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MINUTES OF MEETING

of

MARCH 15 and 16, 1963

Sacramento

A regular meeting of the Law Revision Commission was held in Sacramento on March 15 and 16, 1963.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable James A. Cobey
Honorable Pearce Young (March 15)
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, ex officio

Absent: Joseph A. Ball
James R. Edwards

Messrs. John H. DeMoully, Joseph B. Harvey and Jon D. Smock of the Commission's staff were present, in addition to the following persons:

Herbert E. Ellingwood, Office of Alameda District Attorney (March 16)
Ralph Kleps, Administrative Director of the Courts (March 15)
Arthur H. Sherry, Professor of Law, University of California at Berkeley (March 16)

Minutes of the February Meeting. The minutes of the February meeting were approved.

Future Meetings.

April 26-27, 1963 Sacramento

ADMINISTRATIVE MATTERS

Study No. 34(L) URE.

The executive secretary raised the question how to interest the judges in the evidence study so that the Commission might have the benefit of their thinking before the final recommendation is prepared. Mr. Ralph Kleps, Administrative Director of the Courts, suggested that a formal request from the Commission to the Chief Justice be made for the appointment of an advisory committee from the Judicial Council to work with the Commission on the URE study. A suggestion was also made that the Conference of Judges be requested to appoint a similar committee from that organization. Other groups of interested persons should also be contacted. The staff will prepare a list of organizations for consideration by the Commission so that contact with them may be made at or about the close of the legislative session.

Revision of Penal Code.

The Commission considered Memorandum No. 63-19 and the first supplement thereto.

The Commission has asked Professor Arthur Sherry of the Law School at the University of California at Berkeley whether he would be willing to serve as Chief Research Consultant if the Commission were directed to undertake a revision of the Penal Code. Professor Sherry indicated he would be willing to serve in this capacity.

The Commission discussed the procedure it would follow in revising the Penal Code. Professor Sherry indicated he would like to work with an Advisory Committee in preparing the research study. The research study

is needed to provide the Commission with necessary background research before the Commission undertakes the revision of the Penal Code. Professor Sherry indicated that he believes that the Advisory Committee would be the best method he could use to obtain practical suggestions from experienced persons concerned with the administration of criminal laws. The Commission agreed that an Advisory Committee would be appointed to assist Professor Sherry in preparing the research study.

The Commission did not determine the method of appointment of members of the Advisory Committee. The Executive Secretary was directed to confer with Senator Regan concerning this matter. The Executive Secretary and Professor Sherry also are to prepare a statement of the anticipated costs of preparing the research study. This statement is to be incorporated into a revised statement of the procedure the Commission would use in revising the Penal Code. The Executive Secretary was directed to discuss the statement with Senator Regan and, if Senator Regan believes it to be desirable, with the Chairman of the Assembly Committee on Criminal Procedure.

Executive Secretary a full-time State position.

The Commission considered a staff proposal that the position of Executive Secretary be made a full-time State position. At the present time, 80 percent of the salary of the Executive Secretary is paid by the State and 20 percent is paid by Stanford. The Executive Secretary is expected to teach one seminar each year in the Stanford Law School.

During the past two years, the Law Revision Commission has produced approximately three times the volume of work produced in any previous two-year period. The only increase in staff during the past two years has been

the addition of an administrative trainee, who devotes a substantial portion of his time to editing and preparing materials for publication. Also, during the past two years, the position of Executive Secretary has been made an 80 percent State position. It formerly was a 75 percent State position.

There is every indication that the workload of the Commission will remain at its present level. The Commission's agenda contains 28 topics previously approved by the Legislature. During the next two years, the Commission must complete work on the Uniform Rules of Evidence, a study that the Legislature directed the Commission to make by concurrent resolution adopted in 1956. In addition, during the next two years, recommendations relating to various aspects of sovereign immunity and eminent domain law should be prepared.

The Executive Secretary of the Commission actually has worked full time for the Commission since May 1962, although Stanford has paid 20 percent of his salary during that time. The Commission workload during the past two years has been such that the Executive Secretary has averaged about 50-55 hours a week on Commission work. The two other attorneys who are members of the Commission's staff also have worked a substantial number of hours in excess of the normal work week on a continuing basis.

During the current legislative session, it has become apparent that the Executive Secretary is required to be in Sacramento more than one-half time in order to meet with interested persons to explain the Commission's recommendations and in order to be on call for various legislative hearings

held on bills introduced upon recommendation of the Commission.

