

#34(L)

10/16/64

Memorandum 64-86

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint
Senate Bill No. 1--Division 8)

Attached are two copies of the revised Comments to Division 8.

Mr. McDonough is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

In checking references to the Uniform Rules of Evidence, check the reference against the pamphlet containing the Uniform Rules, not against the pamphlet containing our tentative recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

§ 900. Application of definitions

Comment. Section 900 makes it clear that the definitions in Sections 901 through 905 apply only to Division 8 (Privileges) and that these definitions are not applicable where the context or language of a particular section in Division 8 requires that a word or phrase used in that section be given a different meaning. The definitions contained in Division 2 (commencing with Section 100) apply to the entire code, including Division 8. Definitions applicable only to a particular article are found in that article.

§ 901. "Proceeding"

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

§ 902. "Civil proceeding"

Comment. "Civil proceeding" includes not only a civil action or proceeding, but also any nonjudicial proceeding in which, pursuant to law, testimony can be compelled to be given. See EVIDENCE CODE §§ 901 and 903.

§ 903. "Criminal proceeding"

Comment. The definition of "criminal proceeding" includes not only a "criminal action" (defined in Section 130) but also a proceeding by accusation for the removal of a public officer under Government Code Section 3060 et seq.

§ 904. "Disciplinary proceeding"

Comment. The definition of "disciplinary proceeding" follows the definition of the kind of proceeding initiated by accusation in Government Code Section 11503. The Government Code definition has been modified to make it clear that Section 904 covers not only license revocation and suspension proceedings, but also personnel disciplinary proceedings. "Disciplinary proceeding" does not include, however, a proceeding by accusation for the removal of a public officer under Government Code Section 3060 et seq.

§ 905. "Presiding officer"

Comment. "Presiding officer" is defined so that reference may be made to the person who makes rulings on questions of privilege in nonjudicial proceedings. The term includes arbitrators, hearing officers, referees, and any other person who is authorized to make rulings on claims of privilege. It, of course, includes the judge or other person presiding in a judicial proceeding.

CHAPTER 2. APPLICABILITY OF DIVISION

§ 910. Applicability of division

Comment. This section makes the rules of privilege applicable in all proceedings in which testimony can be compelled. See the definition of "proceeding" in EVIDENCE CODE § 901.

§ 903
§ 904
§ 905
§ 910

Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privilege rules, however, are different from other rules of evidence. Privileges are granted for reasons of policy unrelated to the reliability of the information that is protected by the privilege. As a matter of fact, privileges have a practical effect only when the privileged information is relevant to the issues in a pending proceeding.

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

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

Therefore, the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given. Section 910 makes the privilege rules applicable to all such proceedings. In this respect, it follows the precedent set in New Jersey when privilege rules, based in part on the Uniform Rules of Evidence, were enacted. See N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49).

Whether Section 910 is declarative of existing law is uncertain. No California case has decided the question whether the existing judicially

recognized privileges are applicable in nonjudicial proceedings. By statute, however, they have been made applicable in all adjudicatory proceedings conducted under the terms of the Administrative Procedure Act. GOVT. CODE § 11513. The reported decisions indicate that, as a general rule, privileges are assumed to be applicable in nonjudicial proceedings. See, e.g., McKnew v. Superior Court, 23 Cal.2d 58, 142 P.2d 1 (1943); Ex parte McDonough, 170 Cal. 230, 149 Pac. 566 (1915); Board of Educ. v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 82 (1954); In re Bruns, 15 Cal. App.2d 1, 58 P.2d 1318 (1936). Thus, Section 910 appears to be declarative of existing practice, but there is no authority as to whether it is declarative of existing law. Its enactment will remove the existing uncertainty concerning the right to claim a privilege in a nonjudicial proceeding.

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

§ 911. General rule as to privileges

Comment. No new or common law privileges can be recognized in the absence of statute. The section codifies existing law. See Chronicle Pub. Co. v. Superior Court, 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 117, 35 P.2d 637, 645 (1960); Tatkin v. Superior Court, 160 Cal. App.2d 745, 753, 326 P.2d 201, 205-206 (1958); Whitlow v. Superior Court, 87 Cal. App.2d 175, 196 P.2d 590 (1948). See also 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961); WITKIN, CALIFORNIA EVIDENCE § 396 at 446 (1958).

Section 911 is based on Rule 7(b), (d), and (e) of the Uniform Rules of Evidence.

§ 912. Waiver of privilege

Comment. This section covers in some detail the matter of waiver of those privileges that protect confidential communications.

Subdivision (a). Subdivision (a) states the general rule with respect to the manner in which a privilege is waived: Failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity

to claim the privilege constitutes a waiver. This seems to be the existing law. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 233, 231 P.2d 26, 29 (1951); Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688 (1897). There is, however, at least one case that is out of harmony with this rule: People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954) (defendant's failure to claim privilege to prevent a witness from testifying as to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

Subdivision (b). A waiver of the privilege by a joint holder of the privilege does not operate to waive the privilege for any of the other joint holders of the privilege. This codifies existing law. See People v. Kor, *supra*, 129 Cal. App.2d 436, 277 P.2d 94 (1954) (at the time of the communication, the attorney was acting for both the defendant and the witness who testified); People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951).

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

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matter takes place in another privileged communication, there has not been such an abandonment of the secrecy to which the holder is entitled to deprive the holder of his right to maintain further secrecy.

Subdivision (d). Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the communicant was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver under this section. Nor would a physician's or psychotherapist's keeping of confidential records, such as confidential hospital records necessary to diagnose or treat a patient, be a waiver under this section. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure. Subdivision (d) may change California law. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), applying the California law of privileges, held that a lawyer's revelation to an accountant of a client's communication to the lawyer waived the client's privilege if such revelation was authorized by the client. However, no California case has been found precisely in point.

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

Comment. Section 913 prohibits any comment on the exercise of a privilege and provides that the trier of fact may not draw any inference therefrom. Except as noted below, this probably states existing law. See People v. Wilkes,

44 Cal.2d 679, 284 P.2d 481 (1955). In addition, the court is required, upon request, to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of a privilege. If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, the protection afforded by the privilege would be largely negated.

It should be noted that Section 913 deals only with comment upon, and the drawing of adverse inferences from, the exercise of a privilege. Section 913 does not purport to deal with the inferences that may be drawn from, or the comment that may be made upon, the evidence in the case.

Section 13 of Article I of the California Constitution provides that, in a criminal case, the failure of the defendant to explain or to deny by his testimony the evidence in the case against him may be commented upon. The courts, in reliance on this provision, have held that the failure of a party in either a civil or criminal case to explain or to deny the evidence against him may be considered in determining what inferences should be drawn from that evidence. People v. Adamson, 25 Cal.2d 478, 165 P.2d 3 (1946); Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935). However, the cases have emphasized that this right of comment and consideration does not extend in criminal cases to the drawing of inferences from the claim of privilege itself. Inferences may be drawn only from the evidence in the case. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954); People v. Adamson, supra, 25 Cal.2d 478, 165 P.2d 3 (1946). Section 445 of the Evidence Code expresses the principle underlying this constitutional provision; nothing in Section 913 affects the application of Section 445 in either criminal or civil cases. See the Comment to Section 445. Thus, for example, it is

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perfectly proper under the Evidence Code for counsel to point out that the evidence against the other party is uncontradicted.

People v. Adamson, supra, sustained the validity of Article I, Section 13, of the California Constitution against an attack based upon the United States Constitution. The Adamson decision was affirmed by the United States Supreme Court in Adamson v. California, 332 U.S. 46 (1947), on the ground that the federal privilege arising under the Fifth Amendment to the United States Constitution did not apply in state proceedings. The basis for the decision in Adamson v. California, supra, was recently repudiated in Malloy v. Hogan, 378 U.S. 1 (1964). In neither case, however, did the United States Supreme Court decide whether the right of comment and inference permissible under California law is consistent with the guarantees of the federal constitution. Nonetheless, this recent decision has at least cast doubt on the validity of the California rule--reflected in Article I, Section 13, of the California Constitution and Evidence Code Section 445--when a federal constitutional privilege is involved.

Section 913 may modify existing California law as it applies in civil cases. In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in a self-exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. People v. Snyder, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958) (overruling or disapproving several cases there cited). See also People v. Sharer, 227 Cal. App.2d ___, 38 Cal. Rptr. 278 (1964). Section 913 will, in effect, overrule the holding in the Nelson case, for it declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue. The status of the rule in the Nelson case has been in doubt because of the recent holdings in criminal cases; Section 913 eliminates any remaining basis for applying a different rule in civil cases.

There is some language in Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935), that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it did indicate California law, that law is changed by Evidence Code Sections 445 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege.

