#34(L) 6/4/64

Memorandum 64-39

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

On April 15, 1964, we sent the printed report containing the tentative recommendation and research study on privileges to about 200 persons who had indicated an interest in the URE project. We requested their comments not later than June 1, 1964. We had already sent many of these persons a mimeographed copy of the tentative recommendation and had considered their comments at the time we approved the tentative recommendation for printing.

We received the following comments on the tentative recommendation relating to privileges:

Special Committee of the Conference of California Judges (Exhibit I - yellow)
Letter from Judge Alan G. Campbell (Exhibit II - pink)
Office of Los Angeles District Attorney (commenting on Privileges Division of New Evidence Code) (Exhibit III - green)
League of California Cities Committee (commenting on latest version of mimeographed tentative recommendation prior to sending it to printer) (Exhibit IV - gold)
District Attorney of Alameda County (Exhibit V - white)

At the June meeting, we plan to consider the above listed comments on the tentative recommendation and then approve Division 8 (Sections 900-1060) of the Evidence Code for printing as a part of the preprinted bill. We do not plan to consider this portion of the Evidence Code again until the galleys of the preprinted bill are considered at the September meeting. (However, if we receive a letter containing comments that requires Commission attention we will consider the letter before the September meeting.)

In addition, at the June meeting we plan to approve the comments that the Commission will make to the various code sections. These comments are attached to this memorandum. Please read them carefully and mark any

revisions you believe are necessary on them. Please bring up any policy questions for Commission attention at the June meeting, but mark mere editorial corrections on your copy of the comments and turn it in to the staff at the June meeting. We plan to have these comments set in type for the final report as soon as we have made the necessary editorial changes.

In connection with this memorandum, you may also want to refer to the printed Tentative Recommendation and Research Study relating to the Privileges Article of the Uniform Rules of Evidence.

GENERAL ANALYSIS OF COMMENTS

Generally speaking, the Tentative Recommendation on Privileges was well received. Although we did not receive many comments on the printed tentative recommendation, we previously received a number of comments which we considered when mimeographed tentative recommendation was approved for printing.

The special committee of the League of California Cities comments:

> The consensus of the committee is that the recommendations generally will improve the rules of evidence in California and promote proper administration of justice. In many respects, the interest of municipal counsel in evidence rules is necessarily limited to the scope of the usual city attorney's practice. To avoid duplication, this report will be confined to comments relevant to municipal practice.

The League's special committee concludes its report with the following statement:

> The special city attorneys committee has appreciated the opportunity to submit comments to the Law Revision Commission, particularly because of the substantial contribution the Commission has made in recommending clear and effective legislation. If we can be of further assistance, do not hesitate to call upon us.

The office of the District Attorney of Alameda County generally approves the tentative recommendation except for the psychotherapist-patient privilege in criminal cases.

COMMENTS ON PARTICULAR SECTIONS

Section 900

This is a new section. It is a standard provision that creates no particular problem.

Section 901

This is the same as RURE (Revised Uniform Rules of Evidence) 22.3(1). There were no comments on this definition.

Section 902

This is the same as RURE 22.3(2). We suggest that this section be revised to read:

> 902. "Criminal proceeding" means:
> (a) An action brought by the people of the State of California and initiated by complaint, indictment, information, or accusation to determine whether a person has committed a crime and should be punished therefore, including any court proceedings ancillary thereto.
> (b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for wilful or corrupt misconduct in office.

The primary reason for the suggested revision is to make it clear that subdivision (b) of the revised section covers only proceedings under Sections 3060 et seq. of the Government Code.

Exhibit II (pink) is a letter from Judge Alan G. Campbell that should be considered in connection with Section 902. As revised, Section 902 makes

it clear that the definition of criminal proceedings does not include proceedings to remove public officers except for the special grand jury accusation proceeding provided by the Government Code. Judge Campbell is concerned that a public officer has a privilege not to be called as a witness and not to testify in a proceeding to remove him from public office. (Section 930). If the Commission believes that this objection is well taken, the words "criminal action" should be substituted for "criminal proceeding" in Section 930. Judge Campbell is also concerned that the self-incrimination privilege is available in proceedings to remove public officers and employees from office or to otherwise discipline them. In connection with this point, see the Comment to Section 946 (in the attached white pages containing comments to the statute sections).

Section 903

We received no comments on this section. The section is the same as RURE 22.3(3). The staff suggests that the words "or to hold a public office" be inserted after "public entity" in the third line of the text of the section.

Section 904

This section is the same as RURE 22.3(4). We received no comments on this section.

Section 905

This section is the same as RURE 22.3(5). We received no comments on this section.

Section 910

This section is the same as RURE 22.5. We received no comments on

this section (except as noted in the comment to Section 902).

Section 911

This section is the same as RURE 7(2). This section was not contained in the printed tentative recommendation on privileges. We will receive comments on this section in connection with the tentative recommendation on general provisions (which includes RURE 7). We suggest, however, that the section be approved after it is revised to read as follows:

> 911. Except as otherwise provided by statute:
> (a) No person has a privilege to refuse to be a witness.
> (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or [~~writing~~] other thing.
> (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or [~~writing~~] other thing.

The revisions are intended to conform Section 911 to Section 150. Note that the word "statute" is defined in Section 245 to include a constitutional provision.

Section 912

Subdivision (a). This is the same in substance as RURE 37(1). The first sentence of the subdivision should be revised to read as follows:

> Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 ([~~marital~~] privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), [~~or~~] 1033 (privileges of penitent), or 1034 (privilege of priest) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone.

The above revision makes technical corrections in the first sentence.

The Conference of California Judges (Exhibit I, page 7) suggests in effect that the first sentence of subdivision (a) be revised as follows:

> Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of priest) is waived with respect to a communication protected by such privilege [~~if any~~] as to such holder of the privilege, who, without coercion, has disclosed any part of the communication or has consented to such a disclosure made by anyone.

The Conference of California Judges would also delete subdivision (b) of Section 912 if the above revision is made. The difficulty with the revision suggested by the Conference of California Judges is that it apparently would permit a person to claim a privilege, for example, even though it had previously been waived by his guardian when holder of the privilege. Thus, a privilege belonging to a minor is waived by his guardian, the minor becomes an adult and then claims the privilege on another occasion. Under Section 912 the privilege is gone; under the suggested revision of the Conference the privilege remains. It does not appear to be desirable to keep out evidence that has already been disclosed by a waiver by a person authorized to claim the privilege. Hence, it is suggested that the revision of the Conference not be accepted.

