Memorandum 63-8

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rule 28--Marital Privilege)

Rule 28 and the remaining rules of the privileges article have not been reconsidered by the Commission since its decision of May 1961 to reconsider all of the privileges rules on the merits. We have not received the final comments of the State Bar Committee as yet. For your information, however, we attach hereto the following materials:

Exhibit I (gold pages)--Argument of Professor Clark B. Whittier, Stanford University, Prepared for a Tentative Draft of a Partial Recodification of the California Law of Evidence for the California Code Commission (1937).

Exhibit II (yellow pages)--Excerpt from Minutes of Meeting of Southern Section of State Bar Committee to Consider Uniform Rules of Evidence..

Exhibit III (pink pages)--Excerpt from Minutes of Meeting of Northern Section of State Bar Committee to Consider Uniform Rules of Evidence.

We are also enclosing the pamphlet published by the Law Revision Commission in November 1956 relating to the marital "for and against" testimonial privilege.

In connection with Rule 28, you should read pages 91 to 101 of the privileges study. Compare, too, the treatment of this rule in the New Jersey materials.

The State Bar Committees have raised some problems in connection with the present form of the rule, and there seems to be some other problems which should be considered by the Commission. These are:

Subdivision 1. Professor Whittier raises the question whether there should be any more of a privilege insofar as spouses are concerned

than there is when brothers, sisters, parents, and children are involved. He questions whether confidential communication is actually encouraged by the privilege and expresses doubt that confidential communication has been inhibited between mothers and daughters or fathers and sons because of the absence of any legal protection for such communications.

Subdivision 2. The Southern Section agrees that either spouse should be able to claim the privilege. It disagrees, however, with the Commission's reason for giving both spouses the privilege. The Southern Section agrees with Professor Whittier that confidential communications are exchanged between spouses without regard to the existence or lack of existence of a privilege. The Section thinks that both spouses should have the privilege because it is impracticable to give the privilege to but one. See the examples on page 2 of Exhibit II.

The Commission's reason for granting a post coverture privilege--prevention of blackmail--seems unconvincing. It seems that because the privilege is granted to both, a divorced wife could just as well demand compensation to permit revelation of needed evidence. Moreover, the privilege is only operative in situations where testimony can be compelled. There is nothing in the rule which would prevent an ex-wife from forcing a husband to "buy" her silence as to business and other transactions he told her about in confidence during the marital relationship. Nothing in the rule keeps her from telling confidences to friends, neighbors, business competitors or anyone else. The fact that the wife is privileged under this rule to refuse to give testimony of benefit to a spouse will be discussed more at a later time under subdivision 3 (c).

Subdivision 3. The Southern Section of the State Bar Committee notes on page 3 of Exhibit II that the proceedings listed in paragraph (b) of subdivision (3) are those listed in Penal Code Section 1322, except that proceedings under the Juvenile Court Law are not in this subdivision. Penal Code Section 1322, however, deals with the competency of a husband or wife as a witness. Penal Code Section 1322 provides that there is an exception to this rule of incompetency in juvenile court proceedings. But, even though there is an exception to the rule of incompetency, there is nothing in Section 1322 that indicates that the marital communication privilege expressed in Code of Civil Procedure Section 1881 is inapplicable. Nonetheless, the Commission may wish to consider whether proceedings under the Juvenile Court Law should be added to the list of proceedings under which the marital communication privilege is inapplicable.

It is difficult to understand why paragraph (b) of subdivision (3) is limited to "a criminal action or proceeding." If the privilege is designed to enhance and protect marital relationships, there seems to be no reason for giving a spouse in any kind of a proceeding, civil or criminal, a privilege to refuse to disclose communications--or to prevent the other spouse from revealing communications--which the other spouse is actively seeking to introduce into evidence. The only possible motive for such an action is spite. For somewhat similar reasons the Commission recommended the abolition of the "for and against" testimonial privilege in 1956. Yet, as pointed out on page 94 of the study, "a vestige of it [is] retained by giving both spouses the privilege to suppress evidence of a confidential interspousal communication."

Subdivision (3) (c) is apparently designed to eliminate this vestige so far as criminal actions or proceedings are concerned, but it would seem that similar considerations would require an elimination of this vestige in all proceedings.

