#34(L) 6/17/64

Revised Memorandum 64-39

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

Memorandum 64-39 has been revised to reflect actions at the June meeting.

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 July meeting, we plan to consider the above listed comments on the tentative recommendation and make other revisions and then approve Division 8 (Sections 900-1072) 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.

In addition, at the July meeting we plan to approve the comments that the Commission will make to the various code sections. These comments are attached to Memorandum 64-47.

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.

Sections 900-916

These sections have been revised in accordance with the decisions made at the June meeting.

In Section 912, we refer to "privilege of clergyman" on the assumption that the privilege will be so designated. (If it is not, we will adjust Section 912 accordingly.)

In Section 915(b), we include a reference to the Newsmen's Privilege which we assume the Commission will want to include in Section 915(b).

Section 912

Subdivision (a). 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.

At the June meeting, a motion was made to delete subdivision (b) but it failed. It was suggested that subdivision (b) be again considered at the July meeting.

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.

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. Judge Campbell (Exhibit II - pink) strongly urges that Section 930 be limited to criminal actions. We have added "under this section" after "privilege" in subdivision (b) to conform to the language used in other sections of the Privileges Division.

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 that should also be considered:

941. Except as provided in this article, every natural person who claims the privilege 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.

The staff has revised Section 945 as indicated below:

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 the definition of "evidence" in Division 2 and Section 911 as revised at the June meeting. Regarding the deletion of "corporation, association, or other organization," see definition of "person" in the general definitions in Division 2 ("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.

Section 951

The staff has revised the first portion of this section as indicated below:

> 951. As used in this article, "client" means a person [~~, corporation, association, or other organization~~] (including the United States and a public entity) that, . . .

See the general definition in Division 2 ("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 951 states that "person" is intended to include unincorporated organizations when the organization, as distinguished from its members, is the client.

Section 953

The staff substituted "firm, association, organization, partnership, business trust, or corporation" for "corporation, partnership, association, or other organization" in subdivision (d). See discussion under Section 951 above.

Sections 950 and 952

Same as RURE 26(1). There were no objections to these sections.

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.

Sections 957-964

There were no comments on these sections. The sections are substantially the same as the RURE provision indicated below:

957 -- RURE 26(4)(b)
958 -- RURE 26(4)(c)
959 -- RURE 26(4)(d)
960 -- RURE 26(4)(e)
961 -- RURE 26(4)(f)
962 -- RURE 26(4)(g)
963 -- RURE 26(4)(h)
964 -- RURE 26(5)

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, except that we rephrased Section 984(b) without changing its substance.

Sections 990-993 generally

These sections are the same as RURE 27(1).

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 revised this section as indicated below:

> 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).

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). The staff has revised this section as indicated below:

> 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)

Article 8--Heading

The Conference 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.

Section 1030

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:

> 1030. 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 1031

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

Section 1032

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

> 1032. 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 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 deleted 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 Division 2.

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.

Article 12--Newsman's Privilege

This article was approved at the June meeting. We have divided the section approved at the June meeting into three sections but have made no substantive change in the approved section.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-39

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 <u>or public entity</u> 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 <u>enforcing the law</u>, <u>and to prevent such disclosure by anyone</u>, 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

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

900. Application of definitions.

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

901. Civil proceeding.

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

902. Criminal proceeding.

902. "Criminal proceeding" means:

(a) A criminal action; and

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

903. Disciplinary proceeding.

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

904. Presiding officer.

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

905. Proceeding.

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

CHAPTER 2. APPLICABILITY OF DIVISION

910. Applicability of division.

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

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

911. General rule as to privileges.

911. Except as otherwise provided by statute:

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

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

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

912. Waiver of privilege.

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by a failure to claim the privilege in any proceeding in which a holder of the privilege has the legal standing and opportunity to claim the privilege or by any other words or conduct of a holder of the privilege indicating his consent to the disclosure.

(b) Where two or more persons are the holders of a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), the privilege with respect to a communication is not waived by a particular holder of the privilege unless he or a person with his consent waives the privilege in a manner provided in subdivision (a), even though another holder of the privilege or another person with the consent of such other holder has waived the right to claim the privilege with respect to such communication.

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

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

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

913. (a) Subject to subdivisions (b) and (c):

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

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

(b) In a criminal proceeding, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the judge and by counsel and may be considered by the judge or the jury.

(c) In a civil proceeding, the failure of a person to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the presiding officer and by counsel and may be considered by the trier of fact.

914. Determination of claim of privilege.

914. (a) Whether or not a privilege exists shall be determined in accordance with Section 915 and Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

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

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

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

(b) When a judge is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under Section 1072 (newsmen's privilege) and is unable to rule on the claim without requiring disclosure of the information claimed to be privileged, the judge may require the person from whom disclosure is sought or the person entitled to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing

of all persons except the person entitled to claim the privilege and such other persons as the person entitled to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of the person entitled to claim the privilege, what was disclosed in the course of the proceedings in chambers.

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

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

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

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

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

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

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

917. Confidential communications: burden of proof.

917. Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, or husband-wife relationship, the communication is presumed to have been made in

confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

918. Effect of error in overruling claim of privilege.

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

919. Admissibility where disclosure wrongfully compelled.

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

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

(b) The presiding officer failed to comply with Section 916.

920. Other statutes not impliedly repealed.

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

CHAPTER 4. PARTICULAR PRIVILEGES

Article 1. Privilege of Defendant in Criminal Proceeding

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

930. (a) A defendant in a criminal proceeding has a privilege not to be called as a witness and not to testify.

(b) A defendant in a criminal proceeding has no privilege under this section 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 fact, except to refuse to testify.

Article 2. Privilege Against Self-Incrimination

940. Definition of incrimination.

940. (a) A matter will incriminate a person within the meaning of this article if it:

(1) Constitutes an element of a crime under the law of this State or the United States; or

(2) Is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime; or

(3) Is a clue to the discovery of a matter that is within paragraph (1) or (2).

(b) Notwithstanding subdivision (a), a matter will not incriminate a person if he has become permanently immune from conviction for the crime.

(c) In determining whether a matter is incriminating, other matters in evidence or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors shall be taken into consideration.

941. Privilege against self-incrimination.

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

942. Exception: Submitting to examination.

942. No person has a privilege under this article 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.

943. Exception: Demonstrating identifying characteristics.

943. No person has a privilege under this article 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.

944. Exception: Samples of body fluids or substances.

944. No person has a privilege under this article to refuse to furnish or permit the taking of samples of body fluids or substances for analysis.

945. Exception: Production of thing to which another has superior right.

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

946. Exception: Required records.

946. No person has a privilege under this article to refuse to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection for the purpose of aiding or facilitating the supervision or regulation by a public entity of an office, occupation, profession, or calling when such production is required in the aid of such supervision or regulation.