Section 913 is based on Rule 39 of the Uniform Rules of Evidence.

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

Comment. Subdivision (a) makes the general provisions (Sections 400 through 406) concerning preliminary determinations on admissibility of evidence applicable when a presiding officer who is not a judge is called upon to determine whether or not a privilege exists. Subdivision (a) is necessary because Sections 400 through 406, by their terms, apply only to determinations by a judge.

Subdivision (b) is needed to protect persons claiming privileges in non-judicial proceedings. Because nonjudicial proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he runs the risk of being held in contempt for failing to disclose such information. That the determination of privilege in a judicial proceeding is a question for the judge is well-established California law. See, e.g., Holm v. Superior Court, 42 Cal.2d 500, 507, 267 P.2d 1025, 1029 (1954). Subdivision (b), of course, does not apply to any body--such as the Public Utilities Commission--that has constitutional power to impose punishment for contempt. See, e.g., CAL. CONST., Art. XII, § 22. Nor does this subdivision apply to witnesses before the State Legislature or its committees. See GOVT. CODE §§ 9400-9414.

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

Comment. Section 915 provides that revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged, for such a coerced disclosure would itself violate the privilege. This codifies existing law. See Collette v. Sarrasin, 184 Cal. 283, 288-289, 193 Pac. 571, 573 (1920).

An exception to the general rule of Section 915 is provided for information claimed to be privileged under Section 1040 (official information), Section 1041 (identity of an informer), Section 1060 (trade secret), or Section 1072 (newsmen's privilege). Because of the nature of these privileges, it will sometimes be necessary for the judge to examine the information claimed to be privileged in order to balance the interest in seeing that justice is done in the particular case against the interest in maintaining the secrecy of the information. See cases cited in 8 WIGMORE, EVIDENCE § 2379 at 812 note 6 (McNaughton rev. 1961). And see United States v. Reynolds, 345 U.S. 1, 7-11 (1953), and pertinent discussion thereof in 8 WIGMORE, EVIDENCE § 2379 (McNaughton rev. 1961). Even in these cases, Section 915 provides adequate protection to the person claiming the privilege: If the judge determines that he must examine the information in order to determine whether it is privileged, the section provides that the information be disclosed in confidence to the judge and requires that it be kept in confidence if he determines that it is privileged. Moreover, the exception in subdivision (b) of Section 915 applies only when the judge of a court is ruling on the claim of privilege. Thus, in view of subdivision (a) of Section 915, disclosure of the information cannot be required, for example, in an administrative proceeding.

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

Comment. Section 916 is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, a third party--perhaps the lawyer's secretary--may have been present when a confidential communication to a lawyer was made. In the absence of both the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Section 916 which requires the presiding officer to recognize the privilege.

The erroneous exclusion of information pursuant to Section 916 on the ground that it is privileged might amount to prejudicial error. On the other hand, the erroneous failure to exclude information pursuant to Section 916 would not amount to prejudicial error. See EVIDENCE CODE § 918.

Section 916 apparently is declarative of the existing California law. See People v. Atkinson, 40 Cal. 284, 285 (1870)(attorney-client privilege).

§ 917. Confidential communications: burden of proof

Comment. A number of sections provide privileges for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that such a communication is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that the communication was not made in confidence. See generally, with respect to the marital communication privilege, 8 WIGMORE, EVIDENCE § 2336 (McNaughton rev. 1961). See also Blau v. United States, 340 U.S. 332, 333-335 (1951) (holding that marital communications are presumed to be confidential). In adopting by statute a revised version of the privileges article of the Uniform Rules of Evidence, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. REV. STAT. § 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52, p. 452.

If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See Sharon v. Sharon, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889)(attorney-client

privilege); Hager v. Shindler, 29 Cal. 47, 63 (1865) ("Prima facie, all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

§ 918. Effect of error in overruling claim of privilege

Comment. This section is consistent with existing law. See People v. Gonzales, 56 Cal. App. 330, 204 Pac. 1088 (1922), and discussion of similar cases cited in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 525 note 5 (1964).

Section 918 is based on Rule 40 of the Uniform Rules of Evidence.

§ 919. Admissibility where disclosure erroneously compelled

Comment. Section 919 protects a holder of a privilege from the detriment that might otherwise be caused when a judge erroneously overrules a claim of privilege and compels revelation of the privileged information. Although Section 912 provides that such a coerced disclosure does not waive a privilege, it does not provide specifically that evidence of the prior disclosure is inadmissible; Section 919 assures the inadmissibility of such evidence in a subsequent proceeding.

Section 919 probably states existing California law. See People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951)(prior disclosure by an attorney held inadmissible in a later proceeding where the holder of the privilege had first opportunity to object to attorney's testifying). See also People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954). However, there is little case authority upon the proposition.

Section 919 is based on Rule 38 of the Uniform Rules of Evidence.

§ 920. No implied repeal

Comment. Some of the statutes relating to privileges are found in other codes and are continued in force. See, e.g., PENAL CODE §§ 266h and 266i (making the marital communications privilege inapplicable in prosecutions for pimping and pandering, respectively). Section 920 assures that nothing in this division makes privileged any information declared by statute to be unprivileged or makes unprivileged any information declared by statute to be privileged.

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

Comment. Section 930 recognizes that the defendant in a criminal case has a constitutional privilege not to be called as a witness and not to testify. CAL. CONST., Art. I, § 13. See Killpatrick v. Superior Court, 153 Cal. App.2d 146, 314 P.2d 164 (1957); People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Section 930 also recognizes that the defendant may have a similar privilege under the United States Constitution. See Malloy v. Hogan, 378 U.S. 1.

Section 930 is similar to subdivision (1) of Rule 23 of the Uniform Rules of Evidence.

Article 2. Privilege Against Self-Incrimination

§ 940. Privilege against self-incrimination

Comment. Section 940 recognizes the privilege, derived from the California and United States Constitutions, of a person to refuse, when testifying, to

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give information that might tend to incriminate him. See Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935); In re Leavitt, 174 Cal. App.2d 535, 345 P.2d 75 (1959). This privilege should be distinguished from the privilege stated in Section 930 (privilege of defendant in a criminal case to refuse to testify at all).

Section 940 does not determine the scope of the privilege against self-incrimination; the scope of the privilege is determined by the pertinent provisions of the California and United States Constitutions as interpreted by the courts. See CAL. CONST., Art. I, § 13. See also Malloy v. Hogan, 378 U.S. 1 (1964). Nor does Section 940 prescribe the exceptions to the privilege or indicate when it has been waived. This, too, is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions. For a statement of the scope of the privilege and some of its exceptions, see Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 215-218, 343-377 (1964).

Article 3. Lawyer-Client Privilege

§ 950. "Lawyer"

Comment. "Lawyer" is defined to include a person "reasonably believed by the client to be authorized" to practice law. Since the privilege is intended to encourage full disclosure by giving the client assurance that his communication will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney is sufficient to justify application of the privilege. See 8 WIGMORE, EVIDENCE § 2302 (McNaughton rev. 1961), and cases there cited in note 1. See also McCORMICK, EVIDENCE § 92 (1954).

There is no requirement that the client must reasonably believe that the lawyer is licensed to practice in a jurisdiction that recognizes the lawyer-client privilege. Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions. The California client should not be required to determine at his peril whether the jurisdiction licensing his particular lawyer recognizes the privilege. He should be entitled to assume that the lawyer consulted will maintain his confidences to the same extent as would a lawyer in California.

Section 950 is similar to subdivision (3)(c) of Rule 26 of the Uniform Rules of Evidence.

§ 951. "Client"

Comment. Under Section 951, the State, cities, and other public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned. This codifies existing law. See Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025 (1954). In addition, such unincorporated organizations as labor unions, social clubs, and fraternal societies have a lawyer-client privilege when the organization (rather than its individual members) is the client. See EVIDENCE CODE § 175, defining "person." A minor, too, who consults a lawyer either personally or through a guardian has a privilege in regard to the communications made during the lawyer-client relationship. See EVIDENCE CODE § 953, defining "holder of the privilege."

Section 951 is based on subdivision (3)(a) of Rule 26 of the Uniform Rules of Evidence.

§ 952. "Confidential communication between client and lawyer"

Comment. "Confidential communication between client and lawyer" is used to describe the type of communications that are subject to the lawyer-client

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privilege. In accord with existing California law, the communication must be in the course of the lawyer-client relationship and must be confidential. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234-235, 231 P.2d 26, 29-30 (1951).