The Conference of California Judges suggests that the second sentence of subdivision (a) be deleted. No reason is given for this suggestion. The Commission included the sentence to make it clear that there could be a waiver by conduct of the type described in the second sentence.

Subdivision (b). This subdivision is the same in substance as RURE 37(2). The first three lines of this subdivision should be revised to read:

> (b) Where two or more persons are the holders of a privilege provided by Section 954 (lawyer-client privilege), 980 ([~~marital~~] privilege for confidential marital communications), 994 (physician-patient privilege), or 1014

This is merely a technical correction. See discussion under subdivision (a) above concerning deletion of all of subdivision (b).

Subdivisions (c) and (d). There were no objections to these subdivisions. They are the same in substance as RURE 37(3), (4).

Section 913

This section is the same as RURE 39. The section heading to this section should be revised to read:

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

No objection was made to subdivision (a) of Section 912.

The Conference of California Judges suggests that the following be added at the end of subdivisions (b) and (c): ", unless such failure was occasioned by circumstances beyond his control." The Conference states:

> The situation designed to be protected by the recommended addition is where the person is prevented from explaining or denying evidence against him by reason of a claim of privilege by some other person not under his control, or because the matter is otherwise protected by law.

Most of the Commissioners will recall that subdivisions (b) and (c) were inserted after a long and sometimes emotional debate that extended over a period of more than two years. As a compromise the exact language of the California Constitution was inserted in subdivision (b) and comparable language was inserted in subdivision (c). Moreover, is the language suggested by the Conference free from ambiguity?

Section 914

Subdivision (a). This subdivision is based on the second sentence of RURE 37.7, but this section is not limited to cases where a court is ruling on the claim of privilege.

Subdivision (b). This subdivision is based on RURE 37.7. The Conference of California Judges suggests that the phrase "in a nonjudicial proceeding"

be inserted after "privileged" in the second line of the subdivision. We do not believe the addition to be necessary, but if some revision is needed we suggest that the phrase "in a proceeding not conducted by a court" be used instead of "in a nonjudicial proceeding." We are concerned that the words "in a nonjudicial proceeding" might create ambiguity where an administrative agency is conducting a quasi-judicial proceeding.

Section 915

This is based on RURE 37.5. There were no objections to this Section.

Section 916

This is the same as RURE 36.5

The Conference of California Judges suggests that the introductory portion of subdivision (a) be revised to read:

> (a) The presiding officer [~~shall exclude,~~] on his own motion [,] or upon the motion of any party may exclude information that is subject to a claim of privilege under this division if:

This change would make exclusion discretionary with the presiding officer. "The committee believes that it is improper to place a burden on a judge to exclude privileged information under the conditions set forth in said Rule 36.5 [Section 916]. If the presiding officer is required to exclude such information on his own motion and he fails to do so the question arises whether such failure would amount to prejudicial error."

It would seem that it might be prejudicial error to erroneously exclude information pursuant to Section 916, but the party could not predicate error if the information is admitted even though it should have been excluded pursuant to Section 916. See Section 918. However, to make the matter clear, we suggest that the following be added to the Comment to Section 916.

The erroneous exclusion of information pursuant to this section on the grounds that it is privileged might amount to prejudicial error. On the other hand, the erroneous failure to exclude information pursuant to this section would not amount to prejudicial error. See Section 918.

The words "that is subject to a claim of privilege under this division" may be ambiguous. What is meant, of course, is that the information would be privileged under this division if the privilege were to be claimed by a person entitled to do so under this division (other than Section 916). However, the purpose of Section 916 seems clear, and we do not believe any revision is necessary.

Section 917

This is the same as RURE 28.5. We received no objections to this section.

Section 918

This is the same as RURE 40. There were no objections to this section.

Section 919

This section is the same as RURE 38. The subdivisions should be designated by "(a)" and "(b)" instead of by "(1)" and "(2)".

Subdivision (b) should be revised as follows if the Conference of California Judges' suggestion on Section 916 is adopted:

(b) The presiding officer [~~failed to comply with~~] **did not exclude the privileged matter as authorized by** Section 916.

Section 920

This section is the same as RURE 40.5. There were no comments on this section.

Section 930

This section is the same as RURE 23. Except as noted in the above in connection with Section 902, there were no objections to this section. See the possible revision of Section 930 which is indicated above in connection with Section 902.

Section 940

This section is the same as RURE 24. Concerning Rules 23, 24 [Section 940], and 25, the Committee of the League of California Cities states:

> We consider these revised rules to be a substantial improvement over previous ones, and we want to compliment the Law Revision Commission for progressively clarifying the language in succeeding drafts.

On the other hand, the Conference of California Judges prefers URE Rule 24 to the revised rule (except that after the word "state" in Rule 24, the Conference would insert "or the United States.") The Conference states: "The committee believes that the definition of incrimination, as stated in Rule 24 of the Uniform Rules of Evidence, will be easier to interpret, both for the legal profession and for the judge." You will recall that the language of the revised rule was based largely upon the New Jersey revision of the URE rule and on existing California case law. Consider also Section 404 relating to the preliminary determination of whether evidence is incriminatory.

Section 941

This section is the same in substance as RURE 25 (introductory clause). The Conference of California Judges suggests that this section be revised to read:

> 941. Except as provided in this article, every natural person has a privilege which he may claim to refuse to disclose any matter that will incriminate him [~~if he claims the privilege~~].

An alternative wording, more consistent with the wording of other provisions, would be:

> 941. Except as provided in this article, if he claims the privilege, every natural person has a privilege to refuse to disclose any matter that will incriminate him [~~if he claims the privilege~~].

The clause at the end of Section 941 does seem somewhat awkward.

Section 942

This section is the same in substance as RURE 25(1). We received no objections to this section.

Section 943

This section is the same in substance as RURE 25(2). We received no objections to this section.

Section 944

This section is the same in substance as RURE 25(3). We received no objections to this section.

Section 945

This section is the same in substance as RURE 25(4). We received no objections to this section.

We suggest that Section 945 be revised to read:

> 945. No person has a privilege under this article to refuse to produce for use as evidence or otherwise a [~~document, chattel~~] writing, object, or other thing under his control constituting, containing, or disclosing matter incriminating him if some other person [~~, corporation, association, or other organization~~] (including the United States or a public entity) owns or has a superior right to the possession of the writing, object, or other thing to be produced.

These revisions are suggested for the sake of consistency. Regarding the

use of the phrase "writing, object, or other thing," see Section 150 and suggested revision of Section 911 discussed above. Regarding the deletion of "corporation, association, or other organization," see definition of "person" in Section 190 (to be revised to read: "Person" includes a natural person, firm, association, organization, partnership, business trust, or corporation").