947. Exception: Cross-examination of criminal defendant.

947. Subject to the limitations of Chapter 6 (commencing with Section 780) of Division 6, a defendant in a criminal proceeding who testifies in that proceeding upon the merits before the trier of fact may be cross-examined as to all matters about which he was examined in chief.

948. Exception: Waiver by person other than criminal defendant.

948. Except for the defendant in a criminal proceeding, a person who, without having claimed the privilege under this article, testifies in a proceeding before the trier of fact with respect to a matter does not have a privilege under this article to refuse to disclose in such proceeding anything relevant to that matter.

Article 3. Lawyer-Client Privilege

950. "Lawyer" defined.

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

951. "Client" defined.

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

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

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes advice given by the lawyer in the course of that relationship.

953. "Holder of the privilege" defined.

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

(a) The client when he is competent.

(b) A guardian or conservator of the client when the client is incompetent.

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

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

954. Lawyer-client privilege.

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

(a) The holder of the privilege;

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

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

955. When lawyer required to claim privilege.

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

956. Exception: Crime or fraud.

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

to commit a crime or to perpetrate or plan to perpetrate a fraud.

957. Exception: Parties claiming through deceased client.

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

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

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

959. Exception: Lawyer as attesting witness.

959. There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document, or concerning the execution or attestation of such a document, of which the lawyer is an attesting witness.

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

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

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

961. There is no privilege under this article as to a communication

relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased client, purporting to affect an interest in property.

962. Exception: Communication of physician.

962. There is no privilege under this article as to a communication between a physician and a client who consults the physician or submits to an examination by the physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental condition if the communication, including information obtained by an examination of the client, is not privileged under Article 6 (commencing with Section 990).

963. Exception: Communication to psychotherapist.

963. There is no privilege under this article as to a communication between a psychotherapist and a client who consults the psychotherapist or submits to an examination by the psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition if the communication, including information obtained by an examination of the client, is not privileged under Article 7 (commencing with Section 1010).

964. Exception: Joint clients.

964. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between such clients.

Article 4. Privilege Not to Testify Against Spouse

970. Privilege not to testify against spouse.

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

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

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

972. When privilege not applicable.

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

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

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

(c) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

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

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

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the

other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

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

973. Waiver of privilege.

973. (a) Unless 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, does not have a privilege under this article in the proceeding in which such testimony is given.

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

Article 5. Privilege for Confidential Marital Communications

980. Privilege for confidential marital communications.

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

981. Exception: Crime or fraud.

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

982. Exception: Commitment or similar proceeding.

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

983. Exception: Proceedings to establish competence.

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

984. Exception: Proceeding between spouses.

984. There is no privilege under this article in:

(a) A proceeding by one spouse against the other spouse.

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

985. Exception: Certain criminal proceedings.

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

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

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

(c) Bigamy or adultery.

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

986. Exception: Juvenile court proceedings.

986. There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

987. Communication offered by spouse who is criminal defendant.

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

Article 6. Physician-Patient Privilege

990. "Physician" defined.

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

991. "Patient" defined.

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

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

992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no

third persons other than those who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes advice given by the physician in the course of that relationship.

993. "Holder of the privilege" defined.

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

(a) The patient when he is competent.

(b) A guardian or conservator of the patient when the patient is incompetent.

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

994. Physician-patient privilege.

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

(a) The holder of the privilege;

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

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

995. When physician required to claim privilege.

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

996. Exception: Patient-litigant exception.

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

(a) The patient;

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

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

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

997. Exception: Crime or tort.

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

998. Exception: Criminal or disciplinary proceeding.

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

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

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

1000. Exception: Parties claiming through deceased patient.

1000. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

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

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

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

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

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

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

1004. Exception: Commitment or similar proceeding.

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

1005. Exception: Proceeding to establish competence.

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

1006. Exception: Required report.

1006. There is no privilege under this article as to information which the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information shall not be disclosed.

Article 7. Psychotherapist-Patient Privilege

1010. "Psychotherapist" defined.

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

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

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

1011. "Patient" defined.

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition.

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

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

1013. "Holder of the privilege" defined.

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

(a) The patient when he is competent.

(b) A guardian or conservator of the patient when the patient is incompetent.

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

1014. Psychotherapist-patient privilege.

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

(a) The holder of the privilege;

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

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

1015. When psychotherapist required to claim privilege.

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

1016. Exception: Patient-litigant exception.

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

(a) The patient;

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

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

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

1017. Exception: Court appointed psychotherapist.

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient.

1018. Exception: Crime or tort.

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit

or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

1019. Exception: Parties claiming through deceased patient.

1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

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

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

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

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

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

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

1023. Exception: Proceeding to establish competence.

1023. There is no privilege under this article in a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence.

1024. Exception: Required reports.

1024. There is no privilege under this article as to information which the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information shall not be disclosed.

Article 8. Priest-Penitent Privileges

1030. "Priest" defined.

1030. As used in this article, "priest" means a priest, clergyman, minister of the gospel, or other officer of a church or of a religious denomination or religious organization.

1031. "Penitent" defined.

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

1032. "Penitential communication" defined.

1032. As used in this article, "penitential communication" means a

communication made in confidence in the presence of no third person to a priest who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.

1033. Privilege of penitent.

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

1034. Privilege of priest.

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

Article 9. Official Information and Identity of Informer

1040. Privilege for official information.

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

(b) A public entity (including the United States) has a privilege to refuse to disclose official information, and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity, if the privilege is claimed by a person authorized by the public entity to do so and:

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

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

1041. Privilege for identity of informer.

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

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

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer

be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

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

(c) There is no privilege under this section if the identity of the informer is known, or has been officially revealed, to the public.

1042. Adverse order or finding in certain cases.

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

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

Article 10. Political Vote

1050. Privilege to protect secrecy of vote.

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

Article 11. Trade Secret

1060. Privilege to protect trade secret.

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

Article 12. Newsmen's Privilege

1070. "Newsman" defined.

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

1071. "News media" defined.

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

1072. Newsmen's privilege.

1072. A newsman has a privilege to refuse to disclose the source of news procured for publication and published by news media, unless the source has been disclosed previously or the disclosure of the source is required in the public interest.

DIVISION 8. PRIVILEGES

§ 900

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

§ 901

Comment. "Civil proceeding" includes not only a civil action or proceeding, but also any nonjudicial proceeding that is not a criminal proceeding. See Sections 902 and 905.

§ 902

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

The definition of "criminal action" in Section 130 includes ancillary proceedings, such as writ proceedings to test the sufficiency of the evidence underlying an indictment or information or to attack a judgment of conviction. These proceedings are included in the definition so that the rules of privilege in such proceedings will be the same as they are in the criminal action itself.