Subdivision 4. Both divisions of the Committee object to the deletion of "sufficient evidence, aside from the communication, has been introduced to warrant a finding that". This same objection has been noted in connection with the previously approved rules and in each case the Commission has decided that the omitted words should not be returned to the rule.

The Southern Section had difficulty with the references to "crime" and "fraud". They point out that some crimes may be highly technical and relatively innocuous and some torts may be very serious--much worse than some crimes. They request that the Commission rethink this subdivision. They believe the reference to crime should be retained but they would like to see some limitation on the reference which would tend to limit the reference to crimes involving moral turpitude as distinguished from mere technical violation of the law. So far as torts are concerned they would like to see language in the rule indicating that the tort or fraud is one of major consequences such as a tort involving bodily harm, actual fraud, etc. The problem pointed out by the Southern Section in connection with this subdivision is a problem which also exists in Rule 26.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo 63-8

EXHIBIT I

ARGUMENT FOR ABOLITION OF ALL RESTRICTIONS BASED ON THE HUSBAND-WIFE RELATIONSHIP

Prepared by Clarke B. Whittier

Professor of Law, Stanford University

PAST AND PRESENT LAW

At common law husband and wife were incompetent to testify for or against each other. About 1850 statutes greatly restricted this general rule, which even at common law was subject to certain exceptions. Then, generally by the same statutes, a new principle was recognized; namely, that spouses have a privilege not to disclose marital communications. Thus there are three situations that require consideration: 1. Testimony by one spouse for the other. 2. Testimony by one spouse against the other. 3. Testimony of a spouse to marital communications.

The present law in England may be roughly stated thus: 1. Testimony by one spouse for the other is competent and compellable in civil cases, but in criminal cases is competent and compellable only for the defendant and at his option. 2. Testimony by one spouse against the other is competent and compellable in civil cases, but in criminal cases is generally incompetent. But in a number of sex crimes and some others the spouse is competent and compellable in criminal cases. 3. Testimony of a spouse to marital communications is competent but not compellable. To put it another way: in civil cases nothing is left but the privilege not to disclose marital communications, while in criminal cases testimony

of a spouse for the defendant is allowed at his option but testimony against him is incompetent and testimony to marital communications privileged.

The state of the law in the United States can best be apprehended by an examination of the appended chart.

It will be noticed that incompetency is nearly gone: even as to testimony of a spouse (1) against a criminal defendant, or (2) to marital communications only one-third of the states retain incompetency. Clearly privilege may be made to protect all the policies underlying any of the husband-wife restrictions and incompetency should be everywhere abolished. The purport of these policies will be later set out and discussed.

Next, one should notice that statutes removing the incompetency that existed at common law and creating no privilege should be construed as making the evidence compellable. So the figures in the table following "Competent" and following "Compellable" may well be added together in attempting to envisage the situation. Doing that, we find that in about one-half the states there is no restriction on evidence for a spouse in any case or against a spouse in a civil case. But evidence against a spouse in a criminal case is unrestricted in only ten states while evidence to communications is unrestricted nowhere.

We can see also that the plan of making the evidence privileged, as in California at present, is popular, prevailing in full half the states as concerns evidence against a spouse in criminal cases and evidence to communications. But it must be remembered that also, as in California, there are many cases, set forth in the statutes as exceptions, in which the evidence is entirely unrestricted. Thus the vote for privilege is much smaller than the figures in the chart taken alone would suggest.

STATUTES CONCERNING INCOMPETENCY OR PRIVILEGE OF

HUSBAND AND WIFE

	For each other		Against each other		To Communications
	Civil	Criminal	Civil	Criminal	
Incompetent	4	4	9	16	16
Privileged	16	22	15	25	24
Waiver by spouse testifying.	1	6	1	9	7(?)
Waiver by other.	15	10	14	8	16
Waiver by both.		6		8	1
Competent.[1]	13	15	11	6	
Compellable.[2]	12	9	11	4	
Doubtful or partial.					3
Confidential Communications.					12
Any Communications.[3]					27

Notes

1. This means that these states have abolished incompetency and said nothing as to privilege.

2. This means that in these states there is neither incompetency nor privilege.

3. But in a number of these states any disability is limited to confidential communications by the courts.

. . . . . .

Some states have broad exceptions in which no disability exists, exceptions such as "all criminal cases" or "all civil cases." Such states number thirty.

Other states have restricted exceptions, such as "divorce", "failure to provide for children", or "alienation of affections." Such states number forty-three. Therefore some of these states have broad exceptions also.