Section 946

This section is the same as RURE 25(5). There were no comments on this section.

Section 947

This section is the same as RURE 25(6).

The office of the District Attorney of Los Angeles County suggests that the words "upon the merits" are too limiting in this section. See Exhibit III (green). Section 947 should be compared to existing Penal Code Section 1323 (which provides in part: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief.") The substance of existing law could be retained by deleting the words "upon the merits." This revision would still permit the defendant to object that a confession was involuntary, but if the judge nevertheless admits the confession, the defendant cannot testify before the jury that the confession is not true because it was involuntary unless the defendant is willing to permit cross-examination upon all matters about which he was examined in chief. If the insertion of the words "upon the merits" is intended to change existing law under Penal Code

Section 1323, the comment to Section 947 that will be contained in our final report should be revised to state exactly what change is intended.

Section 948

This section is the same as RURE 25(6). There were no comments on this section.

Additional section

The Conference of California Judges suggests that the following be added to Article 2:

> If the privilege is claimed in any action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness.

The proposed provision appears to be unnecessary in view of Section 404.

Sections 950, 951, 952 and 953 generally

These sections are based on RURE 26(1). The Conference of California Judges suggests that theire sections be renumbered so that the definitions be arranged in the following order:

Section 950 -- define "lawyer" (now Section 953).

Section 951 -- define "client" (now Section 950).

Section 952 -- define "confidential communication between client and lawyer" (now Section 951).

Section 953 -- define "holder of the privilege" (now Section 952).

The staff has no objection to the renumbering of these sections. The definitions now appear in alphabetical order. The renumbering is an attempt to place them in "logical" order.

Section 950

We suggest that the first portion of this section be revised to read:

950. As used in this article, "client" means a person [~~, corporation, association, or other organization~~] (including the United States and a public entity) that, . . .

See Section 190 (to be revised to read: "Person" includes a natural person, firm, association, organization, partnership, business trust, or corporation."). Compare with revised Section 945 set out above in this memorandum. The comment to Section 950 would state that "person" is intended to include unincorporated organizations when the organization, as distinguished from its members, is the client.

Section 952

We suggest the "firm, association, organization, partnership, business trust, or corporation" be inserted for "corporation, partnership, association, or other organization" in subdivision (d). See discussion under Section 950 above.

Section 954

This section is the same as RURE 26(2). There were no objections to this section.

Section 955

This section is substantially the same as RURE 26(3). The language of the RURE provision was reorganized. There were no objections to this section.

Section 956

This section is the same as RURE 26(4)(a). The Conference of California Judges suggests that this section be revised to read:

956. There is no privilege under this article if the judge finds that sufficient evidence aside from the communication, has been introduced to warrant a finding that the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

The suggested revision would restore the substance of the Uniform Rule provision which was revised by the Commission to delete the requirement of evidence in addition to the evidence of the communication. In connection with this suggestion, see Section 915(a). See Research Study in printed pamphlet on privileges article at pages 391-392.

Section 957

This section is substantially the same as RURE 26(4)(b). There were no comments on this section.

Section 958

This section is substantially the same as RURE 26(4)(c). There were no comments on this section.

Section 959

This section is the same as RURE 26(4)(d). There were no comments on this section.

Section 960

This section is the same as RURE 26(4)(e). There were no comments on this section.

Section 961

This section is the same as RURE 26(4)(f). There were no comments on this section.

Section 962

This section is the same in substance as RURE 26(4)(g). There were no comments on this section.

Section 963

This section is the same in substance as RURE 26(4)(h). There were no comments on this section.

Section 964

This section is the same as RURE 26(5). There were no comments on this section.

Section 970

This section is the same in substance as the introductory portion of RURE 27.5(1). There were no comments on this section.

Section 971

This section is the same in substance as RURE 27.5(2). The Conference of California Judges suggests that this section be revised to read:

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

Note that the word "express" is changed to "expressed."

Section 972

This section is the same in substance as RURE 27.5(1)(a) through (d). There were no comments on this section.

Section 973

This section is the same as RURE 27.5(3), (4). The Conference of California Judges suggests that subdivision (a) be revised to read:

> (a) Unless wrongfully compelled to do so, a married person who testifies [~~in a proceeding to which his spouse is a party, or who testifies~~] against his spouse in any proceeding [,] or who testifies in any proceeding in which his spouse is a party as to any fact waives [~~does not have a~~] the privilege [~~under this article~~] in the same proceeding [~~in which such testimony is given~~] with respect to any other fact of which he has knowledge.

This suggested revision does not appear to improve the language of the section.

Sections 980 to 987

There were no comments on these sections. The source of each section is indicated below:

980 -- RURE 28(1)
981 -- RURE 28(2)(a)
982 -- RURE 28(2)(b)
983 -- RURE 28(2)(c)
984 -- RURE 28(2)(d)
985 -- RURE 28(2)(e)
986 -- RURE 28(2)(f)
987 -- RURE 28(2)(g)

All of the sections are the same as the comparable RURE provision.

Sections 990-993 generally

These sections are the same as RURE 27(1). The Conference of California Judges suggests that these definitions be reorganized in a "logical," rather than alphabetical, order. They suggest that the definitions be arranged in the following order:

Section 990 -- "Physician" defined (now Section 993)
Section 991 -- "Patient" defined (now Section 992)
Section 992 -- "Confidential communication between patient and physician" defined (now Section 990)
Section 993 -- "Holder of the privilege" defined (now Section 991)

Section 994

This section is the same as RURE 27(2). There were no comments on this section.

Section 995

This section is the same in substance as RURE 27(3). The RURE provision has been reorganized in stating the provision in the Evidence Code. There were no comments on this section.

Section 996

This section is the same as RURE 27(4)(k). There were no comments on this section. The staff suggests that the section be revised to read as follows:

> 996. There is no privilege under this article in a proceeding [~~, including an action brought under Section 376 or 377 of the Code of Civil Procedure,~~] in which an issue concerning the condition of the patient has been tendered by:
>
> (a) The patient [~~;~~] .
>
> (b) Any party claiming through or under the patient [~~;~~] .
>
> (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.
>
> (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

The revised section is a better statement of the substance of the section.

Sections 997-1006

There were no comments on these sections. The source of each section is indicated below.

997 -- RURE 27(4)(a)
998 -- RURE 27(4)(h), (j)
999 -- RURE 27(4)(i)
1000 -- RURE 27(4)(b)
1001 -- RURE 27(4)(c)
1002 -- RURE 27(4)(d)
1003 -- RURE 27(4)(e)
1004 -- RURE 27(4)(f)
1005 -- RURE 27(4)(g)
1006 -- RURE 27(4)(L)

The sections contained in the Evidence Code are the same as in the RURE.