§ 903

Comment. The definition of "disciplinary proceeding" follows the definition of the kind of proceeding initiated by accusation in Government Code Section 11503. The Government Code definition has been modified to make it clear

that Section 903 covers not only license revocation and suspension proceedings, but also personnel disciplinary proceedings. "Disciplinary proceeding" does not include, however, a proceeding by accusation for the removal of a public officer under Government Code Section 3060 et seq.

§ 904

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

§ 905

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

§ 910

Comment. This section makes the rules of privilege applicable in all proceedings in which testimony can be compelled. See definition of "proceeding" in Section 905.

Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privilege rules, however, are different from other rules of evidence. Privileges are granted for reasons of policy unrelated to the

reliability of the information that is protected by the privilege. As a matter of fact, privileges have a practical effect only when the privileged information is relevant to the issues in a pending proceeding.

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

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

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

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

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

§ 911

Comment. No new or common law privileges can be recognized in the absence of statute. The section codifies existing law. See Chronicle Pub. Co. v. Superior Court, 54 C.2d 548, 565, 7 Cal. Rptr. 109, , 354 P.2d 637, (1960); Tatkin v. Superior Court, 160 Cal. App.2d 745, 753, 326 P.2d 201, (1958); Whitlow v. Superior Court, 87 Cal. App.2d 175, 196 P.2d 590 (1948). See also 8 WIGMORE, EVIDENCE, § 2286 ( ); WITKIN, CALIFORNIA EVIDENCE 446 (1958).

§ 912

Comment. This section covers in some detail the matter of waiver of a privilege to protect the confidentiality of a privileged communication.

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

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

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

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

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

Subdivision (d). Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the communicant was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will be better able to advise his client, the disclosure is not a waiver under this section. Nor would a physician's or psychotherapist's keeping of confidential records, such as confidential hospital records, necessary to diagnose or treat a patient be a waiver under this section. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure. With respect to the interrelationship of the lawyer-client privilege with the physician-patient and psychotherapist-patient privileges in cases where the same person is both client and patient, see Comment to Section 962.

§ 913

Comment. This section deals with the comments that may be made upon, and the inferences that may be drawn from, an exercise of a privilege.

Subdivision (a). No comment may be made on the exercise of a privilege and the trier of fact may not draw any inference therefrom. Except as noted

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

Subdivision (b). This subdivision indicates the extent of permissible comment concerning the failure or refusal of a defendant in a criminal case to explain or deny the evidence against him. The subdivision restates existing law. CAL. CONST., Art. 1, § 13; PENAL CODE § 1323 (superseded by Evidence Code). The cases interpreting Section 13 of Article 1 of the Constitution have made it clear that it is the defendant's failure to explain or deny the evidence against him, not his exercise of any privilege, that may be commented upon and considered. See e.g., People v. Adamson, 27 Cal.2d 478, 488, 165 P.2d 3, 8 (1946) aff'd sub nom., Adamson v. California, 332 U.S. 46 (1947). Unfavorable inferences, if any, may be drawn only from the evidence in the case against him. No inferences may be drawn from the exercise of privileges.

Subdivision (c). This subdivision provides a rule for civil cases equivalent to that applicable in criminal cases under subdivision (b). Although language may be found in California cases suggesting that inferences may be drawn from the claim of privilege itself, subdivision (b) declares what appears to be the existing law that is applicable to civil cases when a party invokes a privilege and refuses to deny or explain evidence in the case against him. See discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 374-377, 523 (1964).

Subdivisions (a) and (c) together may modify California law to some extent. In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in an exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. See People v. Snyder, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958), overruling or disapproving several cases there cited. Section 913 will, in effect, overrule this holding in the Nelson case, for subdivision (a) declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue, and subdivision (c) provides only that subdivision (a) does not preclude the drawing of unfavorable inferences against a person because of his failure to explain or deny the evidence against him. The status of the rule in the Nelson case has been in doubt because of the recent holdings in criminal cases, and Section 913 eliminates any remaining basis for applying a different rule in civil cases.

§ 914

Comment. Subdivision (a) makes it clear that the general provisions (Sections 400 to 406) concerning preliminary determinations on admissibility of evidence are applicable when a determination is to be made whether or not a privilege exists, except that disclosure of information claimed to be privileged may be required only to the extent provided in Section 915.

Subdivision (b) is needed to protect persons claiming privileges in nonjudicial proceedings. Because nonjudicial proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination

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

§ 915

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

An exception to the general rule of Section 915 is provided for information claimed to be privileged under Section 1060 (trade secret), Section 1040 (official information), Section 1041 (identity of an informer), or Section 1072 (newsmen's privilege). Because of the nature of these privileges, it will sometimes be necessary for the judge to examine the information claimed to be privileged in order to balance the interest in seeing that justice is done in the particular case against the interest in maintaining the secrecy of the information. See cases cited in 8 WIGMORE, EVIDENCE § 2379, p. 812 n.6 (McNaughton rev. 1961). And see United States v. Reynolds, 345 U.S. 1, 7-11 (1953), and pertinent dis-

cussion thereof in 8 WIGMORE, EVIDENCE § 2379 (McNaughton rev. 1961). Even in these cases, Section 915 provides adequate protection to the person claiming the privilege: If the judge determines that he must examine the information in order to determine whether it is privileged, the section provides that it be disclosed in confidence to the judge and be kept in confidence if he determines the information is privileged. Moreover, the exception in subdivision (b) of Section 915 applies only when the judge of a court is ruling on the claim of privilege. Thus, in view of subdivision (a) of Section 915, disclosure of the information cannot be required, for example, in an administrative proceeding.

§ 916

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

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

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

§ 917

Comment. A number of sections provide privileges for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that such a communication is presumed confidential and

the party objecting to the claim of privilege has the burden of showing that the communication was not made in confidence. See generally, with respect to the marital communication privilege, 8 WIGMORE, EVIDENCE § 2336 (McNaughton rev. 1961). See also Blau v. United States, 340 U.S. 332, 333-335 (1951). In adopting by statute a revised version of the privileges article of the Uniform Rules of Evidence, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. REV. STAT. § 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52.

If the privilege claimant were required to show the communication was made in confidence, in many cases he would be compelled to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See Sharon v. Sharon, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889); Hager v. Shindler, 29 Cal. 47, 63 (1865)("Prima facie, all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

§ 918

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

§ 919

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

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

§ 920

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

§ 930

Comment. Section 930 restates without substantive change the existing California law. CAL. CONST., Art. I, § 13; People v. Clark, 18 Cal.2d 449, 116 P.2d

56 (1941), People v. Tyler, 36 Cal. 522 (1869); People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Subdivision (b) states in statutory form what the cases make clear, i.e., that a defendant in a criminal case can be required to demonstrate his identifying characteristics so long as he is not required to testify.

