

October 16, 1961

Memorandum No. 48(1961)

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

At the September 1961 meeting, the Commission approved several changes in Rules 23 through 27 of the Privileges Article. The policy reflected in these decisions required several other changes in these rules. Attached as Exhibit I (green pages) is the text of each of these rules, with explanatory comments, as revised to date by the Commission, including staff suggestions which reflect policy previously approved by the Commission.

The following matters should be particularly noted:

Rule 23. The Commission approved the deletion of suggested subdivision (1), which was an attempt to codify the substance of Penal Code Section 1323.5. Because of this decision and the Commission's decision with respect to restricting the scope of the Uniform Rules to judicial proceedings, plus the general policy of limiting the privilege of refusing to testify and expanding the privilege against self-incrimination, the URE rule has been modified to use "a defendant" in place of "an accused". This was previously approved by the Commission prior to the attempted codification of Penal Code Section 1323.5. The use of "a defendant", in addition to being more technically accurate, is consistent with the substance of the URE rules as revised. Moreover,

it is used throughout the Penal Code in accord with Sections 683 and 685, which provide

§ 683. The proceedings by which a party charged with a public offense is accused and brought to trial and punished, is known as a criminal action.

§ 685. The party prosecuted in a criminal action is designated in this code as the defendant.

The staff believes this to be a desirable improvement in the rule.

It should be noted that the question regarding permissible comment on the previous exercise of either this or the privilege against self-incrimination is interrelated with the substance of each of these privileges, so that the language now used in these rules is subject to further consideration when the question of permissible comment is considered.

Rule 24. The Commission approved the State Bar suggestion to include incrimination under federal law as well as state law in the substance of the privilege against self-incrimination. Accordingly, the words "or of the United States" have been added after the word "State" in the definition of incrimination. The comment was revised to reflect this change.

Rule 25. The reference to Rule 37 was deleted because subdivisions (7) and (8) of the revised rule state the permissible extent of waiver of this privilege.

Subdivision (5) has been redrafted to conform to the change made regarding ownership in addition to superior possessory rights. The Commission requested the staff to draft this subdivision to eliminate the repetitious reference to corporation or association or other organization. This has been accomplished by insertion of the words "owns or" in the

phrase "some other person, or a corporation or other association or organization, owns or has a superior right to the possession of the thing ordered to be produced."

Subdivisions (e) and (f) of the URE Rule were tentatively replaced with a new subdivision -- subdivision (6) of the revised rule -- pending staff research on several questions relating to the scope of the privilege. It is hoped this research will be accomplished in time for the November meeting of the Commission.

URE subdivision (g), now renumbered as subdivision (7) of the revised rule, was approved with the deletion of the word "voluntarily" in the second line of the subdivision. In effect, this subdivision states the scope of waiver with respect to a defendant in a criminal action or proceeding.

The revised form of new subdivision (8) provides the scope of waiver with respect to any witness other than a defendant in a criminal action or proceeding. The inclusion of this subdivision and revised subdivision (7) makes unnecessary the cross-reference in this rule to Rule 37.

Rule 26. Because of the several references to a lawyer's representative in this rule, and the clarification of this phrase by inclusion of "partner", a definition of "lawyer's representative" has been added in subdivision (1)(e) to avoid undue repetition.

A close inspection of this rule reveals that the definition of "communication" in subdivision (1)(b) appears to be deficient because a narrow interpretation of the literal language of the subdivision as proposed by the Uniform Commissioners would exclude from the privilege

communications made by the lawyer to his representatives which are incidental to the professional lawyer-client relationship. This deficiency can be corrected by the addition of "or the lawyer" in the phrase "disclosures made by the client or the lawyer to the lawyer's representative . . . " to make it clear that such communications are confidential and privileged under this rule.

In the same paragraph, the words "associate or employee" have been deleted since they are now included in the definition of "lawyer's representative." The phrase "a representative of the lawyer" was changed to "the lawyer's representative" in order to use the defined term.

Paragraph (c) of subdivision (1) has been expanded to include "successors, assigns or trustees in dissolution" of a dissolved corporation, etc., in the definition of "holder of the privilege". This eliminates the necessity for including reference to the termination of the privilege upon dissolution of such entities since, unless there is some person who can claim the privilege, the privilege automatically ceases and the means used sufficiently accomplishes the purpose of the Commission.

In accord with placing an affirmative duty on the lawyer to claim the privilege on behalf of his client when no other person asserts such claim, a new subdivision (4) has been inserted in place of former paragraph (c) of subdivision (3).

At the September 1961 meeting, the Commission directed the staff to consider changing the theory upon which URE subdivision (2)(e) is based from one which would make such communications nonprivileged when offered in an action between parties who jointly consulted a lawyer on a matter of common interest to one which would preclude the assertion of the

privilege by one of the parties. The staff considered this to be a desirable change, particularly in light of the probable defect in wording of the URE provision which literally would exclude from the exception communications or advice given by the lawyer to the joint clients. Accordingly, new subdivision (7) covers the same matter but follows the theory codified in the New Jersey statute that prevents any of the clients from claiming the privilege with respect to that matter against the others in an action or proceeding between them.