Sections 1010-1013

These sections are the same as RURE 27.3(1). The Conference of California Judges suggests that the definitions be organized in a logical, rather than an alphabetical, order. They suggest the following order:

Section 1010 -- "Psychotherapist" defined (now Section 1013)
Section 1011 -- "Patient" defined (now Section 1012)
Section 1012 -- "Confidential communication between patient and psychotherapist" defined (now Section 1010)
Section 1013 -- "Holder of the privilege" defined (now Section 1011)

Section 1014

This section is the same in substance as RURE 27.3(2). In connection with the availability of this privilege in criminal cases, see Exhibit V, a letter from the office of the District Attorney of Alameda County. In connection with this letter, it is important to note one change we are making in the attorney-client privilege: The attorney-client privilege will not provide protection, as it does now, when the attorney secures the services of a psychotherapist to examine the patient in order to provide information the attorney considers necessary in preparing the case for trial. The protection of communications made in the course of such an examination, if any, exists only under the psychotherapist privilege.

In order to clarify the psychotherapist-patient privilege, it is suggested that the following additional section be added to the article on the psychotherapist-patient privilege:

1025. Exception: Sanity of criminal defendant

1025. There is no privilege under this article in a proceeding to determine the sanity of a defendant in a criminal action under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code.

The staff does not believe any exception should be provided for proceedings to determine whether or not the defendant is a mentally disordered sex offender or a narcotic addict. In both cases, the person should be encouraged to seek the services of a psychotherapist and needs the assurance that his communications

to the psychotherapist will not later be used to his detriment. If it is true as the letter contends, that such persons do not seek the aid of a psychotherapist, no harm will result from providing protection to those few persons who actually do seek such aid.

The staff also suggests that the following section, suggested by the Conference of California Judges, be added to the article on the psychotherapist-patient privilege:

1026. Exception: Patient dangerous to himself or others

1026. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the confidential communication is necessary to prevent the threatened danger.

The staff believes that these two additional exceptions will do much to meet the objections to the psychotherapist-patient privilege. In addition, the staff suggests that the Commission again consider the suggestion of Professor Sherry who commented on the mimeographed tentative recommendation. Professor Sherry stated:

> Similarly, I think it unwise to embrace within the meaning of "psychotherapist" any practitioner of medicine. I think the definition ought to be limited to those doctors of medicine who are certified to practice psychiatry.

As we noted in a previous memorandum, we are unable to find any California statute pursuant to which a doctor of medicine is "certified to practice psychiatry." The Governor's commission defined a psychiatrist as follows:

> "psychiatrist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified.

The definition of the Governor's commission would seem to satisfy Professor Sherry's objection and would appear to create no serious problems in determining who is a "psychiatrist" for the purposes of the statute. The definition would in effect limit the scope of the privilege and avoid difficult problems of determining when an ordinary medical doctor is prevented from testifying in a criminal action.

Section 1015

This section is substantially the same as RURE 27.3(3). There were no comments on this section.

Section 1016

This section is the same as RURE 27.3(4)(g). We suggest that this section be revised to read:

> 1016. There is no privilege under this article in a proceeding [~~,-including-an-action-brought-under-Section-376-or-377-of-the-Code of-Civil-Procedure,~~] in which an issue concerning the condition of the patient has been tendered by:
>
> (a) The patient [~~;~~] .
>
> (b) Any party claiming through or under the patient [~~;-or~~] .
>
> (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.
>
> (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

We suggested the same revision of Section 996 (the comparable exception to the physician-patient privilege).

Section 1017

This section is the same as RURE 27.3(4)(h). The office of the District Attorney, County of Los Angeles, makes the following comment on this section:

> Under the practice in Los Angeles County there are occasions when court appointed counsel will request, on behalf of his client, that a psychiatrist

or psychotherapist be appointed by the court for his assistance for presenting a defense or for the entry of an additional plea or even possibly for a suggestion to the court that the court entertain a doubt as to the defendant's present sanity. It is submitted that under any of those circumstances the privilege should apply and not be restricted because of the court appointment.

If the Commission desires to revise Section 1017 in light of this suggestion, the section might be revised to read:

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

It should be noted that if the defendant does make a plea based on insanity or presents a defense based on his mental or emotional condition, the psychotherapist-patient privilege does not apply and the court-appointed psychotherapist may then be required to testify. See Section 1016.

Sections 1018-1024

These sections are the same as the comparable provisions of the RURE. There were no comments on these sections. The source of each section is indicated in the following tabulation.

1018 -- RURE 27.3(4)(a)
1019 -- RURE 27.3(4)(b)
1020 -- RURE 27.3(4)(c)
1021 -- RURE 27.3(4)(d)
1022 -- RURE 27.3(4)(e)
1023 -- RURE 27.3(4)(f)
1024 -- RURE 27.3(4)(i)

In Section 1019, the words "all of whom" should be substituted for "who" in order that the section be consistent with comparable exceptions to other privileges.

Article 8--Heading

The Conferences of California Judges suggests that the heading to this article be changed to: "Clergyman-Penitent Privileges." This seems to be a desirable change. The present title is somewhat misleading, as the Conference committee points out, in that it suggests that the privilege is intended only for members of the Catholic church.

Sections 1030-1032 generally

The Conference of California Judges suggests that the definitions be stated in logical, rather than alphabetical, order. The definitions should, the Conference committee believes, be stated in the following order:

1030 -- "Clergyman" defined (now Section 1032)
1031 -- "Penitent" defined (now Section 1030)
1032 -- "Penitential communication" defined (now Section 1031)

Section 1030

This section is the same as RURE 29(1)(a). The Conference committee suggests that the word "priest" be changed to "clergyman."

Section 1031

This section is the same as RURE 29(1)(b). The Conference of California Judges suggests that this section be revised to read:

> 1031. As used in this article, "penitential communication" means a confession of conduct by a penitent, who believes it to be wrong or immoral, made secretly and in confidence to a clergyman.

Section 1032

This section is the same as RURE 29(1)(c). The Conference of California Judges suggests in substance that this section be revised to read:

> 1032. As used in this article, [~~"priest"~~] "clergyman" means a priest, [~~clergyman,~~] minister [~~of the gospel~~], or other officer of a church or of a religious denomination or religious organization.

Section 1033

This section is the same as RURE 29(2). There were no comments on this section.

Section 1034

This section is the same as RURE 29(3). The Conference of California Judges suggests that "priest" be changed to "clergyman" in this section.