§ 940

Comment. Section 940 defines when a matter will incriminate a person within the meaning of the privilege against self-incrimination.

Subdivision (a). Protection is provided against possible incrimination under a federal law, but not under a law of another state or foreign nation. The scope of the California privilege is not clear, for no decision has been found indicating whether or not California 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, for all persons subject to California law are at the same time subject to federal law. Moreover, the United States Supreme Court recently held that the privilege under the United States Constitution provides similar protection in California proceedings. [Cite June 1964 U.S. Supreme Court case]. The expansion of protection to include the law of sister states or foreign nations seems unwarranted.

Whether a matter is incriminating is not left to the uncontrolled discretion of the person invoking the privilege; the judge ultimately must decide whether a matter is incriminating. See Sections 402 and 404. In making this determination, the judge must consider not only the other matters disclosed, but also the context of the question, the nature of the information sought, and many other pertinent factors. See subdivisions (a) and (c).

The privilege is not available to protect a person from civil--as opposed to criminal--punishment. Thus, the privilege provides no protection against

the disclosure of facts which might involve merely civil liability, economic loss, or public disgrace. See WITKIN, CALIFORNIA EVIDENCE 518 (1958).

Subdivision (b). The possibility of criminal conviction alone, whether or not accompanied by punishment, is sufficient to warrant invocation of the privilege. On the other hand, if a person has become permanently immune from conviction for the crime, he no longer has the privilege. This codifies existing law. "If, at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense, or, if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness 'against himself.'" Ex parte Cohen, 104 Cal. 524, 528, 38 Pac. 364, 365 (1894).

Subdivision (c). Subdivisions (a) and (c) make it clear that other links in the chain of incrimination need not be disclosed before the privilege may be invoked. For example, the witness may be aware of other matters which, when taken in connection with the information sought, are a basis for a reasonable inference of the commission of a crime. The protection of the privilege would be substantially impaired if such other matters had to be disclosed before the privilege against self-incrimination could be invoked. In this respect, Section 940 codifies existing California law. See, e.g., People v. Reeves, 221 Cal. App.2d ___, ___, 34 Cal. Rptr. 815, 820 (1963); People v. Lawrence, 168 Cal. App.2d 510, 516, 336 P.2d 189, 193 (1959); People v. McCormick, 102 Cal. App.2d Supp. 954, 960, 228 P.2d 349, 352 (1951).

§ 941

Comment. Sections 940-948 set forth the privilege, derived from Article I, Section 13 of the California Constitution, of a person when testifying to refuse to give information that might tend to incriminate him. This privilege should be distinguished from the privilege stated in Section 930 (the privilege of a defendant in a criminal case to refuse to testify at all).

In addition to the privilege under Sections 940-948, the witness also has a privilege under the United States Constitution, and the United States Supreme Court recently held that this privilege applies in state proceedings. [Cite June 1964 case].

Thus, in a particular case the witness may rely on the privilege provided by the California Constitution (codified in Evidence Code Sections 940-948), on the privilege provided by the United States Constitution, or on both of these privileges.

Because the privilege stated in Sections 940-948 is derived from the State Constitution, it would exist whether or not Sections 940-948 were enacted. Nonetheless, these sections are desirable in order to codify, and thus summarize and collect in one place, a number of existing rules and principles that otherwise could be extracted only from a large amount of case material and statutes.

Section 941 states the privilege against self-incrimination. Section 940 defines incrimination, and Sections 942-948 state the exceptions to the privilege against self-incrimination.

Sections 941 limits the self-incrimination privilege to natural persons. This limitation is existing law. McLaine v. Superior Court, 99 Cal. App.2d 109, 221 P.2d 300 (1950); West Coast etc. Co. v. Contractors' etc. Bd., 72 Cal. App.2d 287, 164 P.2d 811 (1945) (dictum).

§ 942

Comment. Sections 942, 943, and 944 codify existing law. People v. Lopez, 60 Cal.2d ___, ___, 32 Cal. Rptr. 424, 435-436, 384 P.2d 16, 27-28 (1963) (acts mentioned in Sections 942 and 943 not privileged); People v. Duroncelay, 48

Cal.2d 766, 312 P.2d 690 (1957); People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953) (no privilege to prevent taking samples of body fluids). Of course, nothing in Sections 942-944 authorizes the violation of constitutional rights in regard to the manner in which such evidence is obtained. See Rochin v. California, 342 U.S. 165 (1951).

Section 943 makes it clear that a person can be required to demonstrate his identifying physical characteristics even though such action may incriminate him. Under Section 943, the privilege against self-incrimination cannot be invoked against a direction that a person demonstrate his handwriting, or speak the same words as were spoken by the perpetrator of a crime, or demonstrate his manner of walking so that a witness can determine if he limps like the person observed at the scene of a crime, and the like. This matter may be covered by Section 942, but Section 943 will avoid any problems that might arise because of the phrasing of Section 942. Also, Section 943 makes it clear that a defendant in a criminal case can be required to demonstrate his identifying characteristics the same as any other person so long as he is not required to testify in violation of Section 930.

§ 943

Comment. See Comment to Section 942.

§ 944

Comment. See Comment to Section 942.

§ 945

Comment. Section 945 probably states existing law insofar as it denies the privilege to an individual who would be personally incriminated by surrendering public documents or books of a private organization in his possession. See Wilson v. United States, 221 U.S. 361 (1911), and cases collected in Annot., 120 A.L.R. 1102, 1109-1116 (1939). See also 8 WIGMORE, EVIDENCE § 2259b (McNaughton rev. 1961). Although there apparently is no California case holding that an individual has no privilege with respect to other types of property in his custody but owned by another, the logic supporting the unavailability of the privilege in this situation is persuasive.

§ 946

Comment. Section 946 states existing law. A record that is actually kept pursuant to a statutory or regulatory requirement is not subject to the privilege if the production of the record is sought in connection with the governmental supervision and regulation of the business or activity. Shapiro v. United States, 335 U.S. 1 (1948).

The cases have also held that public employees and persons engaged in regulated activities may be required by statute or regulation to disclose information relating to the regulated activity and may be disciplined for failure or refusal to make the required disclosure, but such cases have never held that such persons have lost their privilege against self-incrimination. See Shapiro v. United States, 335 U.S. 1 (1948). See also People v. Diller, 24 Cal. App. 799, 142 Pac. 797 (1914). Public employees may be required to make disclosures concerning their administration of public affairs and, under some circumstances, may be discharged if they refuse to do so; but, under Section 946, it is clear that they do not surrender the privilege against self-incrimination as a condition of their employment. GOVT. CODE § 1028.1; EDUC. CODE § 12955. See Christal v. Police Commission, 33 Cal. App.2d 564, 92 P.2d 416 (1939).

