9/19/61

Memorandum No. 43(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article - Scope of Article)

A preliminary decision should be made before the specific privileges provided by the Uniform Rules of Evidence are considered: Should the URE Privilege Article be limited to judicial proceedings?

The decision concerning this matter will affect the approach to be taken in repealing existing code sections and may affect how the privilege rules themselves are phrased.

The attached research study (Exhibit I) prepared by the staff may be helpful to the Commission in its consideration of this question. The research study can be summarized as follows: Rule 2 of the URE limits the applicability of the rules to "every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced." Thus, the rules (and the Privileges Article) do not apply to administrative, legislative or executive proceedings. Some of the existing code sections creating privileges, however, are by their terms applicable not just to judicial proceedings but also to administrative and legislative proceedings. Moreover, at least some of the privileges are construed to or probably would be construed to apply in administrative, executive and legislative proceedings.

Thus, if the URE were enacted and our existing code provisions relating to privilege were repealed, we would have a problem as to the status of privilege in administrative, executive and legislative proceedings. New Jersey, the only state that has enacted the Uniform Rules, met this problem by amending Rule 2 to provide that:

> (1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

If a provision similar to the New Jersey provision is not added to the URE we will have this problem: The URE privileges will apply to judicial proceedings. The existing code section privileges will, if the sections are not repealed, perhaps apply to all other proceedings. Or if the existing code sections are repealed, what will be the status of privileges in administrative, executive and legislative proceedings?

You should refer to the research study attached for a more complete discussion of the problem.

Respectfully submitted,

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Executive Secretary

(Memo. 43(1961)

EXHIBIT I

Scope of Privileges Article

Broadly speaking, the Uniform Rules of Evidence are designed to be a complete code of judicial evidence. They are intended to apply to all judicial proceedings and to be the exclusive source of regulations concerning the admissibility of evidence in these proceedings. Thus, Rule 2 makes the Uniform Rules of Evidence applicable in every criminal or civil proceeding conducted by or under the supervision of a court in which evidence is produced.[1]

Rule 7 provides in subdivisions (b), (d), and (e) as follows:

> Except as otherwise provided in these Rules, . . . (b) no person has a privilege to refuse to be a witness, and . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter nor produce any object or writing. . .

The URE privileges article (Rules 23-40) state the conditions--by way of exception to Rule 7(b), (d) and (e)--under which evidentiary privileges are recognized.

Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing privilege rules--that is, rules excluding evidence in judicial proceedings on the grounds of privilege--would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence, for Rule 7(b), (d) and (e) and Rules 23-40 purport to establish a complete system governing the

matter of privilege. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted notwithstanding any pre-existing law which required its exclusion,[2] for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean except to the extent that some other rule or rules write restrictions upon it.

Since the Uniform Rules only apply to judicial proceedings and yet contemplate the repeal of all inconsistant statutes, it is necessary that an examination of the present California law in this area be made. Such an examination is suggested since it appears that present California law extends the use of privileges to proceedings other than those solely judicial.[3] Thus, a determination should be made as to whether privileges in California should continue to apply to these other proceedings.

The Uniform Rules do not indicate what proceedings are included within the term--judicial proceeding. Clearly, if this term could be construed to include administrative proceedings, legislative investigations, and grand jury hearings, there would be little inconsistency between the present California law and the proposed Uniform Rules. However, it has been generally held that only those proceedings resembling the following are judicial: pre-trial examination and discovery proceedings, will contests, proceedings or hearings before bankruptcy or other referees, and proceedings for the appointment of guardians, as well as the orthodox civil and criminal actions.[4] Therefore, such proceedings as those before legislative committees,

administrative boards, and grand juries have been classified as non-judicial.[5]

Prior to 1945, it was the rule in California that if the function of an administrative board was primarily legislative, the rules of evidence as applied by the courts would be greatly relaxed.[6] However, on the other hand, if the function of an administrative board was primarily judicial, then the boards were careful to follow the rules of evidence as applied by the courts.[7] Although there are a very few cases concerning the use of privileges before administrative boards, this attitude no doubt encompassed privileges. Certainly this would have been the case when it is considered that the policy behind the privileges--to promote full and free disclosure (attorney-client privilege, physician-patient privilege) or to promote domestic tranquility (the marital privileges)-- is not changed solely because the proceeding is taking place before an administrative board.