The present office quarters occupied by the Commission do not provide space for an office for an additional attorney. It is not anticipated that the volume of work produced by the Commission will decrease to the point where it will be possible for the Executive Secretary to devote any significant portion of his time to law teaching. Accordingly, it appears that the only step that can be taken at this time to provide some relief to the Commission's staff is to make the position of Executive Secretary a full-time position.

A motion was unanimously adopted that the position of Executive Secretary be a full-time State position. The Executive Secretary was directed to request that the necessary funds to finance this change be included in the 1963-64 budget.

1963 LEGISLATIVE PROGRAM

Sovereign Immunity.

The Executive Secretary reported on the amendments made to Senate Bill No. 42 (liability of public entities and public employees) and Senate Bill No. 43 (claims, actions and judgments against public entities and public employees).

The Commission determined that no objection should be made to the amendments, except for the amendment to Senate Bill No. 42 which provides that an employee is liable for certain injuries caused by prisoners and inmates of mental institutions and for certain injuries to prisoners and inmates of mental institutions. Under the amendments, the public entity, however, is immune from liability, even though the employee is liable. The Commission directed the Executive Secretary to point out the effect of the amendment to the various legislative committees that will consider the bill. The Commission believes that the amendment is inconsistent with the general theory of the bill and will result in an undesirable exception to the liability of public entities.

Discovery in Eminent Domain.

Mr. Ralph Kleps, the Administrative Director of the California Courts, presented a proposal to amend Senate Bill No. 71 to permit the Judicial Council to prescribe rules that would tie the discovery procedure set forth in the bill into the pretrial conference procedure. It was generally recognized that the proposal was meritorious if assurance were provided

that double preparation by the expert witnesses could be avoided. The Commission approved amending S.B. No. 71 to insert between lines 36 and 37 of page 2 of the bill as introduced:

> (e) The Judicial Council, by rule, may prescribe times for serving and filing demands and cross-demands, and a time for serving and filing statements of valuation data, that are different from the times specified in this section, but only if such rules provide assurance that the trial will be held within 20 days from the day on which the statements of valuation data are required by such rules to be served and filed. Such rules may provide for a different form of statement than that specified by paragraph (2) of subdivision (c).

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE

(Privileges Article)

The Commission considered Memoranda 63-21, 63-22, and 63-6 and Revised Rules 25, 26 and 27. The following actions were taken:

Rule 25. The staff pointed out that the qualifying language attached to subdivision (6) was added to protect required business records from prying by private persons for purposes unconnected with the reason the records are required to be kept. The "self-incrimination" privilege is not designed for this purpose, and it does not protect required records maintained by corporations and required records where administrative discipline, as opposed to criminal punishment, is the only governmental action possible.

The Commission considered adding Rule 32.1 to protect required records generally against prying for purposes unconnected with the reason the records are required to be kept. Some expressed the view that the principle expressed in proposed Rule 32.1 is too broad and would make secret too many ordinary business records that otherwise would not be secret. They felt that subdivision (6) goes too far in this direction already. For example, if a public carrier (unincorporated) were required to maintain records so that a regulatory agency could determine whether safety standards were observed, a passenger injured because of a violation of safety regulations would be unable to require their production in his action for damages, but the regulatory agency could compel production of the records so that they could be used in a prosecution or an administrative disciplinary proceeding for the same violation. Others felt that subdivision (6) is not broad

enough since it does not protect corporate records or records upon which administrative disciplinary action only might be based. For example, in the supposed case, above, the plaintiff could force production of the records if the carrier were incorporated or if the only penalty the government could impose were license suspension or revocation.

The Commission left the discussion without taking any action because there did not appear to be 4 votes in favor of any particular proposition.

Rule 26. A motion to delete the reference to "advice" in subdivision (1)(b) and to substitute a reference to "communication" wherever the word "information" is used failed.

The staff was directed to add "or conservator" in subdivision (1)(c) following the word "guardian."

The language of subdivision (3), prepared to carry out the Commission's decisions at the February meeting, was approved.

