

#63.20-40

6/10/69

Memorandum 69-81

Subject: Study 63.20-40 - Evidence (Marital Privilege)

At the June 6-7 meeting, the Commission discussed the deletion of the provisions relating to the marital testimonial privileges from Senate Bill 103 and the submission of the same provisions on these privileges to the 1970 Legislature. The staff was directed to prepare a recommendation on the marital testimonial privileges for consideration by the Commission at the June 26-28 meeting.

The recommendation is attached. We also attach pertinent portions from the C.E.B. book on "Trial Objections." Although we believe that the recommendation should be distributed for comment, we also request that we be permitted to get it ready to print during the summer so that this work can be finished up when the printer is not busy. We have no doubt but that the recommendation will be approved by the State Bar and other interested groups since these groups previously approved the same recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

June 10, 1969

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 6--The Marital Testimonial Privileges

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE: COMMENTS OF INTERESTED PERSONS AND ORGANIZATIONS MUST BE IN THE HANDS OF THE COMMISSION NOT LATER THAN AUGUST 15, 1969, IN ORDER THAT THEY MAY BE CONSIDERED BEFORE THE COMMISSION'S RECOMMENDATION ON THIS SUBJECT IS SENT TO THE PRINTER.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

LETTER OF TRANSMITTAL

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study the law of evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed.

Senate Bill 103 was introduced at the 1969 legislative session to effectuate a Commission recommendation that certain revisions be made in the Privileges Article of the Evidence Code. See Recommendation Relating to the Evidence Code: Number 4--Revision of the Privileges Article (November 1968), reprinted in 9 Cal. L. Revision Comm'n Reports 501 (1969). The bill as introduced included provisions relating to the marital testimonial privileges. However, questions were raised concerning these provisions when the bill was debated on the Assembly floor and the provisions were amended out of the bill before it was voted on by the Assembly so that enactment of the remainder of the bill--provisions relating to the psychotherapist-patient privilege--would not be delayed.

This new recommendation is the same in substance as the marital testimonial privileges portion of the recommendation submitted to the 1969 Legislature.

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to THE EVIDENCE CODE

Number 6--The Marital Testimonial Privileges

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others.¹

The Commission has reviewed HEAFEY, CALIFORNIA TRIAL OBJECTIONS (Cal. Cont. Ed. Bar 1967) and has concluded that Sections 971 and 973 require revision to eliminate problems identified by Mr. Heafey. Accordingly, the Commission makes the following recommendations.

Section 971

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege *not to be called* as a witness by any adverse party unless the witness spouse consents or the adverse party has no knowledge of the marriage. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person *not to testify* against his spouse (Evidence Code Section 970).

In a multi-party action, the privilege of a married person not to be called as a witness may have undesirable consequences. The privilege not to be called apparently permits the married person to refuse to take the stand even though the testimony sought would relate to a part of the case totally unconnected with his spouse. As worded, the privilege is unconditional; it is violated by calling the married person as a witness whether or not the testimony will be "against" his spouse.

Edwin A. Heafey, Jr., has stated the problem as follows:

For example, if a plaintiff has causes of action against *A* and *B* but sues *A* alone, neither privilege can prevent the plaintiff from calling Mrs. *B* as a witness and obtaining her testimony on mat-

¹ For further discussion, see 8 CAL. L. REVISION COMM'N REPORTS 1314 (1967).

ters that are relevant to the cause of action against *A* and do not adversely affect *B*. However, if plaintiff joins *A* and *B* in the same action and wants to call Mrs. *B* for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party adverse to her spouse . . . and from questioning her by her privilege not to testify against her spouse²

The privilege not to be called as a witness also may lead to complications where both spouses are parties to the proceeding. Where an action is defended or prosecuted by a married person for the "immediate benefit" of his spouse or of himself and his spouse, Evidence Code Section 973(b) provides that either spouse may be required to testify against the other. Evidence Code Section 972(a) provides that either spouse may be required to testify in litigation between the spouses. Thus, the privilege not to be called and the privilege not to testify against the other spouse are not available in most cases in which both spouses are parties.³ However, where the spouses are co-plaintiffs or co-defendants and the action of each is not considered to be for the "immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case.⁴ Moreover, the adverse party apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.⁵

If the privilege of a spouse not to be called as a witness were limited to criminal cases,⁶ the significant problems identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against" the party spouse. Accordingly, the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.

²HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

³See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

⁴"[A]llowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship." HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.9 at 317 (Cal. Cont. Ed. Bar 1967).

⁵Id. § 40.10 at 317.

⁶Apparently this privilege was not recognized in civil cases before adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 298, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See *People v. Carmelo*, 84 Cal. App.2d 301, 210 P.2d 538 (1949); *People v. Moore*, 111 Cal. App. 682, 295 Pac. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See *People v. Ward*, 50 Cal.2d 702, 325 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury.

Section 973

Section 973(a) provides that 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 Section 970 (privilege not to be called) or 971 (privilege not to testify against spouse) in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation, the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges—including the privilege not to testify against the party spouse—are waived, despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.⁷ The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 971^{and} 973 of the Evidence Code, relating to evidence.

The people of the State of California do enact as follows:

Evidence Code Section 971 (amended)

SECTION 1. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a party to a defendant in a criminal

⁷ See HENNEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

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 unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended to preclude the assertion by a married person of a privilege not to be called as a witness in a civil proceeding. As to any proceeding to which his spouse was a party, the former wording of Section 971 appeared to authorize a married person to refuse to take the stand when called by a party adverse to his spouse even in multi-party litigation where the testimony sought related to a part of the case wholly unconnected with the party spouse. See HEAPEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. *Id.* § 40.10 at 317.

Elimination of the privilege *not to be called* in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege *not to testify* against one's spouse in any proceeding (Section 970) and the privilege for confidential marital communications (Section 980) are available in a civil proceeding. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case, the non-party spouse should be required to testify. If the testimony would be "against" the party spouse, the witness spouse may claim the privilege not to testify given by Section 970.

Evidence Code Section 973 (amended)

SEC. 2. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies for or 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.

Comment. Subdivision (a) of Section 973 is amended to eliminate a problem that arose in litigation involving more than two parties. In multi-party civil litigation, if a married person is called as a witness by a party other than his spouse in an action to which his spouse is a party, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the former wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges—including the privilege not to testify against the party spouse—were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.