The explanatory comment following the rule is changed to reflect the matters noted above.

Rule 27. Paragraph (c) of subdivision (1) was changed to eliminate the requirement that the sole purpose of the consultation was for diagnosis or treatment. Also, the limiting language to diagnosis, "preliminary to such treatment", was excluded in accord with Commission approval.

The definition of "physician" in paragraph (d) of subdivision (1) has been revised to conform with the language used in the definition of "lawyer", thereby making it clear that the privilege is not available where the communication took place in a jurisdiction which does not recognize the confidential nature of such communications.

The eavesdropper exception has been abolished in this rule.

Paragraph (d) of subdivision (2) has been enlarged to impose an affirmative duty upon the physician to claim the privilege in like manner and under like circumstances as the lawyer. Thus, a physician must claim the privilege unless otherwise instructed, unless there is no holder

in existence. As in the case of the attorney, as a practical matter, the physician will claim the privilege (unless otherwise instructed) in every case where it is not claimed by another, leaving to the judge to determine whether there is a holder in existence, the question of waiver, etc.

The modifying word "deceased" has been omitted from paragraph (b) of subdivision (4) for the same reason that it was not included in the lawyer-client privilege.

The explanatory comments to the rule have been modified to conform to the changes noted above.

Respectfully submitted,

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EXHIBIT I

Revised 10/14/59
11/10/59
12/10/59
5/25/61
10/16/63

Note: This is Uniform Rule 23 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 23. PRIVILEGE OF ACCUSED

(1) [~~Every person has~~] A defendant in [~~any~~] a criminal action or proceeding [~~in which he is an accused~~] has a privilege not to be called as a witness and not to testify.

(2) ~~An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.]~~

[(3)] [An accused] A defendant in a criminal action or proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

~~[(4)--If-an-accused-in-a-criminal-action-does-not-testify,-counsel-may
comment-upon-accused's-failure-to-testify,-and-the-trier-of-fact-may-draw
all-reasonable-inferences-therefrom.]~~

RULE 23 (PRIVILEGE OF ACCUSED) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 23,
relating to the privilege of an accused, as revised by the Commission.

URE Subdivision (1) - Privilege of Defendant

Under existing California statutes as construed by the courts, a defendant
in a criminal case has a privilege not to testify and not to be called as a
witness. The URE reference to "an accused" has been replaced with language
more technically accurate in light of Penal Code Sections 683 and 685.

URE Subdivision (2) - Marital Privilege of Defendant in Criminal Case

The special marital privilege provided by this paragraph for an accused
in a criminal case becomes unnecessary, because the Commission has enlarged
the privilege stated in Uniform Rule 28 so that in all cases a spouse has
a privilege which is the substantial equivalent of that provided by paragraph
(2) for an accused in a criminal case, viz., the privilege - subject to
exceptions comparable to those stated in paragraph (2) - to prevent the
other spouse from testifying to confidential communications, which privilege
survives the termination of the marriage. The Commission has, consequently,
deleted the marital privilege in subdivision (2) of Uniform Rule 23.

URE Subdivision (4) - Comment on Defendant's Exercise of Privilege

Paragraph (4) of Uniform Rule 23 has been deleted because the matter of
commenting on the exercise of the privilege provided by Rule 23 is covered
by Rule 39.

Revised 10/14/59
11/10/59
12/10/59
6/4/61
10/16/61

Note: This is Uniform Rule 24 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 24. DEFINITION OF INCRIMINATION

A matter will incriminate a person within the meaning of these rules if it constitutes, or forms an essential part of, or, taken in connection with other matters [~~disclosed~~], is a basis for a reasonable inference of, such a [~~violation-of~~] crime or public offense under the laws of this State or of the United States as to subject him to liability to [~~punishment-therefor~~] conviction thereof, unless he has become [~~for-any-reason~~] permanently immune from [~~punishment~~] conviction for such [~~violation~~] crime or public offense.

COMMENT

The substance of the URE rule is approved by the Commission. However, the revised rule also provides protection against possible incrimination under a federal law, but not a law of another state or foreign country. The scope of the privilege as it now exists in California is not clear, for no decision has been found indicating whether or not the existing California privilege provides protection against incrimination under the laws of a sovereignty other than California. The inclusion of protection against possible incrimination under a federal law is desirable to give full meaning to this privilege.

The word "disclosed" has been deleted from the Uniform Rule. The witness may be aware of other matters which have not been "disclosed" but which, when taken in connection with the question asked, is a basis for a reasonable inference of such a crime or public offense under the laws of this State as to subject him to liability to conviction thereof.