It is the conviction of the writer that all restrictions based on the husband-wife relationship should be removed and that California may well be the leader in this reform.

GENERAL CONSIDERATIONS

I.

It is plain that the history of these restrictions consists of a gradual lessening of their rigor as in the change from incompetency to privilege, of a gradual introduction and increase of exceptional cases where they are not to apply and of much total abolition as to everything except the privilege concerning marital communications. It does not follow that our ultimate goal should be total abolition of everything. But it suggests that rules so riddled with exceptions and partial extinctions cannot have a very firm basis to rest upon.

II.

Next, the fact that no analogous restrictions have been created for other family relationships makes one wonder why the marriage relation should be singled out. Can it be that a mother should not be allowed to testify for her daughter? The daughter's husband has been murdered, the daughter is on trial. The mother was the only other occupant of the house at the time. She can prove her daughter's innocence. Should she be excluded from the stand? It does not seem so. But suppose she could prove her daughter's guilt. Is the fear of injuring the mother-daughter relation or the repugnance of the mother to condemning the daughter any sufficient reason for letting the criminal daughter escape her due? Again, it does not seem so. Would it be right to let the

daughter exclude even the testimony of the mother to communications from the daughter to the mother tending strongly to show malice aforethought? It does not seem so. In how many cases are mother and daughter limited in their communications to each other because of the absence of a rule of evidence excluding their proof or making them privileged? Probably in none. Rarely do they know anything about the rules of evidence. This protection of the freedom of communication between husband and wife by excluding or making privileged their communications is with little doubt a great farce. They do not know the law and they do not care what it is. They communicate normally, whatever that may be, regardless. It has been well said "As far as the writers are aware (though research might lead to another conclusion) marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups."

Our conclusion must be that there is no such difference between the marital relationship and other family relationships as to justify great protection for the marital relationship while none is given to the others.

III.

In other days it was not uncommon to urge the <u>interest</u> of spouses in each other's property and services as a basis for incompetency or privilege. But of course today when parties are competent to testify in their own behalf all objection on the ground of interest is gone.

Again their bias for each other has been relied on as an argument for some restriction on their testimony. But bias, except when due to interest, has never been a ground of incompetency or privilege: it has been provable

only to impeach the witness. As has just been said interest is no longer a ground of objection and bias due to interest is therefore now also only a basis for impeachment.

It has seldom been urged that the evidence of spouses is so likely to be false that it should be held incompetent on the same line of reasoning that we exclude hearsay evidence. To such an argument it may be answered that its possible falsity is due solely to interest or bias and that these, as we have just stated, are insufficient to exclude the evidence.

IV.

Next we may mention the soft-hearted argument that it is rough to make one spouse testify against the other or to marital confidences, that the spouse called will dislike the task. It hardly needs an answer. Is this antipathy of a spouse to giving such testimony to outweigh the need for doing justice? It is often difficult to get convincing and admissible evidence of facts which one is convinced are facts. This difficulty should not be increased without strong reasons. Criminals must not be allowed to go free to save the feelings of witnesses, spouses or not spouses. Civil wrongs also must not on such sentimental grounds go unredressed.

V.

Another and more plausible argument for restrictions is that compelling a spouse to testify will disturb, perhaps destroy, marital peace. In the first place no right minded spouse will be angered by the testimony of the other spouse though against him or though disclosing marital secrets if such testimony is compelled by the law. He may curse the law just as when

he himself is compelled to testify against himself. But as he would not blame himself so he would not blame his wife. It may be fairly assumed that most spouses would take that attitude and that no possible harm could result. Occasionally however a thoroughly unreasonable spouse might resent even compelled testimony. Some injury to the marriage relation might result. But we cannot in order to avoid such a rare unfortunate outcome exclude evidence which in the great majority of cases will do no such harm and will be useful and perhaps absolutely essential to the discovery of truth and the doing of justice.

Nor can the danger of revenge in some form on the witness by such an unreasonable spouse induce us to exclude evidence from a spouse. The danger is slight when we consider that but few spouses would take any offense and that but few of these would go the length of revenge. The danger of punishment in some form for revengeful acts would lessen them. The witness would, unless family peace were already gone, naturally testify as favorably as possible for the party spouse and make hard feeling well nigh impossible.

VI.

