

#34(L)

9/8/64

First Supplement to Memorandum 64-64

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--  
Division 8--Privileges)

There is attached to this memorandum a letter (green pages) received from the Rules of Evidence Subcommittee of the Judicial Council. The letter suggests the following changes in the Evidence Code:

Section 916

Section 916 now requires the judge to claim a privilege on behalf of an absent holder. The Subcommittee suggests that the section should be permissive instead of mandatory, i.e., the judge should be permitted to claim a privilege for an absent holder but should not be required to unless a party or the witness objects.

The mandatory language was placed in the section by the Commission in the full realization that it is an unenforceable requirement, for Section 918 permits a party to predicate error on an overruled claim of privilege only if he is the holder. But the mandatory language was chosen, nonetheless, to make clear to trial judges that the law is not granting them a discretionary power that they may or may not exercise as they see fit, the law is imposing on them a mandatory requirement that they should obey, despite the fact that there is no enforcement machinery if they do not do so.

Section 917

Section 917 provides a presumption of confidentiality for all of the communication privileges except the clergyman-penitent. The Subcommittee suggests that the clergyman-penitent privilege be added.

### Section 919

If Section 916 is revised as suggested, a conforming amendment would be required in Section 919--changing "required" to "provided".

### Section 970

The Subcommittee recommends restoration of the privilege of a married person to prevent his spouse from testifying against him.

The Commission originally recommended the repeal of this privilege at the 1957 legislative session. The justification for the repeal was most dramatically illustrated in People v. Ward, 50 Cal.2d 702 (1958). Defendant was threatening to kill his wife. She fled, and he shot (and killed) her mother and sister instead. The sister was killed while carrying the infant son of the defendant and his wife. Yet, upon the trial, he was entitled to claim a privilege to prevent his wife from testifying. It is difficult to conceive of any legitimate purpose to be served by allowing such a claim of privilege. The Commission's rationale seems valid--if the privilege is that of the witness spouse only, it will be invoked whenever it is needed to protect the stability of the marital relationship. But if the privilege is granted to the party spouse, it will frequently be invoked--as in Ward--when there is no marital relationship left to be protected and the party merely wishes to suppress evidence in order to thwart justice.

### Section 971

The Subcommittee recommends the following revision:

Except as provided in Sections 972 and 973, a married person whose spouse is a party to a proceeding [~~has-a-privilege~~] may not [~~be~~] be called as a witness by an adverse party [~~to-that-proceeding~~] without the prior express consent of the other spouse [~~having-the~~]

~~privilege-under-this-section~~].

The revision seems--although it is not clear--to make the privilege that of the party-spouse. The original language makes it clear that the witness-spouse is the holder of the privilege.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

CHIEF JUSTICE  
PHIL S. GIBSON  
CHAIRMAN



JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS

RALPH N. KLEPS  
DIRECTOR

RICHARD A. FRANK  
DEPUTY DIRECTOR

4200 STATE BUILDING, SAN FRANCISCO 94102

217 W. First St., Room 1001, Los Angeles 90012

109 Library and Courts Bldg., Sacramento 95814

July 30, 1964

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Room 30, Crothers Hall  
Stanford University  
Stanford, California 94305

Dear John:

Subject: Proposed Evidence Code - Privileges

You have previously received a copy of our staff memorandum, dated July 10, on the above subject.

Our subcommittee met last Saturday and considered the staff recommendations on Privileges. The subcommittee did not complete its review of this subject, but it did reach certain conclusions which I thought should be passed on to you as promptly as possible, so that they could be taken into consideration by the Commission at the August meeting.

In the following summary we have commented only on those sections of proposed Division 8 which our subcommittee thought should be changed. Also, our subcommittee did not complete its review of Article 6 (the physician-patient privilege) or of the articles which follow that one. In other words, with respect to the particular privileges included in Chapter 4 of Division 8, the subcommittee considered only the self-incrimination, lawyer-client and marital privileges.

In Chapter 3 (General Provisions Relating to Privileges) our subcommittee recommends the following changes:

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

The subcommittee concluded that this section should be permissive rather than mandatory with respect to the presiding officer excluding privileged information on his own

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otion, where neither a party to the action nor the witness from whom the information is sought raises the privilege question; but that it could be mandatory where that question is raised by party or witness.