Section 1040

This section is the same as RURE 34(1), (2). The Conference of California Judges suggests that the words "in a manner authorized by the public entity" be deleted from subdivision (b). The Conference committee believes that "the public entity should have the privilege to prevent disclosure of official information by anyone who has acquired the information regardless of whether the person having the information was authorized or not to have such information." This change would provide the public entity with protection against eavesdroppers.

If this change appears to be desirable, the staff suggests that the introductory portion of subdivision (b) be revised to read:

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

This revision would make the provision consistent with the sections that provide for other privileges.

The staff suggests the deletion of the words ", including an officer, agent, or employee of the United States," from subdivision (a). These words are unnecessary in view of the definition of "public employee" in Section 210.

The Committee of the League of California Cities suggests that subdivision (b)(1) be revised to include municipal ordinances. The committee states: "One

area of its application would be business license ordinances, where information is received on a confidential basis, including statements which relate to sales tax, and income tax." It is suggested that if statutory law has not made such information secret, the section (in paragraph (2) of subdivision (b)) provides adequate protection. We believe it would be unwise to permit local entities to create an absolute privilege by ordinance.

Section 1041

This section is the same as RURE 36(1), (2), (3). This section should be made consistent with any changes made in Section 1040.

The Conference of California Judges suggests the complete revision of this section. See page 5 of Exhibit I (yellow pages).

The staff believes that the section as contained in the Evidence Code, revised to conform to Section 1040, is a better and clearer statement of the law.

Section 1042

This section is a combination of RURE 34(3), (4) and RURE 36(4), (5). The office of the District Attorney of Los Angeles County makes the following comment concerning this section:

> The language of 1042(a) indicates that where privilege is claimed and sustained the "presiding officer shall make such order or finding of fact adverse to the public entity." Our Appeals Section has suggested that this language is ambiguous and should be limited strictly to the rejection of evidence. It might be construed to mean a determination of the case itself by dismissal of the proceedings which I am sure was not the intent of the commission.

In connection with this comment, see the comment that will be inserted under this section in our final report.

Section 1050

This section is the same as RURE 31. There were no comments on this section.

Section 1060

This section is the same as RURE 32. There were no comments on this section.

Newsman's Privilege

The Conference of California Judges believes that a Newsman's Privilege should be included in the Evidence Code. The Conference suggests that the proposed Rule contained on pages 505-507 of the Research Study be included in the statute. Note the comments to the proposed rule in the Research Study. See pages 5-6 of Exhibit I (yellow pages).

If a Newsman's Privilege is provided, Section 915 should be revised to include the Newsman's Privilege.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

REPORT OF THE SPECIAL COMMITTEE OF THE
CONFERENCE OF CALIFORNIA JUDGES TO WORK
WITH THE CALIFORNIA LAW REVISION COMMISSION
ON THE STUDY OF UNIFORM RULES OF EVIDENCE
RELATIVE TO:

PRIVILEGES

The committee approves the tentative recommendations of the Commission on all rules relative to Privileges not specifically mentioned herein.

RULE 24 [SECTION 940]

DEFINITION OF INCRIMINATION

The committee recommends that Rule 24 of the Uniform Rules of Evidence be substituted for the Commission's tentative recommendation, except that after the word "state" in said Uniform Rules of Evidence insert the words "or the United States."

The committee believes that the definition of incrimination, as stated in Rule 24 of the Uniform Rules of Evidence, will be easier to interpret both for the legal profession and for the judge.

RULE 25 [SECTIONS 940-948]

SELF-INCRIMINATION PRIVILEGE

The committee recommends that the first paragraph of said Rule 25 be amended to read as follows:

"Every natural person has a privilege which he may claim to refuse to disclose any matter that will incriminate him except under this rule:"

The committee further recommends that Subdivision (a) of Rule 25 of the Uniform Rules of Evidence be re-inserted in said Rule 25 as Subdivision (8), which will read as follows:

"(8) If the privilege is claimed in any action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness."

RULE 26 [SECTIONS 950-964]

LAWYER-CLIENT PRIVILEGE

The committee recommends that the order of the subparagraphs under Subdivision (1) be changed so that:

Subparagraph (d) will be Subparagraph (a);

Subparagraph (a) will be Subparagraph (b);

Subparagraph (b) will be Subparagraph (c); and

Subparagraph (c) will be Subparagraph (d).

The committee further recommends that Subdivision 4 (a) [Section 956] be amended to read as follows:

"If the judge finds that sufficient evidence aside from communication, has been introduced to warrant a finding that the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud."

RULE 27 [SECTIONS 990-1006]

PHYSICIAN-PATIENT PRIVILEGE

The committee recommends that the order of subparagraphs under Subdivision (1) be changed so that:

Subparagraph (d) will be Subparagraph (a);

Subparagraph (c) will be Subparagraph (b);

Subparagraph (a) will be Subparagraph (c); and

Subparagraph (b) will be Subparagraph (d).

RULE 27.3 [SECTIONS 1010-1024]

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The committee recommends that the order of the subparagraphs under Subdivision (1) be changed so that:

Subparagraph (d) will be Subparagraph (a);

Subparagraph (c) will be Subparagraph (b);

Subparagraph (a) will be Subparagraph (c); and

Subparagraph (b) will be Subparagraph (d).

The committee further recommends that Subdivision (4) be amended by adding thereto a new subparagraph to be known as (j) which will read as follows:

"If the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and disclosure of the confidential communication is necessary to prevent the threatened danger."

RULE 27.5 [SECTIONS 970-973]

PRIVILEGE NOT TO TESTIFY AGAINST SPOUSE

The committee recommends that Subdivision (2) be amended by striking the word "the" following the word "without" and inserting in lieu thereof the words "such witnesses" and striking the words at the end of the subdivision "of the spouse having the privilege under this subdivision." Said subdivision [Section 971] will then read as follows:

"Subject to the exceptions listed in subdivision (1) a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without such witness's prior expressed consent."

The committee further recommends that Subdivision (3) [Section 973 (a)] be amended to read as follows:

"Unless wrongfully compelled to do so, a married person who testifies against his spouse in any proceedings or who testifies in any proceeding in which his spouse is a party as to any fact waives the privilege in the same proceeding with respect to any other fact of which he or she has knowledge."

RULE 29 [SECTION 1030-1034]

PRIEST-PENITENT PRIVILEGE

The committee recommends that the title to Rule 29 be amended to read:

CLERGYMAN-PENITENT PRIVILEGE

The committee further recommends that the order of the subparagraphs under Subdivision (1) be amended so that:

Subparagraph (c) will be Subparagraph (a);

Subparagraph (a) will be Subparagraph (b); and

Subparagraph (b) will be Subparagraph (c).