To clarify the meaning of subdivision (4)(a), it was revised to read:

> (a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe 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 revision was to make clearer that the privilege is gone even though the trial judge himself might not be convinced that the conversation was for an illegal purpose; all that the judge has to find is that the evidence would sustain a finding that the services of the lawyer were sought to aid someone in the commission of a crime or fraud. It was suggested that Rule 8 of the

URE, which requires the judge to make the appropriate findings in every case where the admission of evidence is subject to a condition, obviates the necessity for requiring the judge to make findings in this rule. However, the subdivision was approved as indicated because Rule 8 would apparently require the judge to be convinced that the lawyer's services were sought for an improper purpose whereas Rule 25 merely requires him to find that there is sufficient evidence to sustain a finding to that effect, whether or not that evidence has convinced him.

The Commission was satisfied, after discussion, that the exception stated in (4)(a) would be satisfied by a showing of subsequent criminality on the part of the client together with some evidence from which it might be reasonably inferred that the prior consultation with the lawyer was for the purpose of seeking advice in regard to the subsequent criminal conduct.

It was pointed out that this statement of the exception will change the law as it has developed in the cases relating to this privilege. Under the cases, it appears that if there is some evidence of the subsequent criminality of the defendant, the lawyer may be asked concerning consultation relating to that conduct; and, too, although the communication itself may not be compelled to be revealed to the judge to permit him to rule on a claim of privilege, if there is evidence of the communication itself which reveals its unprivileged nature--as, for example, where a document containing the communication is lost and is found by third parties, or where a

party to the conversation or a third party who has heard part of the conversation testifies as to what was said--the evidence will not be struck merely because there is no other evidence as to the nature of the communication.

The Commission indicated that the existing exception to the privilege as expressed in the cases is too broad, and a lawyer should be required to keep inviolate the confidences of his client at least until other evidence has been introduced from which a reasonable inference might be drawn that the communication was for the purpose of aiding someone in the commission of a crime or fraud. Without the foundational requirement of independent evidence, the very thing sought to be protected by the privilege--the communication between client and lawyer--would be revealed in the process of determining whether or not the privilege applies.

A motion to delete the exception entirely, because of the many innocuous business crimes, the discussion of which would not be privileged, did not carry.

The Commission considered the language proposed by the staff to carry out the Commission's decisions in regard to subdivisions (4)(d) and (4)(e). In the second line of subdivision (4)(d), the word "person" was changed to "client". With this modification, subdivisions (4)(d) and (4)(e) were approved. Under the Commission's revision, (4)(d) is strictly an "attesting witness" exception, and is probably narrower than the exception in existing California law. The Commission indicated that the mere fact that a lawyer acts as an attesting witness should not abrograte the privilege

as to all communications relating to the attested document. Subdivision (4)(e) is considerably broader than the existing California law, for the existing California law has an exception only in regard to wills when the parties involved both claim under the testator by inheritance or succession. Subdivision (4)(e), however, creates an exception for communications relating to all dispositive instruments and contains no requirement of any privity between the parties and the deceased client. The exception is justified, however, because the client, being deceased, has little interest in preserving the secrecy of his communications and because of the importance of establishing the intent of the maker with respect to dispositive instruments.

Rule 27, 27.1, 28 and 29--generally. The staff was directed to revise Rules 27, 27.1, 28 and 29 (the communication privileges) so that they conform to the language and style of Rule 26. The purpose is to use the identical language in all of these rules where the identical meaning is intended. Variations in language between the rules should appear only where substantive differences between the rules justify them.

Rule 27. In subdivision (1)(a), in the definition of "confidential communication between patient and physician", the Commission considered whether to include advice given by the physician. The Commission was unable to resolve the question. Some Commissioners indicated that if the privilege did not extend this far, in many cases the nature of the patient's communication might be discovered by asking the physician what his advice was to the patient. Others, however, expressed the view that the only function of the privilege is to protect the patient's communications so that he may give all necessary information to the physician in order to obtain treatment: hence, Rule 27 should only protect the patient's communications to the

physician.

The Commission discussed whether "mental" should be left in subdivision (1)(c) but passed the question until the psychotherapist-patient privilege is considered.

In subdivision (1)(d), everything following the word "nation" was deleted. Thus, the privilege is applicable to communications made to any physician regardless of where the physician is authorized to practice medicine and regardless of where the consultation takes place. The Commission recognized that persons travel from jurisdiction to jurisdiction and have occasion to consult physicians during their travels, and in some cases persons deliberately travel to other jurisdictions to consult particular specialists, and the Commission did not think that a person should be required to investigate the laws of privilege in a particular jurisdiction before consulting a physician there. Commissioner Stanton voted against this extension of the privilege. He indicated that California should not be extending privileges since they keep out relevant evidence where it is needed; if the conversation is not privileged where it takes place, California should not give it greater sanctity.