Revised 10/14/59
11/10/59
12/10/59
2/11/60
8/22/60
1/3/61
5/25/61
10/16/61

Note: This is Uniform Rule 25 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 25. SELF-INCRIMINATION; EXCEPTIONS.

Subject to Rule[s] 23 [~~and-37~~], every natural person has a privilege, which he may claim, to refuse to disclose [~~in-an-action-or-to-a-public official-of-this-state-or-any-governmental-agency-or-division-thereof~~] any matter that will incriminate him, except that under this rule [;] :

[~~(a)-if-the-privilege-is-claimed-in-an-action~~]

(1) The matter shall be disclosed if the judge finds that the matter will not incriminate the witness. [~~;-and~~]

[~~(b)~~] (2) No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics [,] or his physical or mental condition. [~~;-and~~]

(3) No person has the privilege to refuse to demonstrate his identifying characteristics such as, for example, his handwriting, the sound of his voice and manner of speaking or his manner of walking or running.

[~~(c)~~] (4) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [~~;-and~~]

(Rule 25)

~~[(d)]~~ (5) No person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that ~~[,-by-the applicable-rules-of-the-substantive-law,]~~ some other person or a corporation ~~[,]~~ or other association or organization, owns or has a superior right to the possession of the thing ordered to be produced. ~~[;-and]~~

~~[(e)---A-public-official-or-any-person-who-engages-in-any-activity, occupation,-profession-or-calling-does-not-have-the-privilege-to-refuse to-disclose-any-matter-which-the-statutes-or-regulations-governing-the office,-activity,-occupation,-profession-or-calling-require-him-to-record-or-report-or-disclose-concerning-it;-and]~~

~~(f)--A-person-who-is-an-officer,-agent-or-employee-of-a-corporation or-other-association,-does-not-have-the-privilege-to-refuse-to-disclose any-matter-which-the-statutes-or-regulations-governing-the-corporation or-association-or-the-conduct-of-its-business-require-him-to-record-or report-or-disclose;-and]~~

(6) No person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection.

~~[(g)]~~ (7) Subject to Rule 21, a defendant in a criminal action or proceeding who ~~[voluntarily]~~ testifies in the action or proceeding upon the merits before the trier of fact ~~[does-not-have-the-privilege-to refuse-to-disclose-any-matter-relevant-to-any-issue-in-the-action]~~ may be cross-examined as to all matters about which he was examined in chief.

(8) Except for the defendant in a criminal action or proceeding, a witness who, without having claimed the privilege under this rule,

testifies in an action or proceeding before the trier of fact with
respect to a transaction which incriminates him does not have the
privilege under this rule to refuse to disclose in such action or
proceeding any matter relevant to the transaction.

Revised 11/10/59~
12/10/59
8/29/60
1/ 3/61
5/26/61
10/16/61

RULE 25 (SELF-INCRIMINATION; EXCEPTIONS) AS
REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 25, relating to the privilege against self-incrimination, as revised by the Commission.

THE PRIVILEGE

The words "in an action or to a public official of this state or to any governmental agency or division thereof" have been deleted from the statement of the privilege. The Commission has deleted this language from Uniform Rule 25 because the Uniform Rules are, by Uniform Rule 2, concerned only with matters of evidence in proceedings conducted by or under the supervision of courts and do not apply to hearings or interrogations by public officials or agencies. For example, the Uniform Rules of Evidence should not be concerned with what a police officer may ask a person accused of a crime nor with what rights, duties or privileges the questioned person has at the police station.

Even if it were decided to extend the rules beyond the scope of Uniform Rule 2, it is illogical to speak of a privilege to refuse to disclose when there is no duty to disclose in the first place.

An evidentiary privilege exists only when the person questioned would, but for the exercise of the privilege, be under a duty to speak. Thus, the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary "privilege" because the person is under no legal duty to talk to the police officer.

Whether an accusation and the accused's response thereto are admissible in evidence is a separate problem with which Uniform Rule 25 does not purport to deal. Under the California law, silence in the face of an accusation in the police station can be shown as an implied admission. On the other hand, express or implied reliance on the constitutional provision as the reason for failure to deny an accusation has recently been held to preclude the prosecutor from proving the accusation and the conduct in response thereto although other cases taking the opposite view have not been overruled. If given conduct of a defendant in a criminal case in response to an accusation is evidence which the court feels must be excluded because of the Constitution, there is no need to attempt to define these situations in an exclusionary rule in the Uniform Rules of Evidence.

A comparable situation would be where the judge orders a specimen of bodily fluid taken from a party. The rules permit this. But the Uniform Commissioners point out that "a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional rights. . . . [Thus] if the taking is in such manner as to violate the subject's constitutional right to be secure in his person the question is then one of constitutional law on that ground."

The effect of striking out the deleted language from Uniform Rule 25 is that the rule will then apply (under Uniform Rule 2) "in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

EXCEPTIONS

In paragraph (a) of the Uniform Rule, now subdivision (1) of the revised rule, the words "if the privilege is claimed in an action" have been omitted as superfluous because the rule as revised by the Commission applies only in actions and proceedings. The reference to Rule 37 has been omitted in view of subdivisions (7) and (8), which state the existing California law as to waiver of this privilege.