§ 947

Comment. Section 947 states existing law as found in Penal Code Section 1323 (superseded by Evidence Code). See People v. McCarthy, 88 Cal. App.2d 883, 200 P.2d 69 (1948). See also People v. O'Brien, 66 Cal. 602, 6 Pac. 695 (1885); People v. Arrighini, 122 Cal. 121, 54 Pac. 591 (1898).

§ 948

Comment. Section 948 provides a specific waiver provision for the privilege against self-incrimination. The general waiver provision in Section 912

probably would be unconstitutional if applied to the privilege against self-incrimination. Section 948 does not apply to a defendant in a criminal case; the extent of the waiver by a defendant in a criminal case is governed by Section 947.

Under Section 943, the privilege against self-incrimination is waived only in the same action or proceeding, not in a subsequent action or proceeding. California cases interpreting Article I, Section 13 of the California Constitution appear to limit waiver of the privilege against self-incrimination to the particular proceeding in which the privilege is waived. See Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900); In re Sales, 134 Cal. App. 54, 24 P.2d 916 (1933). A person can claim the privilege in a subsequent case even though he waived it in a previous case. In re Sales, supra.

§ 950

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

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

maintain his confidences to the same extent as would a lawyer in California.

§ 951

Comment. Under Section 951, the State, cities, and other public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned. This codifies existing law. See Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025 (1954). In addition, such unincorporated organizations as labor unions, social clubs, and fraternal societies have a lawyer-client privilege when the organization (rather than its individual members) is the client. See Section 175, defining "person."

§ 952

Comment. "Confidential communication between client and lawyer" is used to describe the type of communications that are subject to the lawyer-client privilege. In accord with existing California law, the communication must be in the course of the lawyer-client relationship and must be confidential. See City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234-235, 231 P.2d 26, 29-30 (1951).

Confidential communications also include those made to third parties, such as accountants or similar experts, for the purpose of transmitting such information to the lawyer. Thus, the phrase, "reasonably necessary for the transmission of the information," restates existing California law. See, e.g., City and County of San Francisco v. Superior Court, supra, which involved a communication to a physician. Although the rule of this case would be changed by Sections 962 and 963 insofar as it applies to communications to physicians and psychotherapists consulted as such, Section 952 retains the rule for other expert consultants. (See Comment to Section 962.) A lawyer at times may desire to have a client reveal information to an expert consultant and himself at the same time in order that he may adequately advise the client.

The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" makes it clear that these communications, too, are confidential and within the scope of the privilege, despite the presence of the third party. This part of the definition probably restates existing California law. See Attorney-Client Privilege in California, 10 STAN. L. REV. 297, 308 (1958). See also Himmelfarb v. United States, 175 F.2d 924, 938-939 (9th Cir. 1949). See also subdivision (d) of Section 912 and Comment thereto.

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person, such as a spouse, business associate, or joint client, who is present to aid the consultation or to further their common interest in the subject of the consultation. These words may change previously existing California law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. See Attorney-Client Privilege in California, 10 STAN. L. REV. 297, 308 (1958), and authorities there cited in notes 67-71.

For comparable sections, see Section 992 (physician-patient privilege) and Section 1012 (psychotherapist-patient privilege).

§ 953

Comment. Under subdivisions (a) and (b), the guardian of the client is the holder of the privilege if the client is incompetent, and 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 (b) is the holder of the privilege until the client becomes 21; thereafter, the client himself is the holder of

the privilege. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer. The present California law is uncertain. The statutes do not deal with the problem and no appellate decision has discussed it.

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

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

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

For somewhat comparable sections, see Section 993 (physician-patient privilege) and Section 1013 (psychotherapist-patient privilege).

§ 954

Comment. Section 954 is the basic statement of the lawyer-client privilege. Exceptions to the privilege are stated in Sections 956-964.

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

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

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

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

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

Section 954 is consistent with Penal Code Sections 653j and 653i but provides broader protection for it includes any form of eavesdropping or wrongful interception of confidential communications between lawyer and client. Section 954, like the Penal Code sections, represents sound policy. No one should be able to use the fruits of such wrongdoing for his own advantage by using them as evidence. The use of the privilege to prevent testimony by eavesdroppers and other wrongful interceptors does not, however, affect the rule that the making of the communication under circumstances where others could easily overhear is evidence that the client did not intend the communication to be confidential. See Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889).

Comparable sections. For sections comparable to Section 954, see Section 994 (physician-patient privilege) and 1014 (psychotherapist-patient privilege).

§ 955

Comment. When authorized under subdivision (c) of Section 954, the lawyer must claim the privilege on behalf of the client unless otherwise instructed by a person authorized to permit disclosure. Compare BUS. & PROF. CODE § 6068(e). Sections comparable to Section 955 are Section 995 (physician-patient privilege) and Section 1015 (psychotherapist-patient privilege).

§ 956

Comment. The privilege does not apply where the legal service was sought or obtained in order to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud. California recognizes this exception. Abbott v. Superior Court, 78 Cal. App.2d 19, 177 P.2d 317 (1947). Compare Nowell v. Superior Court, 223 Cal. App.2d , 36 Cal. Rptr. 21 (1963). See Section 981 (confidential marital communications privilege), Section 997 (physician-patient privilege), and Section 1018 (psychotherapist-patient privilege) for somewhat similar exceptions.

§ 957

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

The traditional exception between claimants by testate or intestate succession is based on the theory that the privilege is granted to protect the client's interests against adverse parties and, since claimants in privity within the estate claim through the client and not adversely, the client presumably would want his communications disclosed in litigation

between such claimants in order that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. Yet, there is no reason to suppose, for example, that a client's interests and desires are not represented by a person claiming under an inter vivos transaction--e.g., a deed--executed by a client in full possession of his faculties while those interests and desires are necessarily represented by a claimant under a will executed while the claimant's mental stability was dubious. Therefore, there is no basis in logic or policy for refusing to extend the exception to cases where one or more of the parties is claiming by inter vivos transaction. See the discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 392-396 (1964).

For similar exceptions, see Section 984 (confidential marital communications privilege), Section 1000 (physician-patient privilege), and Section 1019 (psychotherapist-patient privilege).

§ 958

Comment. The breach of duty exception stated in Section 958 has not been recognized by a holding in any California case, although a dictum in one opinion indicates that it would be. Pacific Telephone and Telegraph Co. v. Fink, 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956). This exception is provided because it would be unjust to permit a client to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge. The duty involved must be one arising out of the lawyer-client relationship, e.g., the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services.

For similar exceptions, see Section 1001 (physician-patient privilege) and Section 1020 (psychotherapist-patient privilege).

