statutory authorization for withholding investigatory files. However, this proved to be incorrect, and even such agencies as the FBI did not possess such authority. The exemption covers investigatory files in general, but is limited in time of application.

Exception 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.

Subsection (c) contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel. The aggrieved person can bring an action in the district court where he resides, has his place of business, or in which the agency is situated. If the court finds that the information was wrongfully withheld, the court may require the agency to pay the cost and reasonable attorney's fees of the complainant. This power of the court to assess costs and reasonable attorney's fees is provided so that a private citizen or the press will be less prone to hesitate to use the remedy provided in section 3(c) because of financial inability or risk.

That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency and requiring it to sustain its action by a preponderance of the evidence puts the task of justifying and withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has

improperly withheld public information, when he will not know the reasons for it

The court is authorized to give actions under this subsection precedence on the docket over other causes. Complaints of wrongful withholding shall be heard "at the earliest practicable date and expedited in every way."

DESCRIPTION OF SUBSECTION (d)

This subsection provides that a record be kept of all final votes by agency members in every agency proceeding and that this record of votes be available to the public.

Agency practice in this area varies. This change makes the publication of final votes of agency members a uniform practice and provides the public with a very important part of the agency's decisional process.

The only exemptions are to "protect the national defense or foreign policy" of the United States.

DESCRIPTION OF SUBSECTION (e)

The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exceptions in section 3. Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.

CONCLUSION

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality

A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law (60 Stat. 237) made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

PUBLIC INFORMATION

SEC. 3. [Except to the extent there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—]

(a) [RULES.—] *PUBLICATION IN THE FEDERAL REGISTER.—Except to the extent that there is invoked (1) any function of the United States requiring secrecy for the protection of the national security or (2) any matter relating solely to the internal management of an agency,* every agency shall separately state and currently publish in the Federal Register *for the guidance of the public* [(1)] *(A)* descriptions of its central and field organization [including delegations by the agency of final authority] and the established places at which, *the officers from whom,* and methods whereby, the public may secure information, [or] make submittals or requests *or obtain decisions;* [(2)] *(B)* statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available [as well as], *rules of procedure, descriptions of* forms *available or the places at which forms may be obtained,* and instructions as to the scope and contents of all papers, reports, or examinations; [and (3)] *(C)* substantive rules *of general applicability* adopted as authorized by law and statements of general policy or interpretations *of general applicability* formulated and adopted by the agency [for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law.] *and (D) every amendment, revision, or repeal of the foregoing. Except to the extent that he has actual notice of the terms thereof,* no person shall in any manner be required to resort to, *or be bound or adversely affected by any* [organization or procedure] *matter required to be published in the Federal Register and* not [so] published *therein or in a publication incorporated by reference in the Federal Register.*

(b) AGENCY OPINIONS [AND], ORDERS, *AND RULES.—Except to the extent that matter (1) is specifically required by Executive order to be kept secret for the protection of the national defense of foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute,* every agency shall, [publish or] in accordance with published rules, make available [to] *for* public inspection *and copying* all final opinions [or] *(including concurring and dissenting opinions) and all* orders *made* in the adjudication of cases, [(except those required for good cause to be held confidential and not cited as precedents)] and [all] *those* rules, *statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register, unless such opinions, orders, rules, statements, and interpretations are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to each final order, opinion, rule, statement of policy, and interpretation of general applicability. No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted or promulgated after the effective date of this Act may be relied upon, used, or cited as precedent*

by any agency against any private party unless it has been indexed and either made available or published as provided in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

(c) [PUBLIC] AGENCY RECORDS.—[Save as otherwise required by statute, matters of official record] *Every agency* shall, in accordance with published rules *stating the time, place, and procedure to be followed,* [be made] *make all its records promptly* available to any person [to persons properly and directly concerned except information held confidential for good cause found,] *except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.*

(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and except to the extent required to protect the national defense or foreign policy such record shall be available for public inspection.

(e) LIMITATION OF EXEMPTION.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

(f) As used in this section "Private party" means any party other than an agency.

(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act.

CHAPTER 1. DEFINITIONS

900. Application of definitions.

900. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division.

901. Civil proceeding.

901. "Civil proceeding" means any proceeding except a criminal proceeding.

902. Criminal proceeding.

902. "Criminal proceeding" means:

(a) A criminal action; and

(b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for wilful or corrupt misconduct in office.