Subdivision (3) has been inserted to make it clear that the defendant in a criminal case, for example, can be required to walk so that a witness can determine if he limps like the person she observed at the scene of the crime. Under subdivision (3), the privilege against self-incrimination cannot be invoked to prevent the taking of a sample of handwriting, a demonstration of the witness speaking the same words as were spoken by a criminal as he committed a crime, etc. This matter may be covered by paragraph (b), now subdivision (2), of the Uniform Rule; but subdivision (3) will avoid any problems that might arise because of the phrasing of subdivision (2).

In paragraph (d) of the Uniform Rule, now subdivision (5) of the revised rule, the exception has been revised to indicate more clearly that a corporation or other organization would be included as a person owning or having a superior right of possession. The inclusion of

"owns" is to avoid a possible problem where, for example, articles of incorporation vest exclusive custody of books and records in an officer, even though they are the property of the corporation.

Subdivision (6) of the revised rule restates the acceptable parts of paragraphs (e) and (f) of the URE. The extreme feature of each of these URE subdivisions is that testimony would be compelled, probably in violation of the California Constitution.

The Commission has revised paragraph (g) of the Uniform Rule, now subdivision (7) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). Paragraph (g) of the Uniform Rule (in its original form) conflicted with Section 13, Article I, of the California Constitution, as interpreted by the California Supreme Court.

The Commission has included a specific waiver provision in subdivision (8) of Rule 25. Rule 37 of the Uniform Rules provides a waiver provision that applies to all privileges. However, the waiver provision of Rule 37 would probably be unconstitutional if applied to Rule 25. Thus, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. Note that the waiver of the privilege against self-incrimination under subdivision (8) of revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit the waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the

privilege in a subsequent case even though he waived it in a previous case. The extent of waiver of the privilege by the defendant in a criminal case is indicated by subdivision (7) of the revised rule.

Revised 10/1/59
9/15/59
10/16/61

Note: This is Uniform Rule 26 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

(a) "Client" means a person, ~~[or]~~ corporation, ~~[or-ether]~~ association or other organization (including this State and any other public entity) that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent (i) who himself so consults the lawyer or the lawyer's representative or (ii) whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent. ~~[;]~~

(b) "Communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to ~~[a]~~ the lawyer's representative ~~[;]-associate-or employee-of-the-lawyer]~~ incidental to the professional relationship. ~~[;]~~

(c) "Holder of the privilege" means (i) the client when he is competent, (ii) a guardian of the client when the client is incompetent, (iii) the personal representative of the client if the client is dead and [the-privilege-available-to-a-corporation or-association-terminates-upon-dissolution.]

(iv) a successor, assign or trustee in dissolution of a corporation, association or other organization if dissolved.

(d) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

(e) "Lawyer's representative" includes a partner, associate or employee of the lawyer.

(2) Subject to Rule 37 and except as otherwise provided ~~[by-paragraph-2-ef]~~ in this rule, if a communication [s] is found by the judge to have been between a lawyer and his client in the course of that relationship and in professional confidence, ~~[are-privileged,-and-a]~~ the client has a privilege to:

(a) ~~[if-he-is-the-witness-te]~~ Refuse to disclose ~~[any such]~~ the communication. ~~[,-and]~~

(b) ~~[te]~~ Prevent his lawyer, or the lawyer's representative, from disclosing the communication. ~~[it,-and]~~

(c) ~~[te]~~ Prevent any other ~~[witness]~~ person from disclosing ~~[such]~~ the communication if it came to the knowledge of such ~~[witness]~~ person (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client ~~[,-]~~ or (iii) as a result of a breach of the lawyer-client relationship.

(3) Subject to Rule 37 and except as otherwise provided in this rule, the privilege under this rule may be claimed for the

client by [the-client-in-person-or-by-his-lawyer,-or-if
incompetent,-by-his-guardian,-or-if-deceased,-by-his-personal
representative.] the holder of the privilege or a person who is
authorized to claim the privilege by the holder of the privilege.

(4) Subject to Rule 37 and except as otherwise provided in
this rule, unless there is no holder of the privilege in
existence, the lawyer who received or made the communication
shall claim the privilege under this rule for the client unless
otherwise instructed by the holder of the privilege or his
representative.

(5) [{2}--Such-privilege-shall] The privilege under this
rule does not extend [{a}] to a communication if the judge finds
that [sufficient-evidence,-aside-from-the-communication,-has
been-introduced-to-warrant-a-finding-that] the legal service was
sought or obtained in order to enable or aid the client to commit
a crime or [a-text] to perpetrate or plan to perpetrate a fraud.