The Commission deleted subdivision (2)(b) as unnecessary. The Commission indicated that the requirement that the communication be for the purpose of obtaining treatment should be expressed in the definition of "confidential communication, which, when revised to conform with Rule 26, will require the communication to have been in the course of the professional relationship of physician and patient. The comparable requirement in Rule 26 is

contained in the definition and the matter should be handled in the same way in Rule 27. Commissioner Stanton voted against deleting this subdivision, because the requirement that the communication be for the purpose of treatment should be explicit.

Subdivision (2)(c) was deleted as unnecessary.

In subdivision (3)(c), the word "felony" was deleted and the words "criminal offense" were substituted therefor. This change was made pursuant to the suggestion of the Northern Section of the State Bar Committee. It was pointed out that the privilege is inapplicable in criminal proceedings involving either felonies or misdemeanors, and if the evidence is revealed in such a proceeding it will be admissible as former testimony in civil proceedings. If the exception is limited to damages actions for conduct amounting to felony, too great a premium will be placed on which action is tried first. Moreover, until the criminal trial is held and sentence is adjudged, it is impossible in many cases to determine whether the particular conduct involved was a felony or a misdemeanor; for in many cases it is the sentence that is imposed that fixes the grade of the offense.

The staff was directed to revise subdivision (5) to eliminate the reference to pleadings and to make the exception applicable whenever a party tenders the issue of his condition. It was recognized that a person may place his condition in issue in a variety of ways, and the pleadings will not necessarily reveal when he has done so. Commissioner Stanton voted against this change. In connection with this matter, the Commission discussed whether the privilege should be waived in these circumstances or whether, whenever a party's condition is in issue and the other party would be

prejudiced by the withholding of the information, the holder of the privilege should be forced to choose--as the government is forced to choose under existing law relating to the governmental secrets and informer privileges--between maintaining the secrecy as to his condition and contesting the issue where the condition is relevant. The Commission passed the question without action for further consideration in connection with the governmental secrets and informer privileges.

The Commission considered, but did not approve, the suggestion of the State Bar Committee that the reference to "charter, ordinance, administrative regulation or other provision" be deleted. If the information is validly required to be reported by these enactments, the information will be available from the public records and there is no reason for anyone to assert a privilege in regard to it.

The Commission considered whether to add an exception for joint patients similar to that in Rule 26(5) relating to the lawyer-client privilege. The Commission took no action on the question on the theory that there is no need for such an exception until the privilege rules make clear that there is not a waiver of the privilege that occurs automatically during a joint consultation because of the presence of the other person. It was pointed out that if this theory is correct, subdivision (5) of Rule 26 (joint client exception) is unnecessary also, and subdivision (2) of Rule 37 (waiver by one of joint holders of privilege) makes no sense at all. Both of these subdivisions assume that the privilege is applicable to communications made

during a joint consultation on a matter of common concern and that confidentiality is not destroyed by the presence of another. To the extent that there is ambiguity in this regard, it arises from the definition of "confidential communication" and should be clarified there, for it is that definition that indicates that a communication is not confidential and, hence, not privileged when made in the presence of anyone not necessary for the transmission of the information.

Miscellaneous suggestions. During the discussion of the joint-client, joint-patient problem, a suggestion was also made that the rules should provide that a communication made to a lawyer, doctor or psychotherapist while a spouse (to whom confidential communications may also be made) is present is nonetheless confidential and privileged.

During the discussion of the rules generally, a suggestion was also made that provisions in the rules requiring the judge to make foundational findings or prescribing the procedure by which such findings should be made should be deleted and the subject fully covered in Rule 8. It was also suggested that consideration should be given to requiring a disclosure of the confidential communication to the judge out of the presence of the jury, the opposing party and his counsel so that the judge can determine whether or not the communication is in fact subject to the privilege. This procedure would be designed to prevent the fraudulent assertion of privilege to protect information not given in confidence, not given in a professional relationship or otherwise not subject to the privilege.

These suggestions were not acted upon, but were made merely as matters for the Commissioners to bear in mind when later rules are considered and when the Commission attempts to harmonize all of the rules.