The committee further recommends that Subdivision 1 (a) be amended to read as follows:

"Penitential communication means a confession of conduct by a penitent, who believes it to be wrong or immoral, made secretly and in confidence to a clergyman."

The committee further recommends that the word "priest" in Subdivision 1 (a), 1 (b), 1 (c) and (3) be changed to the word "clergyman" and by reason of such change the word "clergyman" in Subdivision 1 (c) will be stricken.

The committee believes that Rule 29, as proposed by the commission, is in a form that would indicate it was intended only for members of the Catholic church, whereas it should be drafted in a manner which would apply to all forms of religion in which a penitential communication is made to a clergyman, whether such communication is made in the course of discipline or the practice of the church or not.

RULE 34 [SECTIONS 1040-1042]

OFFICIAL INFORMATION

The committee recommends that Subdivision (2) be amended by striking the words "in a manner authorized by the public entity."

The committee believes that the public entity should have the privilege to prevent disclosure of official information by anyone who has acquired the

information regardless of whether the person having the information was authorized or not to have such information.

RULE 36 [SECTIONS 1040-1042]

IDENTITY OF INFORMER

The committee recommends that the URE draft of Rule 36 be adopted in lieu of the Commission's recommendations with the modifications which appear underlined in the following rewriting of said rule:

> A witness or public entity has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States, or a governmental division thereof, charged with the duty of enforcing the law, and to prevent such disclosure by anyone, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed, or (b) disclosure of his identity is essential to assure a fair determination of the issues.

Our committee believes the Commission's draft to be unnecessarily prolix, and that the substance of the Commission's views are accomplished by the foregoing rewrite.

RULE 36.1 [ARTICLE 12 (To commence with Section 1070)]

NEWSMEN'S PRIVILEGE

This rule is not included in the Uniform Rules of Evidence nor is it included within the tentative recommendations of the Commission. It is proposed, however, by the staff of the Commission (see Commission's tentative recommendations Pages 461-505).

Said rule reads as follows:

"(1) As used in this rule, (a) 'Newsmen' means a person directly engaged in procurement or distribution of news through news media; (b) 'news media' means newspapers, press associations, wire services and radio and television.

"(2) A newsman has a privilege to refuse to disclose the source of news disseminated to the public through news media, unless the judge finds that (a) the source has been disclosed previously, or (b) disclosure of the source is required in the public interest."

The committee believes that said rule should be included in any recodification of the law of evidence of this state. Said rule changes existing California law from an absolute to a discretionary privilege. This would more nearly parallel the analogous privilege provided government informers. It would also preclude the possibility of inequitable results in cases where the public interest demands disclosure.

RULE 36.5 [SECTION 916]

CLAIM OF PRIVILEGE BY PRESIDING OFFICER

The committee recommends that the first paragraph of Subdivision (1) be amended to read as follows:

"The presiding officer on his own motion or upon the motion of any party may exclude information that is subject to a claim of privilege under this article if:"

The committee believes that it is improper to place a burden on a judge to exclude privileged information under the conditions set forth in said Rule 36.5. If the presiding officer is required to exclude such information on his own motion and he fails to do so the question arises whether such failure would amount to prejudicial error.

RULE 37 [SECTION 912]

WAIVER OF PRIVILEGE

The committee recommends that subsection 1 be amended to read as follows:

(1) Except as otherwise provided in this rule, the right of any person to claim a privilege provided by Rules 26, 27, 27.3, 28, or 29, is waived with respect to a communication protected by such privilege as to such holder of the privilege, who, without coercion, has disclosed any part of the communication or has consented to such a disclosure made by anyone.

We recommend deleting the balance of subparagraph (1) and all of subparagraph (2).

We approve the balance of the Commission's draft of Rule 37.

The Committee makes the foregoing recommendations for the same reasons as presented with respect to Rule 36.

RULE 37.7 [SECTION 914 (b)]

RULING UPON PRIVILEGED COMMUNICATIONS IN NONJUDICIAL PROCEEDINGS

The committee approves the Commission's draft of this rule, except that we believe that the words "in nonjudicial proceedings" should be inserted on line 2 after the word "privileged" and before the word "unless."

RULE 38 [SECTION 919]

ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

Because of our recommendation concerning Rule 36.5 and the comments thereon, we believe subparagraph (a) should be amended to read as follows:

"(2) The presiding officer did not exclude the privileged matter as authorized by Rule 36.5."

RULE 39 (SECTION 913)

REFERENCE TO EXERCISE OF PRIVILEGES

The committee recommends that subparagraphs (2) and (3) be amended by inserting a comma in the place of the closing period and adding "unless such failure was occasioned by circumstances beyond his control."

The situation designed to be protected by the recommended addition is where the person is prevented from explaining or denying evidence against him by reason of a claim of privilege by some other person not under his control, or because the matter is otherwise protected by law.

DATED: May 22, 1964

Respectfully submitted,

Justice Mildred Lillie
Judge Mark Brandler
Judge Raymond J. Sherwin
Judge James C. Toothaker
Judge Howard E. Crandall
Judge Leonard A. Diether, Chairman

Memo 64-39

EXHIBIT II

Municipal Court
Los Angeles Judicial District

Alan G. Campbell, Judge

May 25, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford, California 94305

Gentlemen:

To my regret, time limitations restrict to one aspect my considered comment on the Commission's tentative recommendations relating to Article V, "Privileges", of "The Uniform Rules of Evidence".

I am deeply concerned about the proposals with respect to Rules 22.3, 22.5 and 23-25, which seem to extend the theory of the privilege or right of a defendant that he shall not be called and may not be required to testify in a criminal trial to a proceeding to determine whether a civil officer should be removed from office.

I had fairly significant experience as a lawyer in connection with problems involving the suspension or discharge of public officers and employees, at all stages, where there were resignations in anticipation, where hearings were waived by failures to demand, where hearings proceeded on demand or otherwise, and were concluded favorably or unfavorably to the officer or employee, where judicial review proceedings were had, and where the decisions initially on review were reviewed by higher courts on appeal or otherwise.

In the course of this rather extensive experience, I not only reviewed many of the decisions and much of the literature which was then applicable, but I examined the practical problems presented in numerous aspects not only in the formal proceedings but in preparation therefor.