(6) The privilege under this rule does not extend to a
communication relevant to:

(a) [,-or-(b)-to-a-communication-relevant-to] An issue
between parties all of whom claim through the client, regardless
of whether the respective claims are by testate or intestate
succession or by inter vivos transaction. [,-or]

(b) [{e}-to-a-communication-relevant-to] An issue of
breach of duty by the lawyer to his client [,-] or by the client
to his lawyer. [,-or]

(c) [~~(d)-to-a-communication-relevant-to~~] An issue concerning an attested document of which the lawyer is an attesting witness. [~~;-er~~]

~~[(e) to-a-communication-relevant-to-a-matter-of-common interest-between-two-or-more-clients-if-made-by-any-of-them--to-a-lawyer-when-they-have-retained-in-common-when-offered-in an-action-between-any-of-such-clients.]~~

(7) Where two or more clients have retained a lawyer to act for them in common regarding a matter of common interest, the privilege under this rule with respect to that matter may not be claimed by any of them as against the others in an action or proceeding between such clients.

Revised 10/1/59
9/15/59
10/17/61

RULE 26 (LAWYER-CLIENT PRIVILEGE) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 26, relating to the lawyer-client privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions contained in paragraph (3) of Uniform Rule 26 have been made the first subdivision of the revised rule to conform to the form of other rules. The definitions are contained in the first subdivision in other Rules. See, for example, Rules 27, 29, and 34.

Definition of "client." Referring to revised Rule 26(1)(a), the definition of client has been revised to make clear that a corporation or association "or other organization (including this State and other public entities)" are considered clients for the purpose of the lawyer-client privilege. This change makes it clear that the State, cities and other public entities have a privilege in the case of a lawyer-client relationship. This is existing law in California. *Rust v. Roberts*, 171 A.C.A. 834, 838 (July 1959) (State has privilege); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722 (1954) (city has privilege). There does not seem to be any reason why the State or any other public entity should not be entitled to the same privilege as a private client.

The definition of client has also been expanded by adding the words "other organization". The broad language of the revised rule is intended to cover such unincorporated organizations as labor unions, social clubs and fraternal organizations in those circumstances where the particular situation is such that the organization (rather than its individual members) is the client. See *Oil Workers Intl. Union v. Superior Court*, 103 C.A.2d 512, 230 P.2d 71 (1951) (not involving a privilege question). There is no reason why in appropriate circumstances these and similar organizations should not have the same privilege as a private individual.

The definition of client has also been modified to make it clear that the term client includes an incompetent who himself consults the lawyer or the lawyer's representative. In this case, subdivision (3) provides that the guardian of the incompetent client can claim the privilege for the incompetent client and that, when the incompetent client becomes competent, he may himself claim the privilege.

Definition of "lawyer." The definition of "lawyer" contained in the Uniform Rule has been modified by inserting a comma after the word "authorized." This corrects an apparent clerical error in the rules as printed by the Commission on Uniform State Laws. Compare with Rule 27 (as printed by the Commission on Uniform State Laws).

The Commission approves the provision of the Uniform Rule which defines "lawyer" 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 should be sufficient.

Definition of Lawyer's Representative. The phrase "lawyer's representative" as used in the Uniform Rules is sufficiently ambiguous to require illustrative definition because of the importance of protecting communications made by the client or the lawyer to such persons as a lawyer's partner, associate or employee.

Definition of "holder of the privilege." The substance of the sentence in Uniform Rule 26(1) reading "the privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" has been stated in the form of a definition in subdivision (1)(c) of the revised rule. This definition substantially conforms to the definition found in Uniform Rule 27, relating to the physician-patient privilege. It makes clear who can waive the privilege for the purposes of Rule 37. It also makes subdivision (3) of the revised rule more concise.

Note that under subdivision (1)(c)(i) of the revised rule, the client is the holder of the privilege if he is competent. Under subdivision (1)(c)(ii) of the revised rule, a guardian of the client is the holder of the privilege if the client is incompetent. Under these two provisions,

an incompetent client becomes the holder of the privilege when he becomes competent. For example, if the client is a minor of 20 years of age and he or his guardian consults the attorney, the guardian under subdivision (1)(c)(iii) is the holder of the privilege until the minor becomes 21 and then the minor is the holder of the privilege himself. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer.

Under subdivision (1)(c)(iii), the personal representative of the client is the holder of the privilege when the client is dead. He may claim the privilege on behalf of the deceased client. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the client and no one can waive it on behalf of the client. If this is the present California law, the commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

Under subdivision (1)(c)(iv), the successor, assign or trustee in dissolution of a dissolved corporation, association or other organization is the holder of the privilege after dissolution. This changes the effect of the last sentence of URE Rule 26(1), which has been omitted from the revised rule since there is no reason to deprive such entities of a privilege when there is only a minor change in form, being merely a technical dissolution, while the substance

remains.

This definition of "holder of the privilege" should be considered with reference to subdivision (3) of the revised Rule 26, specifying who can claim the privilege, and Rule 37, relating to waiver of the privilege.