The protection and encouragement of marital confidence is also urged. This applies chiefly to communications between the spouses and is the usual argument for making such communications privileged. But on examination it seems quite insufficient to support any such doctrine. First, what marital communications should be fostered? If a husband tells his wife he has murdered and robbed someone, should we protect that? Obviously it will either be a statement that a crime they both plotted has been consummated or else it will be made to induce the wife to conspire

with him to accomplish his escape. There seems to be little justification for especially favoring such communications. Justice may demand their proof at the trial. If a husband discloses to his wife a civil wrong which he has committed, does that deserve to be kept sacred? It is really only communications which are both confidential and which involve no harm to others which fall within the reason of the rule. But such communications are seldom if ever material in any litigation. In will contests statements of affection for relatives to whom nothing was given are sometimes important. I do not recall a case in which such a statement was excluded because made between husband and wife: the usual objection is hearsay. In alienation of affections cases they may be important and usually are received. They might well bear on motive for crime in some cases. Perhaps in all these cases they should be admitted. But surely to exclude or privilege them in all cases is to do much more harm than good.

Few know of this marital privilege. It cannot increase confidence in those who never heard of it. Suppose it were removed entirely, would spouses be more discreet? Are sisters more discreet in their conversations because there is no privilege? Are married lawyers who presumably know of the privilege less careful in what they tell their wives than other husbands who do not know of the protection? There is no proof that it has any value.

In California and several other states it extends beyond confidential communications. None of the alleged reasons for the privilege justify this. It can only be sustained as an administratively convenient way of avoiding the question whether a particular communication is confidential. To thus extend the scope of a privilege in itself unjustified seems very erroneous.

VII.

Finally, the many and detailed exceptions which exist to the restrictions on marital testimony, while indicating that the restrictions rest on no very strong basis, or exceptions would not be so numerous, make the law applicable complicated and less likely to be accurately and easily followed. Evidence law which has to be used in the hurry of trials should be as simple as possible. At present it is enormously complex. This particular corner of it, marital testimony, can be swept clean without loss to justice. Indeed it is probable that there will be a real gain to the discovery of truth through doing so. There should be no doubt as to what should be done.

CONCLUSIONS

I.

With regard to testimony for a spouse, probably all will agree that there is no reason for retaining it. Only four states retain the common law incompetency. Nearly half the states, like California, have reduced it to privilege. Of these the majority, again like California, make it the privilege of the spouse whom the testimony will aid. How often will he keep testimony in his own favor from being given? In such states the privilege is just a worthless complication in the law.

But suppose, as in about six states, the privilege is given to the spouse on the stand. Why should that spouse refuse to give the testimony? Only because of hostility to the party spouse. But should the testifying spouse be able to vent his or her anger by aiding in an unjust conviction or an unjust civil judgment against the hated spouse? Nor does requiring

the privilege to be waived by both spouses as California and a few other states do in criminal cases help matters. The spouse whom the testimony will favor will waive the privilege: the testifying spouse should not have a privilege to injure the party spouse by withholding the truth just to gratify his or her hatred of the party spouse.

The only case in California which Mr. Fred E. Hines of the Los Angeles Bar, writing in 19 California Law Review 408, found in which this privilege was passed on in the appellate courts was Falk v. Wittram, (1898) 120 Cal. 479, 52 Pac. 707. In that case an insane husband sued by his guardian. The guardian wished to call the wife. Since the insane husband had insufficient capacity to waive his privilege the wife's testimony favoring the husband was lost. Surely a sorry spectacle. There is certainly no need for preventing one spouse from testifying for the other.

II.

It is clear that sentimental considerations have created more feeling in favor of keeping one spouse from testifying against the other. But the arguments already adduced should convince us that this favor is based on sentiment and not on coldblooded calculation of the utility of the privilege. Despite the sentiment some twenty-five states have reduced the common law incompetency to privilege even in criminal cases. California is one of these. But does the privilege work well?

In civil cases the privilege is, as in California, almost always given to the one who will be injured by the testimony. Why should he have a right to exclude the truth? Are husband and wife to be conspirators sanctioned by law to escape honest debts? Or is it that the husband may say "If my wife testifies against me I will make her life miserable from now

on and so you must let me keep her from doing so." There is not any good reason. Nor would it be wise to give the privilege to the wife: though it would be much more sensible. She is the one who as a result of affection may dislike to testify. She is the one who may suffer from a brutal husband that she had to injure by her testimony. But sentiment must not be allowed to bring about injustice and the very occasional harm to the wife from a brutal husband must not induce us to exclude useful evidence in the overwhelming proportion of cases where no harm would result.