Confidential communications also include those made to third parties-- such as the lawyer's secretary, a physician, or similar expert--for the purpose of transmitting such information to the lawyer. The phrase, "reasonably necessary for the transmission of the information," has been included to cover this situation. This restates existing California law. See, e.g., City and County of San Francisco v. Superior Court, supra (communication to a physician); Loftin v. Glaser, Civil No. 789604 (L.A. Super. Ct., July 23, 1964)(memorandum and order relating to communication to an accountant).

A lawyer at times may desire to have a client reveal information to an expert consultant and himself at the same time in order that he may adequately advise the client. The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" assures that these communications, too, are confidential and within the scope of the privilege, despite the presence of the third party. This part of the definition may change existing California law. Himmelfarb v. United States, 175 F.2d 924, 938-939 (9th Cir. 1949), held that the presence of an accountant during a lawyer-client consultation destroyed the privilege, but no California case directly in point has been found. Of course, if the expert consultant is acting merely as a conduit for communications from the client to the attorney, the doctrine of City and County of San Francisco v. Superior Court, supra, applies and the communication would be privileged under existing law as well as under this section. See also EVIDENCE CODE § 912(d) and Comment thereto.

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person--such as a spouse, business associate, or joint client--who is present to aid the consultation or to further their common interest in the subject of the consultation. These words refer, too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern. But see EVIDENCE CODE § 962 (exception for joint clients). These words may change existing California law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. See Attorney-Client Privilege in California, 10 STAN. L. REV. 297, 308 (1958), and authorities there cited in notes 67-71. See also Himmelfarb v. United States, *supra*.

A comparable definition is contained in Section 992 (physician-patient privilege) and Section 1012 (psychotherapist-patient privilege).

Section 952 is similar to subdivision (3)(b) of Rule 26 of the Uniform Rules of Evidence.

§ 953. "Holder of the privilege"

Comment. Under subdivisions (a) and (b), the guardian of a client is the holder of the privilege if the client has a guardian, and the client becomes the holder of the privilege when he no longer has a guardian. For example, if the guardian of an underage client consults a lawyer, the guardian under subdivision (b) is the holder of the privilege until the guardianship is terminated; thereafter, the client himself is the holder of the privilege. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer. The present California law is uncertain. The statutes do not deal with the problem, and no appellate decision has discussed it.

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Under subdivision (c), the personal representative of a client is the holder of the privilege when the client is dead. He may either claim or waive the privilege on behalf of the deceased client. This may be a change in California law. Under existing law, it seems probable that the privilege survives the death of the client and that no one can waive it after the client's death. See Collette v. Sarrasin, 184 Cal. 283, 289, 193 Pac. 571, 573 (1920). Hence, the privilege apparently is recognized even though it would be clearly to the interest of the estate of the deceased client to waive it. Under Section 953, however, the personal representative of a deceased client may waive the privilege when it is to the advantage of the estate to do so. The purpose underlying the privilege--to provide a client with the assurance of confidentiality--does not require the recognition of the privilege when to do so is detrimental to his interest or to the interests of his estate.

Under subdivision (d), the successor, assign, trustee in dissolution, or any other similar representative of a corporation, partnership, association, or other organization that has ceased to exist is the holder of the privilege after these nonpersonal clients lose their former identity.

The definition of "holder of the privilege" should be considered with reference to Section 954 (specifying who can claim the privilege) and Section 912 (relating to waiver of the privilege).

A somewhat comparable definition is contained in Section 993 (physician-patient privilege) and Section 1013 (psychotherapist-patient privilege).

Section 953 is based on part of subdivision (1) of Rule 26 of the Uniform Rules of Evidence.

§ 954. Lawyer-client privilege

Comment. Section 954 is the basic statement of the lawyer-client privilege. Exceptions to the privilege are stated in Sections 956 through 962.

Privilege must be claimed. Section 954 is based upon the premise that the privilege must be claimed by a person who is authorized to claim the privilege. If there is no claim of privilege by a person with authority to make the claim, the evidence is admissible. Section 954 sets forth the persons authorized to claim the privilege; Section 916 requires the presiding officer to exclude a confidential attorney-client communication on behalf of an absent holder.

Since the privilege is recognized only when claimed by or on behalf of the holder of the privilege, the privilege will exist only for so long as there is a holder in existence. Hence, the privilege ceases to exist when the client's estate is finally distributed and his personal representative discharged. This is apparently a change in California law. Under the existing law, it seems likely that the privilege continues to exist after the client's death ^{that} and/no one has authority to waive the privilege. See Collette v. Sarrasin, supra, 184 Cal. 283, 193 Pac. 571 (1920). See also Paley v. Superior Court, 137 Cal. App.2d 450, 290 P.2d 617 (1955), and discussion of the analogous situation in connection with the physician-patient privilege in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 408-410 (1964). Although there is good reason for maintaining the privilege while the estate is being administered--particularly if the estate is involved in litigation--there is little reason to preserve secrecy at the expense of justice after the estate is wound up and the representative discharged. Thus, the better policy is to terminate the privilege upon discharge of the client's personal representative.

Persons entitled to claim the privilege. Under subdivision (a), the "holder of the privilege" may claim the privilege. Under subdivision (b), persons authorized to do so by the holder may claim the privilege. Thus, the guardian, the client, or the personal representative--when the "holder of the privilege"--may authorize another person, such as his attorney, to claim the privilege. Under subdivision (c) and Section 955, the lawyer must claim the privilege on behalf of the client unless he is otherwise instructed by a person authorized to permit disclosure. See BUS. & PROF. CODE § 6068(e).

Eavesdroppers. Under Section 954, the lawyer-client privilege can be asserted to prevent anyone from testifying to a confidential communication. Thus, clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors of confidential communications between lawyer and client. Probably no such protection was provided prior to the enactment of Penal Code Sections 653i (Cal. Stats. 1957, Ch. 1879, § 1, p. 3285) and 653j (Cal. Stats. 1963, Ch. 1886, § 1, p. 3871). See People v. Castiel, 153 Cal. App.2d 653, 315 P.2d 79 (1957). See also Attorney-Client Privilege in California, 10 STAN. L. REV. 297, 310-312 (1958), and cases there cited in note 84.

Penal Code Section 653j makes evidence obtained by electronic eavesdropping or recording in violation of the section inadmissible in "any judicial, administrative, legislative, or other proceeding." The section also provides a criminal penalty and contains definitions and exceptions. Penal Code Section 653i makes it a felony to eavesdrop upon a conversation between a person in custody of a public officer and that person's lawyer.

Section 954 is consistent with Penal Code Sections 653i and 653j but provides broader protection, for it includes any form of eavesdropping or

wrongful interception of confidential communications between lawyer and client. Section 954, like the Penal Code sections, represents sound policy. No one should be able to profit from such wrongdoing by using as evidence for his own advantage the fruits of such wrongdoing. The use of the privilege to prevent testimony by eavesdroppers and other wrongful interceptors does not, however, affect the rule that the making of the communication under circumstances where others could easily overhear it is evidence that the client did not intend the communication to be confidential. See Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889).

Comparable sections. Comparable sections are Section 994 (physician-patient privilege) and Section 1014 (psychotherapist-patient privilege).

Section 954 is based on the first part of subdivision (1) of Rule 26 of the Uniform Rules of Evidence.

§ 955. When lawyer required to claim privilege

Comment. When authorized under subdivision (c) of Section 954, the lawyer must claim the privilege on behalf of the client unless otherwise instructed by a person authorized to permit disclosure. Compare BUS. & PROF. CODE § 6068(e).

Comparable sections are Section 995 (physician-patient privilege) and Section 1015 (psychotherapist-patient privilege).

§ 956. Exception: Crime or fraud

Comment. The lawyer-client privilege does not apply where the legal service was sought or obtained in order to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

California recognizes this exception. Abbott v. Superior Court, 78 Cal. App.2d 19, 177 P.2d 317 (1947). Compare Nowell v. Superior Court, 223 Cal. App.2d ___, 36 Cal. Rptr. 21 (1963).

A somewhat similar exception is provided by Section 981 (confidential marital communications privilege), Section 997 (physician-patient privilege), and Section 1018 (psychotherapist-patient privilege).

Section 956 is similar to subdivision (2)(a) of Rule 26 of the Uniform Rules of Evidence.

§ 957. Exception: Parties claiming through deceased client

Comment. The lawyer-client privilege does not apply on an issue between parties all of whom claim through a deceased client. Under existing California law, all must claim through the client by testate or intestate succession in order for this exception to be applicable; a claim by inter vivos transaction apparently is not within the exception. Paley v. Superior Court, 137 Cal. App.2d 450, 457-460, 290 P.2d 617, 621-623 (1955). Inter vivos transactions are included within the exception as stated in Section 957.