GENERAL RULE

The substance of the "general rule" contained in URE Rule 26(1) has been set out in the revised rule as subdivision (2).

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

(1) The language of introductory exception to the rule has been revised to delete reference to a specific paragraph of the rule and is instead phrased in the general language "except as otherwise provided in this rule." This change has been made because the exceptions to the "general rule" are contained in various other parts of the revised rule.

(2) The words "are privileged" have been deleted in order to make it clear that the client has the privilege and if the privilege is not claimed by the client or persons authorized under subdivisions (3) and (4) of the revised rule to claim that privilege, the evidence of the communication will be admitted.

(3) The requirement that the communication be found to be between a lawyer and his client in the course of that relationship and in professional confidence had been stated as a condition to the exercise of the privilege. This is in accordance with the existing law which requires a showing by the person invoking the privilege both of the lawyer-client relationship and of the confidential character of the communication. Sharon v. Sharon, 79 Cal. 633, 677 (1889); Collette v. Sarrasin, 184 Cal. 283 (1920). It is suggested that this requirement is more accurately and clearly stated in the revised rule.

(4) Paragraphs (a), (b) and (c) of Uniform Rule 26(1) have been tabulated in paragraph form to improve readability and a number of

revisions have been made.

The words "if he is the witness" have been deleted from paragraph (a) because these limiting words are not a desirable limitation. Note that under Uniform Rule 2, the rules "apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

The words "or the lawyer's representative" have been inserted in paragraph (b) to make clear the substance of the Uniform Rule that the client can prevent the stenographer or other employee or representative of the lawyer from testifying as to the communication. Thus the privilege respecting the attorney's secretary or clerk is vested in the client. Under the present California statute the privilege so far as employees of the attorney is concerned may be vested in the attorney. The basis for the privilege is to encourage full disclosure by the client and for this reason the Commission believes that in all cases the privilege should be vested in the client.

The word "person" has been substituted for "witness" in paragraph (c) because "witness" is suggestive of testimony at a trial whereas the existence of privilege would make it possible for the client to prevent a person from disclosing the communication at a pretrial proceeding as well as at the trial.

(5) Subdivisions (3) and (4) of the revised rule state the substance of the last sentence of Uniform Rule 26(1) reading "the privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" with some

changes. An introductory clause has been inserted in each subdivision to make it clear that the right to claim the privilege for the client is subject to the waiver provision (Rule 37) and to the other exceptions under which a confidential communication between a lawyer and a client is admissible. Under subdivision (3) of the revised rule, the "holder of the privilege" may claim the privilege. The holder of the privilege is the person designated in the definition contained in paragraph (1)(c) of the revised rule.

Also under subdivision (3) of the revised rule, specific provision is made for persons who are authorized to claim the privilege to claim it. 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.

Subdivision (4) states more clearly the substance of what is contained in URE Rule 26(1), which provides the privilege may be claimed by "the client in person or by his lawyer." Under the revised rule in subdivision (4), the lawyer must claim the privilege on behalf of the client unless otherwise instructed by the holder of the privilege or his representative. The Commission believes that, except for the mandatory nature of the claim, this is in substance what is intended to be provided by that part of Uniform Rule 26(1) that provides that privilege may be claimed by the client in person "or by his lawyer."

(6) Under a dictum in a California case a judge can, on his own motion, exclude a confidential attorney-client communication. This is probably because the California statute provides that the communication to the lawyer by the client shall not be disclosed "without the consent of his client." However, the Uniform Rule is based on a theory that the

communication is to be admitted unless the privilege is claimed by a person designated in the statute. The Commission adopts the Uniform Rule with the realization that the confidential communication will be admitted as evidence unless someone entitled to claim the privilege of the client does so.

EXCEPTIONS.

Crime or fraud. In subdivision (5) of the revised rule an exception is stated that the privilege does not apply where the judge finds that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. Uniform Rule 26 extends this exception to bar the privilege in case of consultation with a view of commission of any tort. The Commission has not adopted this extension of the traditional scope of this exception. Because of the wide variety of torts and the technical nature of many, the Commission believes that to extend the exception to include all torts would present difficult problems for an attorney consulting with his client and would open up too large an area of nullification of the privilege.

The Uniform Rule requires that the judge must find that "sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort." The Commission has not retained this requirement that as a foundation for the admission of such evidence there must be a prima facie showing of the

criminal or tortious activities of the client. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes the foundation requirement is too stringent and prefers that the question (as to whether the legal service was sought or obtained to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud) be left to the judge for determination under the provisions of Uniform Rule 8.