In criminal cases the situation is even more serious. Can a spouse escape punishment for crime by closing the other's lips? The suppression of truth, the inability to convict the guilty and so to protect our families and our property far outweigh the remote chance of harm to the testifying spouse or to the family relation. Whether the privilege is given to one spouse or the other or to both it works badly.

III.

What is there to add to what has previously been said about marital communications? Very little. It may be noted however that if a husband, let us say, is a party to a civil case and the privileged communications favor him he will waive his privilege. If however the communications bear against him he will exclude them. Why whould he be put in this favorable position as against his civil antagonist? If the husband is not a party why should his whim about allowing or forbidding his wife's testimony perhaps win or lose the case for the parties interested.

Wigmore says (Second edition, sec. 2332),

> "The communications originate in confidence; the confidence is essential to the relation; the relation is a proper object of encouragement by

> the law; and the injury which would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth."

This is well put and if it is all true in fact we must agree that the privilege should be retained.

But the first clause, that the communications originate in confidence, is not the whole truth either in California or in a number of other states. They may be non-confidential. But are his other statements true even as to confidential communications? His second statement, that "the confidence is essential to the relation," must be taken to mean that confidence that communications will not have to be disclosed in court is essential to the relation. That may be denied in toto. Most spouses never thought about it and would be just as communicative if they did. There is no proof that it is essential. The third statement that marriage should be encouraged by law is conceded. But his fourth statement like his second needs evidence to support it. Who knows or can know that the balance of good is gained by retaining the privilege? How many families have been kept intact and happy because a spouse was not allowed to testify to communications? Does Dean Wigmore know one such? The suppression of evidence can be seen in the records of the cases. But no one knows whether such suppression led to a miscarriage of justice in any case. We can only guess about the relative harm or good done. So Mr. Wigmore's fourth statement must not be taken as truth. It is the writer's guess that probably the truth is the other way. And a privilege should not be created, causing as it does a suppression of otherwise perfectly admissible and presumptively trustworth evidence, without affirmative proof that it will do more good than harm. There is at present no proof to sustain the marital communications privilege. It should therefore be ended.

References.

Calif. Code of Civil Procedure, sec. 1881, subsec. 1.

Calif. Penal Code, sec. 1322.

Wigmore, Evidence, Second edition, Vol. I, Secs. 600-620; Vol. IV, Secs. 2227-2245; Vol. V, Secs. 2332-2341.

Vernier, C. G., American Family Laws, Vol. III, Sec. 226. A very careful collection and classification of American statute law together with valuable critical comments and references to other discussions.

Hines, Fred E., Privileged Testimony of Husband and Wife in California. 19 Calif. Law Review 390-441 (1931). A full collection of California cases and an excellent discussion of the principles involved.

EXHIBIT II

EXCERPT FROM MINUTES OF MEETING

OF

SOUTHERN SECTION OF STATE BAR

COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

The Southern Section met on September 8, 1960, at the Los Angeles office of the State Bar. The following members were present: Barker, Christopher, Kadison, Kaus, and Schall.

Mr. Schall presented his report on Rule 28 (marital privilege). The meeting was devoted to a discussion of that Rule.

(a) Who should have the privilege [subparagraph (1)]. The first phase of the Committee's discussion concerning Rule 28 related to the question of whether the privilege should be extended only to the communicating spouse or whether it should be given to both spouses. It was noted that the URE draft of this rule extends the privilege only to the communicating spouse but that the Law Revision Commission, in revising subparagraph (1) of Rule 28, had recommended giving the privilege to both spouses. There was a sharp division among the members of the Section as to which of these policies is the more desirable. Messrs. Christopher and Kadison were of the opinion that if the privilege is to be retained at all, it should be limited only to the communicating spouse. The other three members were of the opinion that the privilege should be extended to both spouses. In general, the committee was not particularly persuaded by the Commission's argument that giving the privilege to both spouses would have a tendency to encourage the exchange of confidences between a husband and wife. It seemed doubtful to the committee