903. Disciplinary proceeding.

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

904. Presiding officer.

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

905. Proceeding.

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

910. Applicability of division.

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

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

911. General rule as to privileges.

911. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

912. Waiver of privilege.

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) 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 disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), the right of a particular joint holder of the privilege to claim the privilege is not waived unless the privilege of that joint holder has been waived, even though the right of another joint holder to claim the privilege has been waived. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), the right of one spouse to claim the privilege is not waived even though the right of the other spouse to claim the privilege has been waived.

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

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), 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.

913. Comment on, and inferences from, exercise of privilege.

913. (a) If a privilege is exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, the presiding officer and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

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

914. Determination of claim of privilege; limitation on punishment for contempt.

914. (a) Subject to Section 915, the presiding officer shall determine a claim of privilege in any proceeding in the same manner as a judge determines such a claim under Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a judge that he disclose such information. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code.

915. Disclosure of privileged information in ruling on claim of privilege.

915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.

(b) When a judge is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under Section 1072 (newsmen's privilege) and is unable to rule on the claim without requiring disclosure of the information claimed to be privileged, the judge may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

916. Exclusion of privileged information where persons authorized to claim privilege are not present.

916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

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

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

(b) The presiding officer may not exclude information under this section if:

(1) There is no person authorized to claim the privilege in existence; or

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

917. Confidential communications: burden of proof.

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

918. Effect of error in overruling claim of privilege.

918. A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

919. Admissibility where disclosure erroneously compelled.

919. Evidence of a statement or other disclosure is inadmissible against a holder of the privilege if:

(a) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

(b) The presiding officer did not exclude the privileged information as required by Section 916.

920. Other statutes not impliedly repealed.

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

CHAPTER 4. PARTICULAR PRIVILEGES

Article 1. Privilege of Defendant in Criminal Case

930. Privilege not to be called as a witness and not to testify.

930. To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

Article 2. Privilege Against Self-Incrimination

940. Privilege against self-incrimination.

940. To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

Article 3. Lawyer-Client Privilege

950. "Lawyer" defined.

950. As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

951. "Client" defined.

951. As used in this article, "client" means a person (including the United States and a public entity) who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

952. "Confidential communication between client and lawyer" defined.

952. As used in this article, "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 to whom disclosure is 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.

953. "Holder of the privilege" defined.

953. As used in this article, "holder of the privilege" means:

(a) The client when he has no guardian or conservator.

(b) A guardian or conservator of the client when the client has a guardian or conservator.

(c) The personal representative of the client if the client is dead.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

954. Lawyer-client privilege.

954. Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

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

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

955. When lawyer required to claim privilege.

955. The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

956. Exception: Crime or fraud.

956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

957. Exception: Parties claiming through deceased client.

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

958. Exception: Breach of duty arising out of lawyer-client relationship.

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer.

959. Exception: Lawyer as attesting witness.

959. There is no privilege under this article 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.

960. Exception: Intention of deceased client concerning writing affecting property interest.

960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

961. Exception: Validity of writing affecting interest in property.

961. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

962. Exception: Joint clients.

962. 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 article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between such clients.

970. Privilege not to testify against spouse.

970. Except as provided in Sections 972 and 973, a married person has a privilege not to testify against his spouse in any proceeding.

971. Privilege not to be called as a witness against spouse.

971. Except as provided in Sections 972 and 973, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section.

972. When privilege not applicable.

972. A married person does not have a privilege under this article in:

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

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

(c) 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.

(d) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

(4) A crime defined by Section 270 or 270a of the Penal Code.

973. Waiver of privilege.

973. (a) Unless erroneously compelled to do so, a married person who testifies 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.

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

Article 5. Privilege for Confidential Marital Communications

980. Privilege for confidential marital communications.

980. Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

981. Exception: Crime or fraud.

981. There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

982. Exception: Commitment or similar proceeding.

982. There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

983. Exception: Proceedings to establish competence.

983. There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

984. Exception: Proceeding between spouses.

984. There is no privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding against a surviving spouse by a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

985. Exception: Certain criminal proceedings.

985. There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

(a) A crime against the person or property of the other spouse or of a child of either.

(b) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.

(c) Bigamy or adultery.

(d) A crime defined by Section 270 or 270a of the Penal Code.

986. Exception: Juvenile court proceedings.

986. There is no privilege under this article 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.

987. Communication offered by spouse who is criminal defendant.

987. There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

990. "Physician" defined.

990. As used in this article, "physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

991. "Patient" defined.

991. As used in this article, "patient" means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition.

992. "Confidential communication between patient and physician" defined.

992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician 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 to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes advice given by the physician in the course of that relationship.

993. "Holder of the privilege" defined.

993. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

994. Physician-patient privilege.

994. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

(a) The holder of the privilege;

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

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

995. When physician required to claim privilege.

995. The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

996. Exception: Patient-litigant exception.

996. There is no privilege under this article in a proceeding in which an issue concerning the condition of the patient has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

997. Exception: Crime or tort.

997. There is no privilege under this article if 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.

998. Exception: Criminal or disciplinary proceeding.

998. There is no privilege under this article in a criminal proceeding or in a disciplinary proceeding.

999. Exception: Proceeding to recover damages for criminal conduct.

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.

1000. Exception: Parties claiming through deceased patient.

1000. There is no privilege under this article 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.

1001. Exception: Breach of duty arising out of physician-patient relationship.

1001. There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

1002. Exception: Intention of deceased client concerning writing affecting property interest.

1002. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1003. Exception: Validity of writing affecting interest in property.

1003. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

1004. Exception: Commitment or similar proceeding.

1004. There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

1005. Exception: Proceeding to establish competence.

1005. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

1006. Exception: Required report.

1006. There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, 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.

Article 7. Psychotherapist-Patient Privilege

1010. "Psychotherapist" defined.

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation; or

(b) A person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

1011. "Patient" defined.

1011. As used in this article, "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.

1012. "Confidential communication between patient and psychotherapist" defined.

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is 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.

1013. "Holder of the privilege" defined.

1013. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

1014. Psychotherapist-patient privilege.

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege;

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

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

1015. When psychotherapist required to claim privilege.

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

1016. Exception: Patient-litigant exception.

1016. There is no privilege under this article in a proceeding in which an issue concerning the mental or emotional condition of the patient has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

1017. Exception: Court appointed psychotherapist.

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter a plea based on insanity or present a defense based on his mental or emotional condition.

1018. Exception: Crime or tort.

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

1019. Exception: Parties claiming through deceased patient.

1019. There is no privilege under this article 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.

1020. Exception: Breach of duty arising out of psychotherapist-patient relationship.

1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

1021. Exception: Intention of deceased patient concerning writing affecting property interest.

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1022. Exception: Validity of writing affecting interest in property.

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

1023. Exception: Proceeding to determine sanity of criminal defendant.

1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

1024. Exception: Patient dangerous to himself or others.

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

1025. Exception: Proceeding to establish competence.

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

1026. Exception: Required reports.

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1026. There is no privilege under this article as to information that psychotherapist or the patient is required to report to a public employee 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.

Article 8. Clergyman-Penitent Privileges

1030. "Clergyman" defined.

1030. As used in this article, "clergyman" means a priest, minister, or similar functionary of a church or of a religious denomination or religious organization.

1031. "Penitent" defined.

1031. As used in this article, "penitent" means a person who has made a penitential communication to a clergyman.

1032. "Penitential communication" defined.

1032. As used in this article, "penitential communication" means a communication made in confidence in the presence of no third person to a clergyman 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.

1033. Privilege of penitent.

1033. Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

1034. Privilege of clergyman.

1034. Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

Article 9. Official Information and Identity of Informer

1040. Privilege for official information.

1040. (a) As used in this section, "official information" means information not open, or theretofore officially disclosed, to the public acquired in confidence by a public employee in the course of his duty.

(b) Subject to subdivision (c), a public entity (including the United States) has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

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

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) There is no privilege under this section if the person from whom the information is sought acquired knowledge of the information because the public entity failed to exercise due care to protect the confidentiality of the information, unless such person acquired knowledge of the information from the public entity in confidence.

1041. Privilege for identity of informer.

1041. (a) Except as provided in this section, a public entity (including the United States) has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of this State or of the United States, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

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

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

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

(c) There is no privilege under this section if the person from whom the information is sought acquired knowledge of the identity of the informer because the public entity or the informer failed to exercise due care to keep such identity confidential, unless such person acquired knowledge of such identity from the public entity in confidence.

(d) There is no privilege under this section to prevent the informer from disclosing his identity.

1042. Adverse order or finding in certain cases.

1042. (a) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this article by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

Article 10. Political Vote

1050. Privilege to protect secrecy of vote.

1050. If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

Article 11. Trade Secret

1060. Privilege to protect trade secret.

1060. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Article 12. Immunity of Newsman From Citation for Contempt

1070. "Newsman" defined.

1070. As used in this article, "newsman" means a person directly engaged in the procurement of news for publication, or in the publication of news, by news media.

1071. "News media" defined.

1071. As used in this article, "news media" means newspapers, press associations, wire services, radio, and television.

1072. Newsman's Immunity.

1072. A newsman may not be adjudged in contempt for refusing to disclose the source of news procured for publication and published by news media, unless the source has been disclosed previously or the disclosure of the source is required in the public interest.