Other Exceptions. In subdivision (6) of the revised rule, the substance of the other exceptions to Uniform Rule 26 has been retained. None of these exceptions is expressly stated in the existing California statute. Each is, however, more or less recognized to some extent by judicial decision. The exception provided in subdivision (6)(a) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through the client. Under the existing California law, all must claim through the client by testate or intestate succession; a claim by inter vivos transaction is not within the exception. The Uniform Rule would change this to include inter vivos transactions within the exception and the Commission approves this change. Accepting the rule of non-survivorship when all parties claim through a client by testate or intestate succession, the Commission can perceive no basis in logic or policy for refusing to have a like rule when one or both parties claim through such client by inter vivos transaction.

The Eavesdropper Exception. Let us suppose that a switchboard operator listens in on a confidential statement made by a client to his lawyer in the course of a telephone conversation. Or suppose the client

mails a confidential letter and an interceptor steams the letter open and reads it. Or suppose a wrongdoer breaks into and enters the lawyer's office and steals the letter.

Under the so-called "Eavesdropper Exception," the switchboard operator, the interceptor and the wrongdoer all could testify. We may have the eavesdropper exception in California, but the Uniform Rule would abolish it. The Commission approves the Uniform Rule provision (contained in subdivision (2)(c) of the revised rule) which would permit the client to prevent the switchboard operator, interceptor or wrongdoer from testifying as to the communication. The client who consults a lawyer is in danger of eavesdropping, bugging and other such forms of foul play. Eavesdropping is a real and proximate menace to clients. To encourage full disclosure by the client to his attorney, the Commission believes that the client should not be required to run the risk of the switchboard operator, interceptor or wrongdoer testifying as to the confidential communication. Therefore, the Commission approves the Uniform Rule provision.

Joint Clients. Subdivision (7) of the revised rule states the existing California law and the rule proposed in URE paragraph (2)(e). The Commission believes it is stated more clearly in the revised rule because it avoids the possible contention that the exception applies only to a communication "made by any of" the joint clients, leaving privileged the communication made by the lawyer consulted. Also, it changes the theory of the exception from nonprivileged to unable to claim the privilege.

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

RULE 27. PHYSICIAN-PATIENT PRIVILEGE.

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

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

(b) "Holder of the privilege" means (i) the patient when he is competent, (ii) a guardian of the patient when the patient is incompetent and (iii) the personal representative of the patient if the patient is dead. ~~[the-patient-while-alive-and-not-under-guardianship-or-the-guardian-of-the-person-of-an-incompetent-patient,-or-the-personal-representative-of-a-deceased-patient;]~~

(c) "Patient" means a person who, for the [sole] purpose of securing a diagnosis or preventive, palliative [r] or curative treatment [r-or-a ~~diagnosis-preliminary-to-such-treatment,~~] of his physical or mental condition, consults a physician [r] or submits to an examination by a physician [r] .

(d) "Physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in [the] any state or [jurisdiction-in-which-the-consultation-or-examination-takes-place] nation the law of which recognizes a privilege against disclosure of confidential communications between patient and physician.

(2) Subject to Rule 37 and except as otherwise provided [by paragraphs-(3),-(4),-(5)-and-(6)-of] in this rule, a person, whether or not a party, has a privilege in a civil action or proceeding [ex-in-a prosecution-for-a-misdemeanor] to refuse to disclose, and to prevent a witness from disclosing, a communication [r] if he claims the privilege and the judge finds that:

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

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

(c) The witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge [or possession] of the communication [as-the-result-of-an-intentional-breach-of-the-physician's duty-of-nondisclosure-by-the-physician-or-his-agent-or-servant] in the course of its transmittal between the patient and the physician, or in a manner not reasonably to be anticipated by the patient, or as a result

of a breach of the physician-patient relationship; and

(d) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege [fer-his] by the holder of the privilege or (iii) the physician at the time of the confidential communication, who, except as otherwise provided in this rule, unless there is no holder of the privilege in existence, shall claim the privilege under this rule for the patient unless otherwise instructed by the holder of the privilege or his representative.

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

(a) An action or proceeding to commit him or otherwise place him or his property, or both, under the control of another or others because of his alleged mental [incompetence] or physical condition. [y-ex-in]

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

(c) An action or proceeding to recover damages on account of conduct of the patient which constitutes a felony. [criminal-offense-other-than-a misdemeanor, ex]

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

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

(b) An issue between parties claiming by testate or intestate succession or inter vivos transaction from a [deceased] patient.

~~[(4)]~~ (5) There is no privilege under this rule in an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which the condition of the patient is an element or factor of the claim, or counter claim, cross-complaint or affirmative defense, of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

~~[(5)]~~ (6) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office [7] unless the statute, charter, ordinance, administrative regulation or other provision requiring the report or record specifically provides that the information shall not be disclosed.

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

~~[(7)]--A-privilege-under-this-rule-as-to-a-communication-is terminated-if-the-judge-finds-that-any-person-while-a-holder-of-the privilege-has-caused-the-physician-or-any-agent-or-servant-of-the-physician to-testify-in-any-action-to-any-matter-of-which-the-physician-or-his-agent or-servant-gained-knowledge-through-the-communication.]~~

Revised 9/15/59
11/10/59
10/16/61

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

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

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical order.