In 1945, the California Administrative Procedure Act was enacted which states in part: "The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions. . . ."[8] The effect of this statute was to supersede the common law, and therefore, all privileges would apply, regardless of whether the administrative proceeding was legislative or judicial in nature. But the Administrative Procedure Act does not apply to all state agencies[9] nor for example, does it apply to a local civil service board.[10] Therefore in these areas the common law is still in effect and consequently, whether the nature of the

administrative proceeding was legislative or judicial, may still be determinative. But in any administrative proceeding the newsmen's privilege would seem to apply, since § 1881(6) states that:

> 6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.
>
> Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

The attorney-client privilege has been invoked in grand jury hearings in California.[11] In light of the social reasons creating this rule, such application is justified.[12] Moreover, for this same reason, the application of the other privileges in grand jury hearings also may be appropriate. However, it is interesting to note that the physician-patient privilege in California is expressly limited to civil actions.[13] In a civil action, the litigation is solely between the parties. But in a criminal action, the litigation is between the state and an individual. Thus, the Legislature no doubt concluded that the social reasons creating this privilege did not outweigh the state's interest in ascertaining the truth. Since this type of interest weighing is not arbitrary, such a determination is justified. Whether this privilege could be invoked before a grand jury is, therefore, questionable.

As far as state legislative investigations are concerned, Section 9410 of the Government Code provides: "A person sworn and

examined before the Senate or Assembly or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he required to testify." Although this statute has the effect of making the privilege of self-incrimination inapplicable, it provides an immunity for the witness which is as broad as the constitutional provision it supplants.[14] Also as stated above, the newsmen's privilege has been made applicable by statute to legislative investigations.[15] However, there are no statutes and little law concerning the applicability of the other "court made privileges" in legislative investigation proceedings in California or in the United States. On the federal level, the House UnAmerican Activities Committee has recognized to some extent the marital privilege.[16] And in New York City v. Goldwater,[17] a New York case, where a special legislative committee investigating hospital management sought a court order directing hospital authorities to comply with a committee subpoena ordering the production of information relating the diagnosis and treatment of patients, the court refused the order. This case indicates that where the only sanction a legislative investigative committee has in inducing reluctant persons to supply information is by judicial prosecution, the court will give effect to the privilege by refusing to enforce the legislative demands. However, the situation has not yet arisen where a witness claiming a "court made privilege" in a legislative investigation has been adjudged in contempt. Certainly such a witness would appeal his plight to the courts. Whether a court would follow the reasoning of

the New York City case is not clear. The social reasons for the privilege do not appear to be as appealing where the contest is not one of private litigation. And some have suggested that since the purpose of the legislative investigating committee is to aid in the making of new and better laws for society, societies' interest in the truth may outweigh the underlying reasons behind the privileges.[18] On the other hand, the Legislature has expressly made the newsmen's privilege--a privilege that is the most difficult of all to justify--applicable to legislative investigations. If the newsmen's privilege is recognized in a legislative investigation, it would seem to follow that the more traditional privileges should also be recognized.

It may be of interest to examine the procedure followed by New Jersey in this matter, since this is a state which has already adopted the Uniform Rules. New Jersey amended Rule 2 to add the following provision:

> (1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.
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> (2) All other rules contained in this act, or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.
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> (3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.

(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication.[19]

Paragraph (1) of New Jersey Rule 2, set out above, suggests a possible approach to the problem. It is not proposed in this memorandum to present the problems involved in drafting suitable language that could be added to the Uniform Rules if the Commission determines that the Privileges Article should not be limited to judicial proceedings. What is needed now is a decision on this matter. The staff will then prepare materials for consideration by the Commission to implement the decision to be made now.

FOOTNOTES

1. Except to the extent to which the Uniform Rules of Evidence "may be relaxed by other procedural rule or statute applicable to the specific situation." Uniform Rules of Evidence, Rule 2 (1953) [hereinafter cited as Uniform Rules]. If the Uniform Rules were adopted in California they would be "relaxed," for example, by Section 117g of the Code of Civil Procedure relating to proceedings in Small Claims Courts.
2. However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds -- not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."
3. See, e.g., Cal. Code Civ. Proc. § 1881(6).
4. Annot., 133 A.L.R. 732 (1941).
5. Ibid.
6. Thelen, Practice and Procedure Before Administrative Tribunals, 16 Calif. L. Rev. 208, 215 (1926).
7. Ibid.
8. Calif. Gov't Code § 11513(c).
9. See Calif. Gov't Code § 11501.
10. See Hansen v. Civil Service Bd., 147 Cal. App.2d 732, 305 P.2d 1112 (1957).
11. Ex Parte McDonough, 170 Cal. 230, 149 Pac. 566 (1915); Note, 10 Stanford L. Rev. 297, 299 (1958).

12. Cf. Stephan, The Extent to which Fact-Finding Boards Should Be Bound by Rules of Evidence, 24 A.B.A.J. 630, 637 (1938).

13. Cal. Code Civ. Proc. § 1881(4).

14. For an interesting discussion concerning the applicability of this statute, see Comment, 25 Calif. L. Rev. 622 (1937).

15. Cal. Code Civ. Proc. § 1881(6).

16. See Comment, Congressional Investigations and the Privileges of Confidential Communications, 45 Calif. L. Rev. 347 (1957).

17. 284 N.Y. 296, 31 N.E.2d 31 (1940).

18. See 8 Wigmore § 2195 (McNaughton Rev. 1961).

19. N.J. Rev. Stat. § 2A:84A-16 (1960).