§ 959

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

Although the attesting witness exception stated in Section 959 is limited to information of the kind to which one would expect an attesting witness to testify, there is merit in making the exception applicable to all dispositive instruments. One would normally expect that a client would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Accordingly, two additional exceptions--Sections 960 and 961--are provided relating to dispositive instruments generally. Under these exceptions, the lawyer--whether or not he is an attesting witness--is able to testify concerning the intention or competency of a deceased client and is able to testify to communications relevant to the validity of various dispositive instruments that have been executed by the client. These exceptions have been recognized by the California decisions only in cases where the lawyer is an attesting witness.

§ 960

Comment. See Comment to Section 959. Comparable sections are Section 1002 (physician-patient privilege) and Section 1021 (psychotherapist-patient privilege).

§ 961

Comment. See Comment to Section 959. Comparable sections are Section 1003 (physician-patient privilege) and Section 1022 (psychotherapist-patient privilege).

§ 962

Comment. The exceptions provided by Sections 962 and 963 make the lawyer-client privilege inapplicable to protect a communication between the lawyer's client and a physician or psychotherapist consulted as such if the communication is not independently privileged under the physician-patient privilege or psychotherapist-client privilege. This changes previously existing California law. In City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951), the court held that, even though a client's communication to a physician was not privileged under the physician-patient privilege, the communication nevertheless was privileged under the lawyer-client privilege because the purpose of the client's consultation with the physician was to assist the lawyer in preparing the client's lawsuit. The broader implications of this decision in regard to a conduit theory of communications between client and lawyer are not affected by the exceptions stated in Sections 962 and 963, for it is clear under Section 954 that either the client or the lawyer may communicate with each other through agents. However, in the specific situations covered by Sections 962 and 963--communications between a client and a physician or psychotherapist consulted as such--other statutory provisions spell out in detail the conditions and circumstances under which communications to physicians (Sections 990-1006) and psychotherapists (Sections 1010-1024) are privileged. Where a client's communication to either of these persons is not protected by the privilege granted these relationships, there is no reason to protect the communication by applying a different privilege in circumvention of the policy expressed in the privilege that ought to be applied. The admissibility of

relevant evidence bearing upon substantive issues in a given case should not be determined on the basis of whether a lawyer is consulted before a client sees his physician or psychotherapist for diagnosis or treatment. Note, however, that a communication by the lawyer to the physician or psychotherapist is not within the exceptions stated in Sections 962-963. See Section 912(d) and Comment thereto.

§ 963

Comment. See Comment to Section 962.

§ 964

Comment. This section states existing law. Harris v. Harris, 136 Cal. 379, 69 Pac. 23 (1902).

§ 970

Comment. Under this article, a married person has two privileges: (1) a privilege not to testify against his spouse in any proceeding (Section 970) and (2) a privilege not to be called as a witness in any proceeding to which his spouse is a party (Section 971).

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

The privilege is based in part on a 1956 recommendation and study made by the Commission. See Recommendation and Study Relating to The Marital "For and Against" Testimonial Privilege, 1 CAL. LAW REVISION COMM'N., REP., REC. & STUDIES, Recommendation and Study at F-1 (1957).

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

§ 971

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

§ 972

Comment. The exceptions to the privileges under this article are similar to those contained in Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, both of which are superseded by the Evidence Code; but the exceptions in this section have been made consistent with those provided in Article 5 (commencing with Section 980) of this chapter (the privilege for confidential marital communications). For comparable exceptions, see Comments to Sections in Article 5 of this chapter.

§ 973

Comment. Subdivision (a). This subdivision contains a special waiver provision for the privileges provided by this article. Under subdivision (a), a married person who testifies in a proceeding to which his spouse is a party waives both privileges provided for in this article. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and expect that spouse to invoke the privilege provided in Section 970 to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and

invoke the privilege not to testify against his spouse as to other matters. In any proceeding where a married person's spouse is not a party, the privilege not to be called as a witness is not available and subdivision (a) provides that the privilege not to testify against a spouse is waived when a person testifies against his spouse in that proceeding. Thus, for example, in a grand jury proceeding a married person may testify the same as any other witness without waiving the privilege provided under Section 970 so long as he does not testify against his spouse.

Subdivision (b). This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section ***, formerly Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives the privilege. Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927); Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448 (1929). But cf. Marple v. Jackson, 184 Cal. 411, 193 Pac. 940 (1920). And when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. Hagen v. Silva, 139 Cal. App.2d 199, 293 P.2d 143 (1956). Similarly, when the spouses join as plaintiffs in an action to recover damages to one of them, the cause of action being community property at the time the case was decided, each has been held to have waived the privilege as to the testimony of the other. In re Strand, 123 Cal. App. 170, 11 P.2d 89 (1932). However, the privilege is available to the plaintiff spouse who sues alone to recover for his personal injuries,

even when the recovery would have been community property. Rothschild v. Superior Court, 109 Cal. App. 345, 293 Pac. 106 (1930). But cf. Credit Bureau of San Diego, Inc. v. Smallen, 114 Cal. App.2d Supp. 834, 249 P.2d 619 (1952). This rule has seemingly been developed to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse under Code of Civil Procedure Section 1881(1)(superseded by Evidence Code). It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. Ayres v. Wright, 103 Cal. App. 610, 284 Pac. 1077 (1930).

§ 980

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

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

Termination of marriage. The privilege may be claimed as to confidential communications made during a marriage even though the marriage has terminated

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

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

§ 981

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

and in many cases the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit. Comparable sections are Section 956 (lawyer-client privilege), Section 997 (physician-patient privilege), and Section 1018 (psychotherapist-patient privilege).

§ 982

Comment. Sections 982 and 983 express existing law. CODE CIV. PROC. § 1881(1)(superseded by Evidence Code). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, virtually all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. Therefore, inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings, it would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information.

Comparable sections are Section 972(a) (privilege not to be witness against spouse) and Section 1004 (physician-patient privilege).

§ 983

Comment. See Comment to Section 982. Comparable sections are Section 972(b) (privilege not to be witness against spouse), Section 1005 (physician-patient privilege), and Section 1023 (psychotherapist-patient privilege).

§ 984

Comment. The exception for litigation between the spouses states existing law. CODE CIV. PROC. § 1881(1) (superseded by Evidence Code). Section 984 extends the principle of the exception to similar cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse.

See generally Estate of Gillett, 73 Cal. App.2d 588, 166 P.2d 870 (1946). Somewhat comparable sections are Section 957 (lawyer-client privilege), Section 1000 (physician-patient privilege), and Section 1019 (psychotherapist-patient privilege).

§ 985

Comment. Section 985 restates with minor variations an exception recognized under existing law. CODE CIV. PROC. § 1881(1) (superseded by Evidence Code). Sections 985 and 986 together create an exception for all the proceedings mentioned in Section 1322 of the Penal Code (superseded by Evidence Code). Unlike the similar exception stated in Section 972(d), the exception stated in Section 985 applies without regard to whether the crimes mentioned in Section 985 are committed before, during, or after marriage. A comparable exception is provided by Section 972(d) (privilege not to be witness against spouse).