The traditional exception between claimants by testate or intestate succession is based on the theory that the privilege is granted to protect the client's interests against adverse parties; since claimants in privity within the estate claim through the client and not adversely, the client presumably would want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. Yet, there is no reason to suppose, for example, that a client's interests and desires are not represented by a person claiming under an inter vivos transaction--e.g.,

a deed--executed by a client in full possession of his faculties while those interests and desires are necessarily represented by a claimant under a will executed while the claimant's mental stability was dubious. Therefore, there is no basis in logic or policy for refusing to extend the exception to cases where one or more of the parties is claiming by inter vivos transaction. See the discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 392-396 (1964).

A similar exception is provided by Section 984 (confidential marital communications privilege), Section 1000 (physician-patient privilege), and Section 1019 (psychotherapist-patient privilege).

Section 957 is based on subdivision (2)(b) of Rule 26 of the Uniform Rules of Evidence.

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

Comment. Section 958 states a breach of duty exception to the lawyer-client privilege that has not been recognized by a holding in any California case, although dicta in several opinions indicate that it would be if the question were presented in a proper case. People v. Tucker, 61 Cal.2d ___, 40 Cal. Rptr. ___ (1964); Henshall v. Coburn, 177 Cal. 50, 169 Pac. 1014 (1917); Pacific Tel. & Tel. Co. v. Fink, 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956); Fleschler v. Strauss, 15 Cal. App.2d 735, 60 P.2d 193 (1936). See generally WITKIN, CALIFORNIA EVIDENCE § 419 (1958). This exception is provided because it would be unjust to permit a client to accuse his attorney of a breach of duty and, at the same time, allow him to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge.

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The duty involved must be one arising out of the lawyer-client relationship, e.g., the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services. For example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged. See People v. Tucker, 61 Cal.2d ___, 40 Cal. Rptr. ___ (1964).

A similar exception is provided by Section 1001 (physician-patient privilege) and Section 1020 (psychotherapist-patient privilege).

Section 958 is based on parts of subdivision (2) of Rule 26 of the Uniform Rules of Evidence.

§ 959. Exception: Lawyer as attesting witness

Comment. Section 959 states an exception to the lawyer-client privilege that is confined to the type of communication about which one would expect an attesting witness to testify. The mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the documents attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. Under existing law, the attesting witness exception has been used as a device to obtain information from a lawyer relating to dispositive instruments when the lawyer receives the information in his capacity as a lawyer and not merely in his capacity as an attesting witness. See In re Mullin, 110 Cal. 252, 42 Pac. 645 (1895).

Although the attesting witness exception stated in Section 959 is limited to information of the kind to which one would expect an attesting

witness to testify, there is merit in making the exception applicable to all dispositive instruments. One would normally assume that a client would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Accordingly, two additional exceptions--Sections 960 and 961--are provided relating to dispositive instruments generally. Under these exceptions, the lawyer--whether or not he is an attesting witness--is able to testify concerning the intention or competency of a deceased client and is able to testify to communications relevant to the validity of various dispositive instruments that have been executed by the client. These exceptions have been recognized by the California decisions only in cases where the lawyer is an attesting witness.

Section 959 is the same as subdivision (2)(d) of Rule 26 of the Uniform Rules of Evidence.

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

Comment. See the Comment to Section 959.

This exception to the lawyer-client privilege is comparable to the one provided in Section 1002 (physician-patient privilege) and Section 1021 (psychotherapist-patient privilege).

§ 961. Exception: Validity of writing affecting property interest

Comment. See the Comment to Section 959.

This exception to the lawyer-client privilege is comparable to the one provided in Section 1003 (physician-patient privilege) and Section 1022 (psychotherapist-patient privilege).

§ 962. Exception: Joint clients

Comment. This section states existing law. Clyne v. Brock, 82 Cal. App.2d 958, 965, 188 P.2d 263, 267 (1958); Croce v. Superior Court, 21 Cal. App.2d 18, 68 P.2d 369 (1937). See also Harris v. Harris, 136 Cal. 379, 69 Pac. 23 (1902).

Section 962 is similar to subdivision (2)(e) of Rule 26 of the Uniform Rules of Evidence.

Article 4. Privilege Not to Testify Against Spouse

§ 970. Privilege not to testify against spouse

Comment. Under this article, a married person has two privileges: (1) a privilege not to testify against his spouse in any proceeding (Section 970) and (2) a privilege not to be called as a witness in any proceeding to which his spouse is a party (Section 971). The language used in these sections is based on the first portion of subdivision (2) of Rule 23 of the Uniform Rules of Evidence.

The privilege not to testify is provided by Section 970 because, in many cases, it would seriously disturb if not completely disrupt the marital relationship of the persons involved if one spouse were compelled to testify against the other. Society stands to lose more from such disruption than it stands to gain from the testimony which would be made available if the privilege did not exist.

The privilege is based in part on a previous recommendation and study made by the California Law Revision Commission. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to The Marital "For and Against" Testimonial Privilege at F-1 (1957).

For a discussion of the law applicable under Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, both of which are superseded by the Evidence Code, see the Comment to Code of Civil Procedure Section 1881.

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

Comment. The privilege of a married person not to be called as a witness against his spouse is somewhat similar to the privilege given the defendant in a criminal case under Section 930. This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution's calling the defendant's wife as a witness, thus forcing her to object before the jury. The privilege not to be called as a witness does not apply, however, in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding, but he may refuse to answer a question that would compel him to testify against his spouse because of the privilege stated in Section 970.

§ 972. When privilege not applicable

Comment. The exceptions to the privileges under this article are similar to those contained in Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, both of which are superseded by the Evidence Code. However, the exceptions in this section have been drafted so that they are consistent with those provided in Article 5 (commencing with Section 980) of this chapter (the privilege for confidential marital communications).

A discussion of comparable exceptions may be found in the Comments to the sections in Article 5 of this chapter.

Section 972 is based on subdivision (2)(a) of Rule 23 of the Uniform Rules of Evidence.

§ 973. Waiver of privilege

Comment. Section 973 contains special waiver provisions for the privileges provided by this article.

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Subdivision (a). Under subdivision (a), a married person who testifies in a proceeding to which his spouse is a party waives both privileges provided for in this article. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and expect that spouse to invoke the privilege provided in Section 970 to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and invoke the privilege not to testify against his spouse as to other matters. In any proceeding where a married person's spouse is not a party, the privilege not to be called as a witness is not available; subdivision (a) provides that the privilege not to testify against a spouse is waived when a person testifies against his spouse in that proceeding. Thus, for example, in a grand jury proceeding a married person may testify like any other witness without waiving the privilege provided under Section 970 so long as he does not testify against his spouse.

Subdivision (b). This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section 776, which ~~supersedes~~ Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives the privilege. Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927); Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448 (1929). But cf. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940 (1920). Also, when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. Hagen v. Silva, 139 Cal. App.2d 199, 293 P.2d 143 (1956). It has been held that a plaintiff spouse, suing

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alone to recover for his personal injuries, could invoke the privilege to prevent the other spouse from testifying, even at a time when the California law provided that the recovery in such an action would be community property. Rothschild v. Superior Court, 109 Cal. App. 345, 293 Pac. 106 (1930). However, when both spouses joined as plaintiffs in an action to recover damages to one of them, each was held to have waived the privilege as to the testimony of the other. In re Strand, 123 Cal. App. 170, 11 P.2d 89 (1932). (It should be noted that, with respect to damages for personal injuries, Civil Code Section 163.5 (added by Cal. Stats. 1957, Ch. 2334, § 1, p. 4066) provides that all damages awarded to a married person in a civil action for personal injuries are the separate property of such married person.) This principle of waiver has seemingly been developed to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse under Code of Civil Procedure Section 1881(1)(superseded by the Evidence Code). It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. Ayres v. Wright, 103 Cal. App. 610, 284 Pac. 1077 (1930).

Article 5. Privilege for Confidential Marital Communications

§ 980. Privilege for confidential marital communications

Comment. Section 980 is the basic statement of the privilege for confidential marital communications. It is based on subdivision (1) of

Rule 28 of the Uniform Rules of Evidence. Exceptions to this privilege are stated in Sections 981 through 987.

Who can claim the privilege. Under Section 980, both spouses are the holders of the privilege and either spouse may claim it. Under existing law, the privilege may belong only to the nontestifying spouse inasmuch as Code of Civil Procedure Section 1881(1), superseded by the Evidence Code, provides: "[N]or can either . . . be, without the consent of the other, examined as to any communication made by one to the other during the marriage." (Emphasis added.) It is likely, however, that Section 1881(1) would be construed to grant the privilege to both spouses. See In re De Neef, 42 Cal. App.2d 691, 109 P.2d 741 (1941). But see People v. Keller, 165 Cal. App.2d 419, 423-424, 332 P.2d 174, 176 (1958) (dictum).

A guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse.

Termination of marriage. The privilege may be claimed as to confidential communications made during a marriage even though the marriage has been terminated at the time the privilege is claimed. This states existing law. CODE CIV.

PROC. § 1881(1)(superseded by Evidence Code); People v. Mullings, 83 Cal. 138, 23 Pac. 229 (1890). Free and open communication between spouses would be unduly inhibited if one of the spouses could be compelled to testify as to the nature of such communications after the termination of the marriage.

Eavesdroppers. The privilege may be asserted to prevent testimony by anyone. Thus, eavesdroppers may be prevented from testifying by a claim of privilege. To a limited extent, this constitutes a change in California law. See the Comment to Section 954. See generally People v. Peak, 66 Cal. App.2d 894, 153 P.2d 464 (1944); People v. Morhar, 78 Cal. App. 380, 248 Pac. 975 (1926); People v. Mitchell, 61 Cal. App. 569, 215 Pac. 117 (1923). Protection against eavesdroppers and other wrongful interceptors is desirable, for no one should be able to use the fruits of such wrongdoing for his own advantage. The protection afforded against eavesdroppers also changes the existing law permitting a third party, to whom one of the spouses had revealed a confidential communication, to testify concerning it. People v. Swaile, 12 Cal. App. 192, 195-196, 107 Pac. 134, 137 (1909); People v. Chadwick, 4 Cal. App. 63, 72, 87 Pac. 384, 387-388 (1906). See also Wolfe v. United States, 291 U.S. 7 (1934). Under Section 912, such conduct would constitute a waiver of the privilege only as to the spouse who makes the disclosure; the privilege would remain intact as to the spouse not consenting to such disclosure.

§ 981. Exception: Crime or fraud

Comment. Section 981 sets forth an exception to the privilege for confidential marital communications when the communication was made to enable or aid anyone to commit or plan to commit a crime or fraud. This exception does not appear to have been recognized in the California cases dealing with this privilege. Nonetheless, the exception does not seem so broad that it would impair the values that the privilege is intended to preserve;

in many cases, the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit. This exception would not, of course, infringe on the privileges accorded to a married person under Sections 970 and 971.

A comparable exception is provided by Section 956 (lawyer-client privilege), Section 997 (physician-patient privilege), and Section 1018 (psychotherapist-patient privilege).

Section 981 is similar to subdivision (2)(e) of Rule 28 of the Uniform Rules of Evidence.

§ 982. Exception: Commitment or similar proceeding

Comment. Sections 982 and 983 express existing law. CODE CIV. PROC. § 1081(1)(superseded by Evidence Code). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, almost all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. Therefore, inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings, it would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information.

A comparable exception is provided by Section 972(a)(privilege not to be witness against spouse), Section 1004 (physician-patient privilege), and Section 1024 (psychotherapist-patient privilege).

§ 983. Exception: Proceeding to establish competence

Comment. See the Comment to Section 982.

This exception to the privilege for confidential marital communications is comparable to the one provided in Section 972(b) (privilege not to be witness against spouse), Section 1005 (physician-patient privilege), and Section 1025 (psychotherapist-patient privilege).

§ 984. Exception: Proceeding between spouses

Comment. The exception to the marital communications privilege for litigation between the spouses states existing law. CODE CIV. PROC. § 1881(1) (superseded by Evidence Code). Section 984 extends the principle of the exception to similar cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse. See generally Estate of Gillett, 73 Cal. App.2d 588, 166 P.2d 870 (1946).

A somewhat comparable exception is provided by Section 957 (lawyer-client privilege), Section 1000 (physician-patient privilege), and Section 1019 (psychotherapist-patient privilege).

Subdivision (a) of Section 984 is based on subdivision (2)(a) of Rule 28 of the Uniform Rules of Evidence.

§ 985. Exception: Certain criminal proceedings

Comment. Section 985 restates with minor variations an exception to the marital communications privilege that is recognized under existing law. CODE CIV. PROC. § 1881(1) (superseded by Evidence Code). Sections 985 and 986 together create an exception for all the proceedings mentioned in Section 1322 of the Penal Code (superseded by the Evidence Code). The exception stated in Section 985 applies without regard to whether the crimes mentioned in Section 985 are committed before, during, or after marriage. The

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comparable exception provided by Section 972(e)(privilege not to be a witness against spouse) applies only to crimes committed before or during the marriage. However, by definition, that privilege cannot apply after the marriage has been terminated.

Section 985 is based on subdivision (2)(c) of Rule 28 of the Uniform Rules of Evidence.

§ 986. Exception: Juvenile court proceeding

Comment. See the Comment to Section 985.

This exception to the marital communications privilege is comparable to the one provided in Section 972(c)(privilege not to be a witness against spouse).

§ 987. Exception: Communication offered by spouse who is criminal defendant

Comment. Section 987 states an exception to the marital communications privilege that does not appear to have been recognized in any California case. Nonetheless, it is a desirable exception. When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his defense, his spouse (or his former spouse) should not be privileged to withhold the information. The privilege for marital communications is granted to enhance the confidential relationship between spouses. Yet, nothing would seem more destructive of marital harmony than to permit one spouse to refuse to give testimony which is material to establish the defense of the other spouse in a criminal proceeding.

Section 987 is based on subdivision (2)(b) of Rule 23 and subdivision (2)(d) of Rule 28 of the Uniform Rules of Evidence.

Article 6. Physician-Patient Privilege

§ 990. "Physician"

Comment. "Physician" is defined to include a person "reasonably believed by the patient to be authorized" to practice medicine. This changes existing law, which requires that the physician be licensed. See CODE CIV. PROC. § 1881(4) (superseded by Evidence Code). If this privilege is to be recognized, it should protect the patient from reasonable mistakes as to unlicensed practitioners. The privilege also should be applicable to communications made to a physician authorized to practice in any state or nation. When a California resident travels outside the State and has occasion to visit a physician during such travel, or when a physician from another state or nation participates in the treatment of a person in California, the patient should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California physician in California. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate to the physician.

Section 990 is based on subdivision (1)(b) of Rule 27 of the Uniform Rules of Evidence.

§ 991. "Patient"

Comment. "Patient" means a person who consults a physician for the purpose of diagnosis or treatment. This definition conforms with existing California law. See McRae v. Erickson, 1 Cal. App. 326, 332-333, 82 Pac. 209, 212 (1905).

Section 991 is based on subdivision (1)(a) of Rule 27 of the Uniform Rules of Evidence.

§ 992. "Confidential communication between patient and physician"

Comment. The definition of "confidential communication" sets out the requirement that the information be transmitted in confidence between a patient and his physician in the course of the physician-patient relationship. This section restates existing law, except that it is uncertain whether a doctor's statement to a patient giving his diagnosis is presently covered by the privilege. See CODE CIV. PROC. § 1881(4) (superseded by Evidence Code).

A comparable definition is contained in Section 952 (lawyer-client privilege) and Section 1012 (psychotherapist-patient privilege).

Section 992 is similar to subdivision (1)(d) of Rule 27 of the Uniform Rules of Evidence.

§ 993. "Holder of the privilege"

Comment. A guardian of the patient is the holder of the privilege if the patient has a guardian. If the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege. The provision making the personal representative of the patient the holder of the privilege when the patient is dead may change California law. Under the existing law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. See the discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 408-410 (1964). Under Section 991, however, the personal representative of the patient has authority to claim or waive the privilege after the patient's death. The personal representative can protect the interest of the patient's estate in the confidentiality of these statements and can waive the privilege when the

estate would benefit by waiver. When the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy.

This definition of "holder of the privilege" should be considered with reference to Section 994 (specifying who can claim the privilege) and Section 912 (relating to waiver of the privilege).

A comparable definition is contained in Section 953 (lawyer-client privilege) and Section 1013 (psychotherapist-patient privilege).

Section 993 is based on subdivision (1)(c) of Rule 27 of the Uniform Rules of Evidence.

§ 994. Physician-patient privilege

Comment. This section, like Section 954 (lawyer-client privilege), is based on the premise that the privilege must be claimed by a person who is authorized to claim the privilege. If there is no claim of privilege by a person with authority to make the claim, the evidence is admissible. See the Comments to Sections 993 and 954.

The persons entitled to claim the privilege are specified. See the Comments to Sections 993 and 954.

For the reasons indicated in the Comment to Section 954, an eavesdropper or other wrongful interceptor of a communication privileged under this section is not permitted to testify to the communication.

Comparable sections are Section 954 (lawyer-client privilege) and Section 1014 (psychotherapist-patient privilege).