Specifically the subcommittee recommends that section a) be revised to read as follows:

"(a) The presiding officer may on his own motion, and shall on the motion of any party or at the request of the person from whom the information is sought, exclude information that is subject to a claim of privilege . . . ."

Comment: We agree with the statement in the first paragraph of your proposed official comment on Section 916, to the effect that the section "is needed to protect the holder of the privilege when he is not available to protect his own interest." However, we are not sure about the validity of the statement in the third paragraph, that this section "apparently is declarative of the existing California law," citing People v. Atkinson, 40 Cal. 284, 285 (1870). We read this case and found that it related to a situation where the holder of the privilege was present and did attempt to protect his own interest. Atkinson was a prosecution for grand larceny, in which the attorney who had represented the defendant at the preliminary examination, but who was not representing the defendant at the trial, was called as a witness for the prosecution and asked questions regarding certain statements made by the defendant. The defendant and his attorney objected to the testimony as violating the attorney-client privilege. The attorney-witness could not recall whether the statements were made to him out of court in his capacity as attorney, or in court as a part of the defendant's testimony at the preliminary examination. Under these circumstances, the court overruled the defendant's objections and compelled the attorney-witness to testify. The Supreme Court held that this was prejudicial error, and remanded the cause for a new trial on that ground alone.

The question that concerns us is whether it is wise for you to cite Atkinson, which specifically held that it is prejudicial error for the court to fail to exclude privileged information, immediately following the statement in the comment to the effect that

"erroneous failure to exclude information pursuant to Section 916 would not amount to prejudicial error." We realize that in your comment Atkinson is cited in support of the proposition that Section 916 is "declarative of the existing California law," rather than in support of the proposition that erroneous failure to exclude privileged information "pursuant to Section 916 would not amount to prejudicial error." However, on closer analysis, is Atkinson really authority for the proposition that Section 916 is declarative of existing California law? If it is to be cited at all, would it not be better to cite it in the comment on Section 918, which provides that "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege. . . ."?"

917. Confidential communications: burden of proof

This section provides that in connection with certain communication privileges 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." The clergyman-penitent privilege is not included among the privileges listed, and our subcommittee was of the opinion that it should be included.

919. Admissibility where disclosure wrongfully compelled

In the Judicial Council staff memorandum of July 10 it was suggested that subdivision (b) of this section be revised to read:

"(b) The presiding officer did not exclude the privileged matter as required by Section 916."

With slight modification, consisting of substituting the word "information" for the word "matter," this revision was approved by the Law Revision Commission at the July meeting.

If Section 916 is revised as recommended by our subcommittee so that it would be permissive rather than mandatory with respect to the presiding officer excluding privileged information on his own motion, then the word "require" in Section 919 should be changed to "provided," since the latter term would cover both the permissive and mandatory features of Section 916.

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In Chapter 4 (Particular Privileges) our subcommittee recommends the following changes:

970. Privilege not to testify against spouse

Our subcommittee was of the opinion that a married person should not only have the privilege of refusing to testify against his spouse, but should have the converse privilege of preventing his spouse from testifying against him. Therefore, the subcommittee recommends that Section 970 be revised to read as follows:

"Except as provided in Sections 972 and 973, a married person has a privilege not to testify against his spouse, and a privilege to prevent his spouse from testifying against him, in any proceeding."

If this change is made the heading should also be revised to read "Privilege not to testify against spouse, and to prevent spouse from testifying."

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

Our subcommittee recommends a minor revision in this section which would eliminate a few words without changing the substance. If revised in accordance with the subcommittee's recommendation, the section would read as follows:

"Except as provided in Sections 972 and 973, a married person whose spouse is a party to a proceeding may not be called as a witness by an adverse party without the prior express consent of the other spouse."

Due to August vacations planned by subcommittee members, we will not have a chance to complete our review of Privileges until the next meeting, which is scheduled for August 29. After that date we will prepare a report showing the conclusions reached by the subcommittee on the entire Privileges Division, as well as reports on the subjects previously considered.

Very truly yours,

Ralph N. Kleps, Director

By

  
Warren P. Marsden  
Attorney

WPM:elt

cc: Members of Rules of  
Evidence Subcommittee