§ 986

Comment. See Comment to Section 985. A comparable exception is provided by Section 972(c) (privilege not to be witness against spouse).

§ 987

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

§ 990

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

§ 991

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

§ 992

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

Comparable sections are Section 952 (lawyer-client privilege) and Section 1012 (psychotherapist-patient privilege).

§ 993

Comment. A guardian of the patient is the holder of the privilege if the patient is incompetent. If the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege. The provision making the personal representative of the patient the holder of the privilege when the patient is dead may change California law. Under the existing law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. See the discussion in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges), 6 CAL. LAW REVISION COMM'N, REP., REC. § STUDIES, 201, 408-410 (1964). Under Section 991, however, the personal representative of the patient has authority to claim or waive the privilege after the patient's death. The personal representative can protect the interest of the patient's estate in the confidentiality of these statements and can waive the privilege when the estate would benefit by waiver. And, when the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy.

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

Comparable sections are Section 953 (lawyer-client privilege) and Section 1013 (psychotherapist-patient privilege).

§ 994

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

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

For the reasons indicated in the Comment to Section 954, an eavesdropper or other wrongful interceptor of a communication privileged under this section is not permitted to testify to the communication. See Comment to Section 954. See generally Kramer v. Policy Holders Life Ins. Assn., 5 Cal. App.2d 380, 393, 42 P.2d 665, 671 (1935); Horowitz v. Sacks, 89 Cal. App. 336, 265 Pac. 281 (1928).

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

§ 995

Comment. When authorized under subdivision (c) of Section 994, the physician must claim the privilege on behalf of the patient unless otherwise instructed by a person authorized to permit disclosure. Comparable sections are Section 955 (lawyer-client privilege) and Section 1015 (psychotherapist-patient privilege).

§ 996

Comment. Section 996 provides that the privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. If the patient himself tenders the issue of his condition, he should do so with the realization that he will not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege. A limited form of this exception is recognized by Code of Civil Procedure Section 1881(4) (superseded by Evidence Code) which makes the privilege inapplicable in personal injury actions. The exception in Section 996 also states previously existing California law in extending the statutory exception to other situations where the patient himself has raised the issue of his

condition. In re Cathey, 55 Cal.2d 679, 12 Cal. Rptr. 762, 361 P.2d 426 (1961) (prisoner in state medical facility waived physician-patient privilege by putting his mental condition in issue by application for habeas corpus). See also City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 232, 231 P.2d 26, 28 (1951) (personal injury case).

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

Section 996 also provides that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in a case under the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

Section 1016 provides a comparable exception to the psychotherapist-patient privilege.

§ 997

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

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

Somewhat comparable sections are Section 956 (lawyer-client privilege), Section 981 (privilege for confidential marital communications), and Section 1018 (psychotherapist-patient privilege).

§ 998

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

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

§ 999

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

§ 1000

Comment. See discussion of comparable exception to the lawyer-client privilege in Comment to Section 957. See also Section 984 (privilege for confidential marital communications) and Section 1019 (psychotherapist-patient privilege) for other comparable exceptions.

§ 1001

Comment. See discussion of comparable exception to the lawyer-client privilege in Comment to Section 958. Section 1020 provides a comparable exception to the psychotherapist-patient privilege.

§ 1002

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

Sections 960 and 961 (lawyer-client privilege) and Sections 1021 and 1022 (psychotherapist-patient privilege) provide comparable exceptions.

§ 1003

Comment. See Comment to Section 1002.

§ 1004

Comment. The exception provided by Section 1004 covers not only commitments of mentally ill persons but also covers such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the privilege should not apply because the proceedings are being conducted for the benefit of the patient. In such proceedings, he should not have a privilege to withhold evidence that the court needs in order to act properly for his

welfare. There was no similar exception in previous California law. McClenahan v. Keyes, 188 Cal. 574, 584, 206 Pac. 454, 458 (1922)(dictum). But see 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege where the physician acts pursuant to court appointment for the explicit purpose of giving testimony. Section 982 provides a comparable exception to the privilege for confidential marital communications.

§ 1005

Comment. This exception is new to California law; but, when a patient's condition is placed in issue by instituting such a proceeding, the patient should not be permitted at the same time to withhold from the court the most vital evidence relating to his condition. Comparable sections are Section 983 (privilege for confidential marital communications) and Section 1023 (psychotherapist-patient privilege).

§ 1006

Comment. This is a new exception not previously recognized by California law; it is a desirable exception, however, because no valid purpose is served by preventing the use of relevant information that is required to be reported and made public. Section 1024 provides a comparable exception to the psychotherapist-patient privilege.

§ 1010

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

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

§ 1011

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

§ 1012

Comment. This section is comparable to Section 992 (physician-patient privilege). See Comment to Section 992. Section 952 (lawyer-client privilege) also is comparable.

§ 1013

Comment. This section is comparable to Section 993 (physician-patient privilege). See Comment to Section 993. Section 953 (lawyer-client privilege) also is comparable.

§ 1014

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

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

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

Generally, the privilege provided by this article follows the physician-patient privilege and the Comments to Sections 990-1016 are pertinent (with reference to Section 1014, see the Comments to Sections 994 and 954). The following differences, however, should be noted:

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

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

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

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. There is no similar exception in the psychotherapist-patient privilege. A patient's fear of future commitment proceedings based upon what he tells his psychotherapist would inhibit the relationship between the patient and his psychotherapist almost as much as would the patient's fear of future criminal proceedings based upon such statements. If a psychotherapist becomes convinced during a course of treatment that his patient is a menace to himself or to others because of his mental or emotional condition, he is free to bring such information to the attention of the appropriate authorities. The privilege is merely an exemption from the general duty to <u>testify</u> in a proceeding in which testimony can ordinarily be compelled to be given. The only effect of the privilege would be

to enable the patient to prevent the psychotherapist from testifying in any commitment proceedings that ensue.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. Nor does it apply in administrative disciplinary proceedings. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no similar exception in civil actions or administrative proceedings involving the patient's criminal conduct. Section 954 (lawyer-client privilege) and Section 994 (physician-patient privilege) are comparable to Section 1014.

§ 1015

Comment. When authorized by subdivision (c) of Section 1014, the psychotherapist must claim the privilege on behalf of the patient unless otherwise instructed by a person authorized to permit disclosure. Section 955 (lawyer-client privilege) and Section 995 (physician-patient privilege) are comparable.

§ 1016

Comment. This section is the same in substance as Section 996 (physician-patient privilege). See Comment to Section 996.