Section 994 is similar to portions of subdivision (2) of Rule 27 of the Uniform Rules of Evidence.

§ 995. When physician required to claim privilege

Comment. When authorized under subdivision (c) of Section 994, the physician must claim the privilege on behalf of the patient unless otherwise instructed by a person authorized to permit disclosure.

Comparable sections are Section 955 (lawyer-client privilege) and Section 1015 (psychotherapist-patient privilege).

§ 996. Exception: Patient-litigant exception

Comment. Section 996 provides that the physician-patient privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. If the patient himself tenders the issue of his condition, he should do so with the realization that he will not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege. A limited form of this exception is recognized by Code of Civil Procedure Section 188i(4) (superseded by the Evidence Code) which makes the privilege inapplicable in personal injury actions. The exception in Section 996 also states existing California law in extending the statutory exception to other situations where the patient himself has raised the issue of his condition. In re Cathey, 55 Cal.2d 679, 690-692, 12 Cal. Rptr. 762, 768, 361 P.2d 426, 432 (1961) (prisoner in state medical facility waived physician-patient privilege by putting his mental condition in issue by application for habeas corpus). See also City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 232, 231 P.2d 26, 28 (1951) (personal injury case).

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Section 996 also provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (wrongful death). Under Code of Civil Procedure Section 1881(4) (superseded by the Evidence Code), a person authorized to bring the wrongful death action may consent to the testimony by the physician. As far as testimony by the physician is concerned, there is no reason why the rules of evidence should be different in a case where the patient brings the action and a case where someone else sues for the patient's wrongful death.

Section 996 also 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 a case under the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

A comparable exception is provided by Section 1016 (psychotherapist-patient privilege).

Section 996 is based on subdivision (4) of Rule 27 of the Uniform Rules of Evidence.

§ 997. Exception: Crime or tort

Comment. While Section 956 provides that the lawyer-client privilege does not apply when the communication was made to enable anyone to commit or plan to commit a crime or a fraud, Section 997 creates an exception to the physician-patient privilege where the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a

tort, or to escape detection or apprehension after commission of a crime or a tort. This difference in treatment of the physician-patient privilege stems from the fact that persons do not ordinarily consult their physicians in regard to matters which might subsequently be determined to be a tort. On the other hand, people often consult lawyers about precisely these matters. The purpose of the privilege--to encourage persons to make complete disclosure of their physical and mental problems so that they may obtain treatment and healing--is adequately served without broadening the privilege to provide a sanctuary for planning or concealing torts. Because of the different nature of the lawyer-client relationship, a similar exception to the lawyer-client privilege would substantially impair the effectiveness of the privilege. Whether the exception provided by Section 997 now exists in California has not been determined in any decided case, but it probably would be recognized in an appropriate case in view of the similar court-created exception to the lawyer-client privilege. See the Comment to Section 956.

A somewhat comparable exception is provided by Section 956 (lawyer-client privilege), Section 981 (privilege for confidential marital communications), and Section 1018 (psychotherapist-patient privilege).

Section 997 is based on subdivision (6) of Rule 27 of the Uniform Rules of Evidence.

§ 998. Exception: Criminal or disciplinary proceeding

Comment. The physician-patient privilege is not applicable in a criminal proceeding. This restates existing law. CODE CIV. PROC. § 1881(4) (superseded by Evidence Code). See also People v. Griffith, 146 Cal. 339, 80 Pac. 68 (1905). In addition, Section 998 provides that the privilege may not be claimed in those administrative proceedings that are comparable to criminal proceedings, i.e., proceedings brought for the purpose of imposing discipline of some sort. Under existing law, this privilege is available in all administrative proceedings conducted under the Administrative Procedure Act because it has been incorporated

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in Government Code Section 11513(c) by reference; but it is not specifically made available in administrative proceedings not conducted under the Administrative Procedure Act because the statute granting the privilege in terms applies only to civil actions. Section 998 sweeps away this distinction, which has no basis in reason, and substitutes a distinction that has been found practical in judicial proceedings.

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

Comment. Section 999 makes the physician-patient privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. Under Section 1292 relating to hearsay, the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. Thus, if the exception provided by Section 999 did not exist, the evidence subject to the privilege would be available in a civil trial only if a criminal trial were conducted first; it would not be available if the civil trial were conducted first. The admissibility of evidence should not depend on the order in which civil and criminal matters are tried. This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried.

Section 999 is based on the last part of subdivision (3)(a) of Rule 27 of the Uniform Rules of Evidence.

§ 1000. Exception: Parties claiming through deceased patient

Comment. See the Comment to Section 957.

This exception to the physician-patient privilege is comparable to the one provided in Section 957 (lawyer-client privilege), Section 984 (privilege

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§ 999
§ 1000

for confidential marital communications), and Section 1019 (psychotherapist-patient privilege).

Section 1000 is based on subdivision (4) of Rule 27 of the Uniform Rules of Evidence.

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

Comment. See the Comment to Section 958.

This exception to the physician-patient privilege is comparable to the one provided by Section 958 (lawyer-client privilege) and Section 1020 (psychotherapist-patient privilege).

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

Comment. Sections 1002 and 1003 provide exceptions to the physician-patient privilege for communications relevant to an issue concerning the validity of any dispositive instrument executed by a now deceased patient or concerning his intention or competency with respect to such instrument. Where this kind of issue arises, communications made to his physician by the person executing the instrument may be important. Permitting these statements to be introduced in evidence after the patient's death will not materially impair the privilege. Existing California law provides exceptions virtually coextensive with those provided in Sections 1002 and 1003. CODE CIV. PROC. § 1881(4)(superseded by Evidence Code).

Comparable exceptions are provided by Sections 960 and 961 (lawyer-client privilege) and Sections 1021 and 1022 (psychotherapist-patient privilege).

§ 1003. Exception: Validity of writing affecting property interest

Comment. See the Comment to Section 1002.

§ 1004. Exception: Commitment or similar proceeding

Comment. The exception to the physician-patient privilege that is provided by Section 1004 covers not only commitments of mentally ill persons but also covers such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the privilege should not apply because the proceedings are being conducted for the benefit of the patient. In such proceedings, he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare. There is no similar exception in existing California law. McClenahan v. Keyes, 188 Cal. 574, 584, 206 Pac. 454, 458 (1922)(dictum). But see 35 OPS. CAL. ATTY. GEN. 266 (1960), regarding the unavailability of the present physician-patient privilege where the physician acts pursuant to court appointment for the explicit purpose of giving testimony.

A comparable exception is provided by Section 982 (privilege for confidential marital communications) and Section 1024 (psychotherapist-patient privilege).

Section 1004 is based on subdivision (3)(a) of Rule 27 of the Uniform Rules of Evidence.

§ 1005. Exception: Proceeding to establish competence

Comment. This exception to the physician-patient privilege is new to California law; but, when a patient's condition is placed in issue by instituting such a proceeding, the patient should not be permitted at the same time to withhold from the court the most vital evidence relating to his condition.

A comparable exception is provided by Section 983 (privilege for confidential marital communications) and Section 1025 (psychotherapist-patient privilege).

Section 1005 is based on subdivision (3)(a) of Rule 27 of the Uniform Rules of Evidence.

§ 1006. Exception: Required report

Comment. This is a new exception to the physician-patient privilege, not currently recognized by California law. It is a desirable exception, however, because no valid purpose is served by preventing the use of relevant information that is required to be reported and made public.

A comparable exception is provided by Section 1026 (psychotherapist-patient privilege).

Section 1006 is based on subdivision (5) of Rule 27 of the Uniform Rules of Evidence.

Article 7. Psychotherapist-Patient Privilege

§ 1010. "Psychotherapist"

Comment. A "psychotherapist" is defined as any medical doctor or certified psychologist. The privilege is not confined to those medical doctors whose practice is limited to psychiatry because many medical doctors who do not specialize in the field of psychiatry nevertheless practice psychiatry to a certain extent. Some patients cannot afford to go to specialists and must obtain treatment from doctors who do not limit their practice to psychiatry. Then, too, because the line between organic and psychosomatic illness is indistinct, a physician may be called upon to treat both physical and mental or emotional conditions at the same time. Disclosure

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§ 1010

of a mental or emotional problem will often be made in the first instance to a family physician who will refer the patient to someone else for further specialized treatment. In all of these situations, the psychotherapist privilege is applicable if the patient is seeking diagnosis or treatment of his mental or emotional condition.

§ 1011. "Patient"

Comment. See the Comment to Section 991. Section 1011 is comparable to Section 991 (physician-patient privilege) except that Section 1011 is limited to diagnosis or treatment of the patient's mental or emotional condition.