I must say that I have not studied the reported decisions in the last few years, but I believe that before then the persuasive decisions were uniform that the reasons and purposes of the constitutional prohibitions against compelled self incrimination had no application to public employee discharge proceedings. May I add that I strongly believe that the logic of those decisions should reject all proposals to create any privilege which would protect any public officer or employee in his office or position against the consequences of his refusal to testify in any proceeding about matters relevant to his duties or qualifications.

Surely, it is important beyond all measure that the confidence of the public in its officers and employees not be avoidably impaired. Surely public confidence would be impaired if judges, police officers, teachers, or any other officers or employees were to be protected in their offices or employments, despite refusals to answer fully to appropriate inquiries.

Yours very truly,

Alan G. Campbell

cc: Judge Howard E. Crandall
Judge Leonard A. Diether

Memo. 64-39

EXHIBIT III

COUNTY OF LOS ANGELES

Office of the District Attorney
Los Angeles, Calif. 90012

May 27, 1964

* * *

The following comments are submitted with reference to the division of Privileges as set forth in the proposed Evidence Code.

Section 947. Cross-examination of Criminal Defendant.

It is submitted that there are occasions when a defendant will testify on his own behalf but not "upon the merits" of the charge upon which he is being tried. For example, he may elect to take the stand and testify only with reference to the question of the free and voluntary nature of his confession or to the facts which would negative the right of the People to produce evidence because of an invasion of his rights under our search and seizure laws. It is suggested that the limitation of the phrase "upon the merits" is too narrow and should be expanded to cover all phases upon which the defendant testified in chief.

1017. Court Appointed Psychotherapist

Under the practice in Los Angeles County there are occasions when court appointed counsel will request, on behalf of his client, that a psychiatrist or psychotherapist be appointed by the court for his assistance for presenting a defense or for the entry of an additional plea or even possibly for a suggestion to the court that the court entertain a doubt as to defendant's present sanity. It is submitted that under any of those circumstances the privilege should apply and not be restricted because of the court appointment.

1042. Adverse Order or Finding in Certain Cases.

The language of 1042(a) indicates that where privilege is claimed and sustained the "presiding officer shall make such order or finding of fact adverse to the public entity." Our Appeals Section has suggested that this language is ambiguous and should be limited strictly to the rejection of evidence. It might be construed to mean a determination of the case itself by dismissal of the proceedings which I am sure was not the intent of the commission.

Very truly yours,
/s/ Joseph T. Powers
JOSEPH T. POWERS
Assistant Chief Trial Deputy

Memo 64-39

EXHIBIT IV

CITY OF REDLANDS CALIFORNIA

March 9, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: John H. DeMoully

Gentlemen:

Charles R. Martin, President of the City Attorneys' Section of the League of California Cities, appointed a committee of seven city attorneys to review the Law Revision Commission's tentative recommendations relating to Rules of Evidence.

With the undersigned as chairman, the committee includes:

Walter N. Anderson, Gardena
Robert H. Baida, Beverly Hills
Harry B. Cannon, Coachella
Glenn A. Forbes, San Leandro
John H. Larson, Cudahy
Henry Shatford, Temple City

The consensus of the committee is that the recommendations generally will improve the rules of evidence in California and promote proper administration of justice. In many respects, the interest of municipal counsel in evidence rules is necessarily limited to the scope of the usual city attorney's practice. To avoid duplication, this report will be confined to comments relevant to municipal practice.

RULES 23, 24, and 25

We recommend the adoption of Rules 23, 24, and 25 relating to the privileges of accused persons, including protection against self-incrimination. We consider these revised rules to be a substantial improvement over previous ones, and we want to compliment the Law Revision Commission for progressively clarifying the language in succeeding drafts.

RULE 26

Rule 26, the lawyer-client privilege, adequately provides that a municipality is entitled to claim the privilege. The only question concerns a confidential communication made to a

city attorney by a public official. As we read the rule, the city could claim the privilege and it could be waived by the governing body, namely the city council. The question raised is whether the council could waive the privilege when it would be detrimental to a particular employee. For example, a confidential communication might be made by a public employee in the scope of his official employment, only to find that the city council has power to waive the privilege in an action against him. As to Rule 37, concerning the waiver of privilege, we find nothing of detriment to municipalities.

RULES 30, 31, and 32

We generally concur in the commission's recommendations as to Rules 30, 31, and 32. In connection with proposed Rule 27.1, it appears that a psychoanalyst might hear a murder confessed to in his office and go into a trial to help another, but not in trial of the confessor. This may open a possible loophole: confessions to a psychologist being used as a contrived defense.

In proposed Rule 34.2a, entitled "Official Information", a privilege is conferred if the disclosure is forbidden by Congress or a state law. This committee suggests that municipal ordinances be added to the section. One area of its application would be business license ordinances, where information is received on a confidential basis, including statements which relate to sales tax, and income tax.

RULES 33, 34, 35, 38, 39, and 40

Rule 33 pertains to "secret of state" and refers to information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States etc In view of the wording of said rule, it would appear to us that Rule 33 does not directly concern the municipal lawyer.

Rule 34 pertains to official information relating to the internal affairs of this state or the United States acquired by a public official of this state or the United States in the course of his duty or transmitted from one such official to another in the course of duty. As far as this particular rule pertains to the municipal law field, it seems reasonably clear that the official information privilege is recognized and enforced in California by Section 18815 of the Code of Civil Procedure. In view of this, the committee favors adoption of Rule 34.

A review and analysis of Rule 35 relating to communication to grand jury appears to have no effect whatsoever on the practice of law in the municipal law field, and it would appear that this rule does not directly concern the municipal lawyer.

Rules 38 and 39 would apply certain privileges of witnesses and generally re-state existing California law. These two rules are supported by the municipal lawyers.

It appears that Rule 40 is not a rule of evidence, but is a statement of the existing California law, and will remain in effect whether Rule 40 is adopted or not. In the trial of municipal cases, the Rule will be of considerable benefit to municipal counsel.

The special city attorneys committee has appreciated the opportunity to submit comments to the Law Revision Commission, particularly because of the substantial contribution the commission has made in recommending clear and effective legislation. If we can be of further assistance, do not hesitate to call upon us.

Yours very truly,

S/

Edward F. Taylor, Chairman
City Attorneys' Committee
Law Revision Commission

EFT:ph

Memo 64-39

EXHIBIT V

Office of
DISTRICT ATTORNEY
Alameda County

June 1, 1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford, California 94305

Gentlemen:

We have reviewed the tentative recommendation on Article V (Privilege) and offer commendation and accord for the general structure and content of the rules so proposed.