§ 1017

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

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

§ 1018

Comment. This section is the same in substance as Section 997 (physician-patient privilege). See Comment to Section 997. Section 956 (lawyer-client privilege) and Section 981 (privilege for confidential marital communications) also provide somewhat comparable exceptions.

§ 1019

Comment. See discussion of comparable exception in Comment to Section 957. Section 1019 is the same in substance as Sections 957 (lawyer-client privilege) and 1000 (physician-patient privilege). Section 984 provides a somewhat comparable exception to the privilege for confidential marital communications.

§ 1020

Comment. See discussion of comparable exception in Comment to Section 958. Section 1020 is the same in substance as Sections 958 (lawyer-client privilege) and 1001 (physician-patient privilege).

§ 1021

Comment. Sections 1021 and 1022 are the same in substance as Sections 1002 and 1003 relating to the physician-patient privilege. See Comment to Section 1002. Sections 960 and 961 provide comparable exceptions to the lawyer-client privilege.

§ 1022

Comment. See Comment to Section 1021.

§ 1023

Comment. This is the same in substance as Section 1005 (physician-patient privilege). See Comment to Section 1005.

§ 1024

Comment. This is the same in substance as Section 1006 (physician-patient privilege). See Comment to Section 1006.

§ 1030

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

§ 1031

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

§ 1032

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

§ 1033

Comment. This section provides the penitent with a privilege to refuse to disclose, and to prevent the priest from disclosing, a penitential communication. In this regard, the section differs from Code of Civil Prodedure Section 1881(3) (superseded by Evidence Code) in that the Section 1881(3) gives a penitent a privilege only to prevent the priest from disclosing a confession. Literally construed, Section 1881(3) does not give the penitent himself the right to refuse disclosure of the confession. However, similar privilege statutes have been held to grant a privilege both to refuse to disclose and to prevent the other communicant from disclosing the privileged statement. See City and County

of San Francisco v. Superior Court, 37 Cal.2d 227, 236, 231 P.2d 26, 31 (1951) (attorney-client privilege); Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 526, 47 Pac. 364, 366 (1897)("a client cannot be compelled to disclose communcations which his attorney cannot be permitted to disclose"). Hence, it is likely that Section 1881(3) would be similarly construed.

Because of the definition of "penitential communication," Section 1033 provides a broader privilege than existing law which is limited to "confessions."

§ 1034

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

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

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

§ 1040

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

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

The privilege may be asserted only against persons who have acquired the information in an authorized manner. If, for example, a person reported by telephone a violation of the law, his identity would be privileged under Section 1041 and the information furnished would be privileged under Section 1040. If another person were present when the telephone call was made, the privileges granted by Sections 1040 and 1041 could not be used to prevent that third person from testifying concerning what he heard and saw. No case has been discovered involving this issue, but the language of subdivision 5 of Code of Civil Procedure Section 1881 indicates that no privilege now exists that would exclude such testimony.

Official information is absolutely privileged if its disclosure is forbidden by either a federal or state statute. Other official information is subject to a conditional privilege; the judge must determine in each

instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweighs the other. The statute recognizes that the Legislature cannot establish hard and fast rules to guide the judge in this process of balancing public and private interests. He should, of course, be aware that the public has an intersst in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information.

§ 1041

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

The privilege under Section 1041 may be claimed under the same conditions that the official information privilege under Section 1040 may be claimed. See Comment to Section 1040.

The privilege under Section 1041 applies only if the informer furnishes the information to a law enforcement officer or to a representative of an administrative agency charged with enforcement of the law, but the section permits the informer to furnish the information to another for the purpose of transmittal to such officer or representative.

§ 1042

Comment. Subdivision (a). This subdivision expresses the rule of existing law that in a criminal case, "since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow

it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." United States v. Reynolds, 345 U.S. 1, 12 (1953). This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the court must dismiss the case if the public entity does not reveal the information. People v. McShann, 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the court will strike the testimony of a particular witness or make some other order appropriate under the circumstances if the public entity insists upon its privilege. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958).

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

Subdivision (b). This subdivision states the existing California law as declared in People v. Keener, 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864,

361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

§ 1050

Comment. Section 1050 declares existing law. The California cases declaring such a privilege have relied upon the provision of the Constitution that "secrecy in voting be preserved." CAL. CONST., Art. II, § 5. See Bush v. Head, 154 Cal. 277, 97 Pac. 512 (1908); Smith v. Thomas, 121 Cal. 533, 54 Pac. 71 (1898). Since the policy of ballot secrecy extends only to legally cast ballots, the California cases and this section recognize that there is no privilege as to the manner in which an illegal vote has been cast. Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821 (1902).

§ 1060

Comment. This privilege is granted so that secrets essential to the successful continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness' duty to testify as the means for injuring an otherwise profitable business. See generally 8 WIGMORE, EVIDENCE § 2212(3)(McNaughton rev. 1961). Nevertheless, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that may be classified as trade secrets. Recognizing the privilege as to such information would serve only to hinder the courts in

determining the truth without providing the owner of the secret any needed protection. In many cases, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny.

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

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

§ 1070

Comment. See the Comment to Section 1072.

§ 1071

Comment. See the Comment to Section 1072.

§ 1072

Comment. This article provides a privilege of certain newsmen to maintain secrecy as to the source of their news. Because of the basic similarity between the governmental informer privilege and the newsmen's privilege--that is, both are privileges granted to maintain secrecy concerning the identity of a person who has furnished information to the holder of the privilege--the privilege given newsmen is substantially the same as that granted to public officials concerning the identity of their informers. See Section 1041. The Commission recommends this article because newsmen have a privilege under existing law. CODE CIV. PROC. § 1881(6)(superseded by this article).

The term "news media" is defined in Section 1071 to include the most important channels of communication of news to the public. Other news media are excluded and, hence, their newsmen will enjoy no privilege. This is consistent with existing California law. CODE CIV. PROC. § 1881(6). The policy of this section and of existing law is to extend the privilege to those media that are most intimately engaged in the dissemination of current news. News magazines and other media, although concerned with news, are excluded. This limitation is imposed in recognition of the fact that the privilege will exclude pertinent information in some instances. Hence, the privilege is granted only where the need for it seems most crucial.

Consistent with existing California law, Section 1072 vests the privilege in the newsman. The privilege exists not so much to protect the informer as to protect the newsman's sources of information. Hence, if the newsman believes that a particular source of information does not need the protection of secrecy, he need not invoke the privilege and the informant cannot invoke the privilege.

Section 1072 requires the information to have been disseminated. This is similar to the requirement of subdivision 6 of Code of Civil Procedure Section 1881 that the information be "published in a newspaper" or "used for news or news commentary purposes on radio or television."

Just as a judge may require disclosure of a governmental informer's identity when such disclosure is required in the interest of justice, Section 1072 also permits the judge to overrule a claim of privilege when the public interest requires that the information be disclosed.