§ 1012. "Confidential communication between patient and psychotherapist"

Comment. See the Comment to Section 992.

A comparable definition is contained in Section 952 (lawyer-client privilege) and Section 992 (physician-patient privilege).

§ 1013. "Holder of the privilege"

Comment. See the Comment to Section 993.

A comparable definition is contained in Section 953 (lawyer-client privilege) and Section 993 (physician-patient privilege).

§ 1014. Psychotherapist-patient privilege

Comment. This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege.

Existing California law provides no special privilege for psychiatrists and other physicians acting as psychotherapists except that which is enjoyed by physicians generally. On the other hand, persons who consult psychologists have a broad privilege under Business and Professions Code Section 2904 (superseded by the Evidence Code). Yet, the need

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for a privilege broader than that provided to patients of medical doctors is as great for persons consulting psychiatrists as it is for persons consulting psychologists. Adequate psychotherapeutic treatment is dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Unless a patient can be assured that such information will be held in utmost confidence, he will be reluctant to make the full disclosure upon which his treatment depends. ^{California Law Revision} The/Commission has received several reports indicating that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of physicians acting as psychotherapists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege will operate to withhold relevant information in some situations where such information would be crucial, the interests of society will be better served if physicians acting as psychotherapists are able to assure patients that their confidences will be protected. The privilege also applies to psychologists and supersedes the psychologist-patient privilege provided in the Business and Professions Code. The new privilege is one for psychotherapists generally.

Generally, the privilege provided by this article follows the physician-patient privilege, and the Comments to Sections 990 through 1016 are pertinent. The following differences, however, should be noted:

(1) The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal actions and similar

proceedings. Since the interests to be protected are somewhat different, this difference in the scope of the two privileges is justified, particularly since the ^{Law Revision} Commission is advised that proper psychotherapy often is denied a patient solely because of a fear that the psychotherapist may be compelled to reveal confidential communications in a criminal proceeding.

Although the psychotherapist-patient privilege applies in a criminal proceeding, the privilege is not available to a defendant who puts his mental or emotional condition in issue, as, for example, by a plea of insanity or a claim of diminished responsibility. The exceptions provided in Sections 1016 and 1023 make this clear. This is only fair. In a criminal proceeding in which the defendant has tendered his condition, the trier of fact should have available to it the best information that can be obtained in regard to the defendant's mental or emotional condition. That evidence most likely can be furnished by the psychotherapist who examined or treated the patient-defendant.

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. ^{EVIDENCE CODE § 1004.} Section 1024 provides a somewhat narrower exception in the psychotherapist-patient privilege. A patient's fear of future commitment proceedings based upon what he tells his psychotherapist would inhibit the relationship between the patient and his psychotherapist almost as much as would the patient's fear of future criminal proceedings based upon such statements. Hence, the psychotherapist-patient privilege protects the communication unless the psychotherapist becomes convinced during a course of treatment that his patient is a menace to himself or to others and that disclosure is necessary to prevent the threatened danger.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. EVIDENCE CODE § 999. Nor does it apply in administrative disciplinary proceedings. EVIDENCE CODE § 998. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. EVIDENCE CODE § 998. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no similar exception in civil actions or administrative proceedings involving the patient's criminal conduct.

Comparable sections are Section 954 (lawyer-client privilege) and Section 994 (physician-patient privilege).

§ 1015. When psychotherapist required to claim privilege

Comment. When authorized by subdivision (c) of Section 1014, the psychotherapist must claim the privilege on behalf of the patient unless otherwise instructed by a person authorized to permit disclosure.

Comparable sections are Section 955 (lawyer-client privilege) and Section 995 (physician-patient privilege).

§ 1016. Exception: Patient-litigant exception

Comment. See the Comment to Section 996.

This exception to the psychotherapist-patient privilege is the same in substance as the one provided by Section 996 (physician-patient privilege).

§ 1017. Exception: Court-appointed psychotherapist

Comment. Section 1017 provides an exception to the psychotherapist-patient privilege if the psychotherapist is appointed by order of a court to examine the patient. Generally, where the relationship of psychotherapist and patient is created by court order, there is not a sufficiently confidential relationship to warrant extending the privilege to communications made in the course of that relationship. Moreover, when the

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psychotherapist is appointed by the court, it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. It would be inappropriate to have the privilege apply in this situation. See generally 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege under these circumstances.

On the other hand, it is essential that the privilege apply where the psychotherapist is appointed by order of the court to provide the defendant's 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. If the defendant determines not to tender the issue of his mental or emotional condition, the privilege will protect the confidentiality of the communication between him and his court-appointed psychotherapist. If, however, the defendant determines to tender this issue--by a plea of not guilty by reason of insanity, by presenting a defense based on his mental or emotional condition, or by raising the question of his sanity at the time of the trial--the exceptions provided in Sections 1016 and 1023 make the privilege unavailable to prevent disclosure of the communications between the defendant and the psychotherapist.

§ 1018. Exception: Crime or tort

Comment. See the Comment to Section 997.

This exception to the psychotherapist-patient privilege is the same in substance as the one provided by Section 997 (physician-patient privilege). Somewhat comparable exceptions are provided by Section 956 (lawyer-client privilege) and Section 981 (privilege for confidential marital communications).

§ 1019. Exception: Parties claiming through deceased patient

Comment. See the Comment to Section 957.

This exception to the psychotherapist-patient privilege is the same in substance as the one provided by Section 957 (lawyer-client privilege) and Section 1000 (physician-patient privilege). A somewhat comparable exception is provided by Section 984 (confidential marital communications).

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

Comment. See the Comment to Section 958.

This exception to the psychotherapist-patient privilege is the same in substance as the one provided in Section 958 (lawyer-client privilege) and Section 1001 (physician-patient privilege).

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

Comment. See the Comment to Section 1002.

The exceptions to the psychotherapist-patient privilege provided in Sections 1021 and 1022 are the same in substance as those provided in Sections 960 and 961 (lawyer-client privilege) and Sections 1002 and 1003 (physician-patient privilege).

§ 1022. Exception: Validity of writing affecting property interest

Comment. See the Comment to Section 1021.

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

Comment. This section probably is unnecessary because the exception provided by Section 1016 is broad enough to cover the situation covered by Section 1023. Nevertheless, Section 1023 is included to make it clear that the psychotherapist-patient privilege does not apply when the defendant raises the issue of his sanity at the time of the trial.

§ 1024. Exception: Patient dangerous to himself or others

Comment. This section provides a narrower exception to the psychotherapist-patient privilege than the comparable exceptions provided by Section 982 (privilege for confidential marital communications) and Section 1004 (physician-patient privilege). Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger.

§ 1025. Exception: Proceeding to establish competence

Comment. See the Comment to Section 1005.

This exception to the psychotherapist-patient privilege is the same in substance as the exception provided in Section 1005 (physician-patient privilege).

§ 1026. Exception: Required report

Comment. See the Comment to Section 1006.

This exception to the psychotherapist-patient privilege is the same in substance as the exception provided in Section 1006 (physician-patient privilege).

Article 8. Clergyman-Penitent Privileges

§ 1030. "Clergyman"

Comment. "Clergyman" is broadly defined in this section.

Section 1030 is similar to subdivision (1)(a) of Rule 29 of the Uniform Rules of Evidence.

§ 1031. "Penitent"

Comment. This section defines "penitent" by incorporating the definitions in Sections 1030 and 1032.

Section 1031 is based on subdivision (1)(b) of Rule 29 of the Uniform Rules of Evidence.

§ 1032. "Penitential communication"

Comment. "Penitential communication" is defined so that the privilege applies to any communication which the clergyman has a duty to keep secret and which is made to a clergyman in the presence of no third person. Under existing law, the communication must be a "confession." CODE CIV. PROC. § 1881(3) (superseded by Evidence Code). This change in California law extends the protection that traditionally has been provided only to those persons whose religious practice involves "confessions."

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Section 1032 is based on subdivision (1)(c) of Rule 29 of the Uniform Rules of Evidence.

§ 1033. Privilege of penitent

Comment. This section provides the penitent with a privilege to refuse to disclose, and to prevent the clergyman from disclosing, a penitential communication. In this regard, the section differs from Code of Civil Procedure Section 1881(3)(superseded by the Evidence Code) in that the Section 1881(3) gives a penitent a privilege only to prevent a clergyman from disclosing a confession. Literally construed, Section 1881(3) does not give the penitent himself the right to refuse disclosure of the confession. However, similar privilege statutes have been held to grant a privilege both to refuse to disclose and to prevent the other communicant from disclosing the privileged statement. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 236, 231 P.2d 26, 31 (1951) (attorney-client privilege); Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 525-526, 47 Pac. 364, 366 (1897)("a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose"). Hence, it is likely that Section 1881(3) would be similarly construed.