members that spouses even think about the privilege when they exchange confidences. However, the majority of the committee were convinced that practical considerations make it imperative that the privilege be bilateral rather than unilateral. Situations illustrative of the practical difficulties which might arise from giving the privilege to the communicating spouse alone were discussed. The members considered situations in which the communicating spouse is not a party to the lawsuit in question, is not present in court, and is not in a position to protect his interest by asserting his privilege. Another situation which was discussed may be illustrated by the following example: Wife (W) tells Husband (H) on June 1, "I hit a man with my car today." The next day H says to W, "The man you ran over yesterday is going to live." Should W have the privilege of refusing to testify to what H said on June 2? She technically was the non-communicating spouse as to H's statement on June 2, but H's statement would not have been made had it not been for W's statement to H on June 1. The majority of the members felt that in such a situation W should have the privilege.

(b) Should the privilege extend only during the marriage relationship, or should it continue afterwards? Subparagraph (1) of Rule 28 as revised by the Law Revision Commission, preserves the present California rule which continues the marital privilege even after the marriage relationship has terminated. The members of the Section unanimously agreed with the Commission's view that the privilege should continue beyond the term of the marriage relationship. They agreed with the Commission's view that the adoption of any other rule would lead to blackmail.

(c) Final action as to subparagraph (1). In view of the conclusions stated above in these minutes, a majority of the members of the Section

approve subparagraph (1) of Rule 28 in the form revised by the Commission [11/9/59 revision].

(d) Subparagraph (2) of Rule 28. [Claiming of privilege by guardian]. The members of the Section approved the Law Revision Commission's revision of subparagraph (2), reading as follows:

> Subject to rule 37 and except as otherwise provided in subparagraphs (3) and (4) of this rule, a guardian of an incompetent spouse may claim the privilege on behalf of that spouse.

(e) Subparagraph (3) of Rule 28 [as revised by the Commission]. With reference to subparagraph (3), in the form revised by the Commission, the following action was taken.

The members approved the Commission's redraft of clauses (a) through (e), subject to the elimination of a possible inconsistency, as noted below.

It appeared to the Committee that there may be one area of inconsistency between subparagraph 3 (b), as revised by the Commission, and present California Penal Code §1322. P.C. §1322 states, in substance, the general rule that neither a husband or wife is competent to testify as a witness in a criminal action to which one or both spouses are parties, and then the section goes on to enumerate certain types of cases which constitute exceptions to the general rule of incompetency. The Commission's subparagraph 3 (b) seems to cover all of the exceptions noted in P.C. §1322 except one: namely, proceedings under the Juvenile Court Law. The Committee is uncertain whether the omission by the Commission of a reference to Juvenile Court proceedings was intentional. The Committee is unaware of any policy reason why the omission should be intentional.

(f) Subparagraph (4) of Rule 28 [as revised by the Commission]. With reference to subparagraph (4) in the form revised by the Commission, the Committee concluded that any finding by the judge to the effect that the communication was made to enable anyone to commit a crime or perpetrate a fraud, and thus not entitled to the privilege, should be a finding predicated, at least initially, upon evidence other than the communication itself. The Committee was of the opinion that, in order to prevent a destruction of the very privilege itself, it would be necessary to preserve the confidential nature of the communication at least until sufficient other evidence had been presented to make it reasonably probable that the communication was made to enable one to commit a crime, etc. Mr. Schall agreed to prepare and to submit a redraft of subparagraph (4) with this idea in mind.

Messrs. Christopher and Kadison left the meeting at this point, leaving less than a quorum of members remaining.

The remaining members continued to discuss, on an informal basis, the Commission's action in deleting from revised subparagraph (4) the phrase "a tort". Two of the three members agreed with the Commission's view that the category of "torts" is so broad that, if we were to except from the privilege any communication made for the purpose of enabling a tort to be committed, that might very well emasculate the entire privilege. Mr. Schall was of the opinion, however, that the privilege should not be available if it reasonably can be established that the communication was made to enable or aid anyone to commit a tort. In view of a lack of a quorum, it was decided to defer a decision on this question to a later meeting.

The meeting was then adjourned.

Stanley A. Barker
Vice Chairman

EXHIBIT II

EXCERPT FROM MINUTES OF MEETING

OF

SOUTHERN SECTION OF STATE BAR

COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

Rule 28, subparagraph (4) [Law Revision Commission version].