Definition of "holder of the privilege." The definition of "holder of the privilege" contained in the Uniform Rule has been rephrased in the revised rule to conform to the similar definition in revised Rule 26. Note that under this definition, a guardian of the patient is the holder of the privilege if the patient is incompetent. This differs from the Uniform Rule which makes the guardian of the person of the patient the holder of the privilege. Under the revised definition, if the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege.

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

The personal representative of the patient is the holder of the privilege when the patient is dead. He may claim the privilege on behalf of the deceased patient. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the

patient in some cases and no one can waive it on behalf of the patient. If this is the existing California law, the Commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

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

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

The Commission disapproves the requirement of the Uniform Rule that the patient must consult the physician for the sole purpose of treatment or diagnosis preliminary to treatment in order to be within the privilege. Since treatment does not always follow diagnosis, the Commission believes the limitation of diagnosis "preliminary to treatment" is undesirable. Also, inclusion of the limitation "sole" with respect to the purpose of the consultation places undue emphasis upon a collateral matter.

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

The Commission approves the provision of the Uniform Rule which defines "physician" to include a person "reasonably believed by the patient to be authorized" to practice medicine. In order to recognize this privilege, we should be willing to protect patients from the mistakes as to unlicensed practitioners. However, the Commission favors a substantive definition similar to that in revised Rule 26(1)(d) since

this state should recognize a privilege only where similarly recognized in another jurisdiction.

GENERAL RULE

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

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

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

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

(3) Under the revised rule, the privilege is applicable only in civil actions and proceedings. The Commission rejects that portion of the Uniform Rule that extends the privilege to a prosecution for a misdemeanor. The existing California statute restricts the privilege to a civil action or proceeding and the Commission is unaware of any criticism of the existing statute. In addition, if the privilege is applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, it would be possible for the prosecutor in some instances to prosecute for a felony in order to make the physician-patient privilege not applicable. A rule of evidence should not be a significant factor in determining whether

an accused is to be prosecuted for a misdemeanor or a felony.

(4) Subparagraph (iii) of paragraph (c) in subdivision (2) of the revised rule abolishes the eavesdropper exception. This change makes Rule 27 conform to Rule 26 in this regard.

(5) Subparagraph (d) of paragraph (2) of the Uniform Rule has been revised to conform to Uniform Rule 26 insofar as who may claim the privilege is concerned. This revision directs the physician to claim the privilege on behalf of the patient unless otherwise instructed, unless there is no holder of the privilege in existence. The Commission believes that in this case the Uniform Rule is not clear but that the Uniform Rule might be construed to mean that the physician is a person "authorized to claim the privilege for" the holder of the privilege.

EXCEPTIONS

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

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

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

(3) The provision of the Uniform Rule that there is no privilege in an action to recover damages on account of conduct of the patient which

constitutes a criminal offense other than a misdemeanor has been rephrased but not changed in substance. Although the revised rule denies the physician-patient privilege in a prosecution for a misdemeanor, the Commission does not believe that the patient should be denied his privilege in a civil action or proceeding against him for damages on account of conduct which it is alleged constituted a misdemeanor.

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

(5) The Uniform Rule provides that there is no privilege in an action in which the claim of the patient is an element or factor of the claim "or defense" of the patient. The revised rule does not extend the patient-litigant exception this far but instead provides that the privilege does not exist in an action or proceeding in which the condition of the patient is an element or factor of the claim "or counter claim, cross-complaint or affirmative defense" of the patient. The Commission's revised rule will protect the patient in the following case.

Divorced husband (P) brings a proceeding against his ex-wife (D) to gain custody of child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls psychiatrist who is treating D. Under the Uniform Rule it appears that D's objection to the psychiatrist's testimony would be overruled; but the contrary is the case under the revised rule.

The Commission does not believe that a plaintiff should be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action or proceeding.

(6) The revised rule provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (Wrongful Death Statute). The Uniform Rule does not contain this provision. Under the existing California statute, a person authorized to bring a wrongful death action may consent to the testimony by the physician. There is no logical reason why the rules of evidence should be different as far as testimony by the physician is concerned in a case where the patient brings the action and the case where a wrongful death action is brought. Under the Uniform Rule and under the revised rule, if the patient brings the action, the condition of the patient is an element of the claim and no privilege exists. The revised rule makes the same rule applicable in wrongful death cases.

The revised rule provides that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

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

(8) A necessary comma has been inserted and an unnecessary comma has been deleted from paragraph (6) of the Uniform Rule (subdivision (7)

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

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

determination under the provisions of Uniform Rule 8.

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

EAVESDROPPER EXCEPTION

Uniform Rule 27 does not abolish the eavesdropper exception so far as the physician-patient privilege is concerned. Although this exception is a traditional one, the Commission does not believe that it is worthy of retention. The same reasons that justify abolishing this exception in the case of the lawyer-client privilege apply here.