Because of the definition of "penitential communication," Section 1033 provides a broader privilege than the existing law.

Section 1033 is based on subdivision (2) of Rule 29 of the Uniform Rules of Evidence.

§ 1034. Privilege of clergyman

Comment. This section provides the clergyman with a privilege in his own right. He may claim this privilege even if the penitent has waived the privilege granted him by Section 1033.

There may be several reasons for granting the traditional priest-penitent privilege. At least one underlying reason seems to be that the law will not compel a clergyman to violate--nor punish him for refusing to violate--the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties. See generally 8 WIGMORE, EVIDENCE §§ 2394-2396 (McNaughton rev. 1961).

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

Section 1034 is based on subdivision (2) of Rule 29 of the Uniform Rules of Evidence.

Article 9. Official Information and Identity of Informer

§ 1040. Privilege for official information

Comment. Section 1040 provides a privilege for official information. Under existing law, official information is protected either by subdivision 5 of Code of Civil Procedure Section 1881 (which, like Section 1040, prohibits disclosure when the interest of the public would suffer thereby) or by specific statutes which remain in effect (such as the provisions of the Revenue and Taxation Code prohibiting disclosure of tax returns). See, e.g., REV. & TAX. CODE §§ 19281-19289. Section 1881 is superseded by the Evidence Code.

Section 1040 permits the official information privilege to be invoked by the public entity concerned with the disclosure of the information or by an authorized agent thereof. Since the privilege is granted to enable the government to protect its secrets, no reason exists for permitting the privilege to be exercised by persons who are not concerned with the public interest.

The privilege may be asserted to prevent testimony by persons who have received official information from the public entity in confidence or who have obtained such information in a manner not reasonably to be anticipated by the public entity. Thus, if official information is obtained by a person who uses electronic eavesdropping equipment or who breaks into the office of the public entity, the privilege would permit the public entity to exclude the evidence so obtained. On the other hand, if the public entity fails to exercise due care to keep the information confidential, it is not privileged. Thus, for example, if a third person passes an open door and overhears a conversation between two public employees involving official information, the privileges granted by Sections 1040 and 1041 could not be used to prevent the third person from testifying concerning what he heard. Sections 1040 and 1041 provide a public entity with more protection against eavesdroppers and other wrongful interceptors of official information than existing law. See the Comment to Section 954 (attorney-client privilege).

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

Section 1040 is similar to subdivisions (1) and (2) of Rule 34 of the Uniform Rules of Evidence.

§ 1041. Privilege for identity of informer

Comment. Section 1041 provides a privilege to protect against disclosure of the identity of an informer. Under existing law, the identity of an informer is protected by subdivision 5 of Code of Civil Procedure Section 1881 (which, like Section 1041, prohibits disclosure when the interest of the public would suffer thereby). Section 1881 is superseded by the Evidence Code.

With two exceptions, the privilege provided by Section 1041 may be claimed under the same conditions as the official information privilege provided by Section 1040 may be claimed. This privilege does not apply if a person is called as a witness and asked if he is the informer; nor does it apply if the informer fails to exercise due care to keep his identity secret. See the Comment to Section 1040.

The privilege provided by Section 1041 applies only if the informer furnishes the information to a law enforcement officer or to a representative

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of an administrative agency charged with enforcement of the law, but the section permits the informer to furnish the information to another for the purpose of transmittal to such officer or representative.

Section 1041 is based on Rule 36 of the Uniform Rules of Evidence.

§ 1042. Adverse order or finding in certain cases

Comment. Section 1042 provides special rules regarding the invocation of the privileges provided in this article by the prosecution in a criminal proceeding or a disciplinary proceeding.

Subdivision (a). This subdivision expresses the rule of existing California law in a criminal case. As was stated by the United States Supreme Court in United States v. Reynolds, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the court must dismiss the case if the public entity does not reveal the information. People v. McShann, 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the court must strike the testimony of a particular witness or make some other order appropriate under

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the circumstances if the public entity insists upon its privilege. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958).

Subdivision (a) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (a) does not require the imposition of its sanction if the privilege is invoked in an action prosecuted by the State, and the information is withheld by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (a) states existing California law. People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (b). This subdivision states the existing California law as declared in People v. Keener, 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

Article 10. Political Vote

§ 1050. Privilege to protect secrecy of vote

Comment. Section 1050 declares existing law. The California cases declaring such a privilege have relied upon the provision of the Constitution

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that "secrecy in voting be preserved." CAL. CONST., Art. II, § 5. See Bush v. Head, 154 Cal. 277, 97 Pac. 512 (1908); Smith v. Thomas, 121 Cal. 533, 54 Pac. 71 (1898). Since the policy of ballot secrecy extends only to legally cast ballots, the California cases--as well as Section 1050--recognize that there is no privilege as to the manner in which an illegal vote has been cast. Patterson v. Harley, 136 Cal. 265, 68 Pac. 821 (1902).

Section 1050 is based on Rule 31 of the Uniform Rules of Evidence.

Article 11. Trade Secret

§ 1060. Privilege to protect trade secret

Comment. This privilege is granted so that secrets essential to the successful continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness' duty to testify as the means for injuring an otherwise profitable business. See generally 8 WIGMORE, EVIDENCE § 2212(3)(McNaughton rev. 1961). Nevertheless, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that may be classified as trade secrets. Recognizing the privilege as to such information would serve only to hinder the courts in determining the truth without providing the owner of the secret any needed protection. In many cases, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny.

Therefore, the privilege exists under this section only if its application will not tend to conceal fraud or otherwise work injustice. It will not permit concealment of a trade secret when disclosure is essential in the interest of justice. The limits of the privilege are necessarily uncertain and will have to be worked out through judicial decisions.

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

Section 1060 is based on Rule 32 of the Uniform Rules of Evidence.

Article 12. Immunity of Newsmen From Citation for Contempt

§ 1070. "Newsmen"

Comment. See the Comment to Section 1072.

§ 1071. "News media"

Comment. See the Comment to Section 1072.

§ 1072. Newsmen's immunity

Comment. This article permits certain newsmen to maintain secrecy as

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to the source of their news. Because of the basic similarity between the governmental informer privilege and the protection afforded newsmen under this article--that is, both are permitted to maintain secrecy concerning the identity of a person who has furnished information--the protection given newsmen is substantially the same as that granted to public officials concerning the identity of their informers. See EVIDENCE CODE § 1041. The Commission recommends adoption of this article because newsmen are given somewhat similar protection under existing law. CODE CIV. PROC. § 1881(6) (superseded by this article).

The term "news media" is defined in Section 1071 to include the most important channels of communication of news to the public. Other news media are excluded and, hence, their newsmen are not provided the protection afforded by this article. This is consistent with existing California law. CODE CIV. PROC. § 1881(6). The policy of Section 1071 and of existing law is to extend the protection against disclosure of news sources to those news media that are most intimately engaged in the dissemination of current news.

Consistent with existing California law, Section 1072 provides protection to the newsman. The statutory protection exists not so much to protect the informer as to protect the newsman's sources of information. Hence, if the newsman believes that a particular source of information does not need the protection of secrecy, he need not invoke the provisions of this article. Nothing in the article protects the informer from being required to disclose that he is the news source. This is consistent with the treatment afforded governmental informers under Section 1041.

Section 1072 requires that the information have been disseminated. This is similar to the requirement of subdivision 6 of Code of Civil Procedure

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Section 1881 that the information be "published in a newspaper" or "used for news or news commentary purposes on radio or television."

Just as a judge may require disclosure of a governmental informer's identity when such disclosure is required in the interest of justice, Section 1072 also permits the judge to require disclosure when the public interest requires that the identity of the news source be disclosed. This changes existing law which does not permit the judge to require disclosure by the newsman even when the interest of justice requires it. However, the newsman's need for protection seems to be no greater than the public entity's need for protection in the case of a governmental informer, and this article provides the newsman with substantially the same protection the public entity has under similar circumstances.

It should be noted that Section 1072 provides an immunity from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of the sanctions provided by the discovery act when the newsman is a party to a civil proceeding. In this respect, Section 1072 retains existing law. Bramson v. Wilkerson, Civil No. 760973 (L.A. Super. Ct., January 4, 1962), as reported in 3 Cal. Disc. Proc. 72 (Metropolitan News Review Section, January 30, 1962) (memorandum opinion of Judge Philbrick McCoy). This limitation of the protection provided by Section 1072 is consistent with Section 1042 which limits the protection afforded to a public entity to refuse to disclose the identity of an informer.