We would, however, specifically disagree with proposed Rule 27.3 creating a Psychotherapist-Patient Privilege. As the Commission points out the general concept of Privilege involves a balancing of the public interest expressed in the Privilege as against the interest of the production of all relevant and material evidence at trial. The Commission has balanced the interests in this case by deciding that the expected improvement in current levels of psychiatric treatment to be brought about by a rule of confidentiality is of greater public interest than the unhampered production of psychiatric evidence at criminal trials and commitment proceedings. We would question whether the actual assistance this rule would provide to psychiatric treatment has greater social value than a criminal trial which does not arbitrarily exclude evidence of the mental state of the defendant. It should be noted that there are also proposals coming before the Legislature to eliminate the M'Naghten rule and institute new rules in this area of "legal insanity." It is obvious that the proposed changes would greatly increase the use and significance of psychiatric evidence in criminal trials. Is it wise to change the trial structure by the addition of a rule of arbitrary exclusion of previously admissible psychiatric evidence while simultaneously changing the same trial structure to give much greater recognition and significance to psychiatric evidence?

The proposed rule would not operate to improve the quality of psychiatry as it relates to evidence offered in criminal proceedings. As a practical matter the psychiatrist enters the arena of the criminal trial after his "patient" is already a defendant or has been arrested. His impact on the trial is in the capacity of an expert diagnostician and not in his ability to treat a mental illness. A reliable diagnosis surely does not require that peculiar rapport said to be necessary for successful treatment. We have recently had a situation in this county where the psychotherapist was physically assaulted by a homicide suspect he was examining. This manifest lack of rapport did not prevent the expert from diagnosing a severe mental illness. It appears then that the proposed rule does not serve to enhance the diagnostic function of psychiatry or to alter the nature of the psychiatric evidence used in

criminal trials. Additionally, it does not appear that the proposed rule will improve psychiatric treatment of criminal offenders. When a man is on trial as a murderer or a rapist or a sex pervert and evidence is being introduced as to such conduct it seems ludicrous to exclude evidence as to his mental state with the idea in mind of protecting his potential psychiatric treatment by assuring him that his "innermost secrets" will not be publicly revealed. The proposed rule does not help in the involuntary commitment situation either, inasmuch as rapport is non-existent by definition when the treatment is forced on the patient. By a process of elimination then the social justification for the proposed rule would seem to be in the potential benefit to psychiatric patients other than those already discussed. The number of these persons is open to question in at least one regard in that their chief characteristic is that they do not report to psychiatrists for treatment. When it is additionally seen that these potential patients are of a lesser order in the sense that they are not involved in known overt criminal behavior or to be so seriously disturbed as to require forcible commitment, the public interest being promoted by the proposed rule would seem to be less significant than the interest in a complete criminal trial.

Psychiatric evidence is used in criminal trials and related proceedings in the following instances:

1. Legal insanity. (Penal Code Sec. 1026 et seq.) The plea of not guilty by reason of insanity requiring a bifurcated trial.

2. Present sanity. (Penal Code Sec. 1368 et seq.)

3. State of mind as it effects responsibility. This is the type of evidence admitted under the concept of the Wells-Gorshen cases, chiefly in homicide trials. Evidence such as that admitted in Peo. v. Jones in 288 cases is also included.

4. Evidence admitted in the people's case in chief. (For example, the psychiatric evidence in Peo. v. Nash, 52 Cal. 2nd 36.) This would include direct evidence in penalty phase prosecutions under Penal Code Sec. 190.1.

5. Post conviction proceedings. To determine whether or not the defendant is a Mentally Disordered Sex Offender, or a Narcotic Addict and occasionally for probation reports.

The proposed rule would clearly eliminate category 4, which relates to evidence which would be offered by the prosecution. Category 1, the plea of not guilty by reason of insanity, would seem to have no evidentiary restrictions. There may be a problem if it is deemed that the court-appointed psychiatrist is the only one allowed to testify over a claim of privilege. The frequency of disagreement in psychiatric testimony makes the availability of expert testimony

very important. Categories 2 and 5 pose some problems. In each instance the court initiates the formal psychiatric inquiry. Under the proposed rule there is no privilege where, " . . . an issue concerning the mental or emotional condition of the patient has been tendered (i) by the patient. . . ." There is thus the possibility that no evidence other than that provided by the court-appointed psychiatrist would be admitted inasmuch as the "issue" has been "tendered" by the court rather than the patient. This would be an unsatisfactory situation. In many instances the issues raised in these situations are more adequately explored when psychiatrists previously obtained by the prosecution and the defense add their knowledge to that provided by the court-appointed expert. The remaining category deals with situations where the evidence is offered by the defense which of course would not be excluded. The Commission apparently contemplates that here there would be no privilege. In the comment it is stated " . . . 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 diminished responsibility." There is, of course, no plea of diminished responsibility. One could hope of course that the rule would be interpreted to allow the prosecution rebuttal evidence in this situation. The present situation, in reference to trial court and appellate court practice, is not such that the prosecution can expect a liberal interpretation of statutes which are created to protect the position of the defendant, as this statute ultimately does. The point to be considered then, is that the proposed rule would hamper the introduction of relevant evidence on these issues. If the answer is that the rule does permit such testimony, why have the rule at all?

There is an implicit discrimination in the proposed rule between the defense and prosecution. The operation of the rule is such that it does not prevent the introduction of any psychiatric evidence desired by the defense. The public interest in the right of the defendant to offer all evidence in his behalf is held to be greater than the potential impact on psychiatry by the destruction of confidentiality. The Commission indicates that the public interest in an identical prosecution position is not as great, stating, "The amount of good society might derive from obtaining a certain number of additional convictions by the help of the psychiatrist's testimony would almost certainly be outweighed by the harm done in destroying the confidentiality of the psychiatrist-patient relationship. Punishment is not that much more important than therapy."

Initially it may be observed that the evidence that psychiatry needs this rule to improve its treatment of patients should be very strong to justify a change in our traditional trial structure of permitting each side to present all credible, relevant, and material evidence. Society is surely interested in the problem of the mentally ill criminal offender, and the failure to convict, and thus bring under control, such a person is a serious situation. Punishment is not the only end of conviction and it is naive to believe that the mentally ill criminal offender will receive therapy if not

convicted. There is a good deal of harm to society from this failure to convict. We are not convinced that psychiatric treatment in this State is so ineffective that it needs this extension of the current rules of privilege at the expense of the criminal trial structure and the lack of "additional convictions" of these criminal offenders who constitute one of our most serious social problems.

Thank you for this opportunity to comment on the recommendation.

Very truly yours,

J. F. COAKLEY
District Attorney

By S/
D. Lowell Jensen
Deputy District Attorney

DLJ:dvm