The Southern Section again considered subparagraph (4) of URE Rule 28, in the form proposed by the Law Revision Commission. This subparagraph would take out of the area of the marital privilege communications made to "enable or aid anyone to commit or plan to commit a crime or [~~a tort~~] or to perpetrate or plan to perpetrate a fraud."

There was much discussion, and many points of view were advanced. With the exception of Mr. Schall, the members of the Section were in agreement with the Commission's view that the classification of "torts" is so broad that to extend the exception to include all torts would open up too large an area for nullification of the marital privilege. Mr. Newell would go further. He would favor a complete and absolute privilege, with no exceptions made for crimes, torts, or fraud except in instances where such wrongs are directed against the other spouse. He pointed out that the word "fraud" can be as misleading as the word "tort"; that if the concept of constructive fraud is included within the term fraud as used in subparagraph (4), then the classification of frauds can be almost broad as that of torts. Mr. Schall, on the other hand, argued in favor of an exception to the privilege in cases where the communication is made to enable anyone to commit a crime or a tort, but he would eliminate the reference to "fraud" and he would further agree that only those torts which involve some form

of active conduct or bodily harm should make the privilege inapplicable. He further argued that it does not make sense to deny the privilege where the communication involves a crime, however, innocuous, but to permit the privilege where the communication involves a tort, however, extreme; that there are many torts which are a lot worse than some crimes.

By and large, it was the sense of the Committee that, as a matter of policy, one spouse should be able to say pretty much what he likes to the other without fear of the conversation going any farther; that if this right is to be restricted and non-privileged, it should be restricted and non-privileged only when there is some compelling justification. It appeared to the Committee that the problems raised by subparagraph (4) are serious enough to justify further thought by the Law Revision Commission. For example, in making an exception to the privilege where the communication enables anyone to commit a "crime", did the Commission consider the distinction between crimes which are of the "malum in se" variety as against those which are purely technical violations of, for example, some regulatory ordinance? What about distinctions between actual fraud and constructive fraud?

Basically, the conclusions reached were as follows:

(a) The Southern Section would retain the reference to a "crime" in subparagraph (4), but would want to limit the reference, by some appropriate language, to crime involving moral turpitude - as distinguished from mere technical violations.

(b) If there is to be any exception to the marital privilege in cases where the communication is made to enable anyone to commit a tort or to perpetrate a fraud, the words "tort" and "fraud" should be defined

and delimited by appropriate language which makes reasonably clear that the tort or, as the case may be, the fraud, to which reference is made is one of major consequence: i.e., torts involving bodily harm; actual fraud, etc. The Committee was unable to suggest any precise language which would make these distinctions clear and unambiguous, but it believes that the matter should be given further study by the Commission to determine the practicability of making such distinctions.

The Committee members again considered the question of whether there should be included in subparagraph (4) some foundation requirement that, as a condition to denial of the privilege in the areas to which subparagraph (4) relates, there be introduced evidence other than the communication itself. A majority of the members (4 to 1) were of the opinion that there should be a requirment of independent evidence; that to eliminate such requirement, as the Commission has done, could very well destroy the privilege; that the following language appearing in the original URE draft of this subparagraph, requiring evidence aside from the communication itself, should be retained: "sufficient evidence, aside from the communication, has been introduced to warrant a finding that . . .".

* * *

EXHIBIT III

MINUTES OF MEETING

OF

NORTHERN SECTION OF COMMITTEE TO
CONSIDER UNIFORM RULES OF EVIDENCE

The Northern Section of the Committee met at the office of Heller, Ehrman, White & McAuliffe on Tuesday, August 1, 1961, at 4:30 P.M.

There were present the following:

Messrs. Bates, Erskine, Liebermann and Baker.

There were absent the following:

Messrs. Pattee and Lesky.

Mr. Liebermann reported on Rule 28. He stated in general that in his opinion Rule 28, as drafted by the Commissioners on Uniform Law, was not as good a rule as that proposed by the Law Revision Commission. The revision by the latter comes closer to our present California law.

Under the rule of the Commissioners only the spouse who transmits the communication is the holder of the privilege. Furthermore, the rule of the Commissioners would limit the right to claim the privilege only during the marriage while the rule proposed by the Law Revision Commission would not so limit the time during which the privilege may be claimed.

Upon discussion of these two phases of the rule the members of the Committee recognized the policy in favor of the introduction of all relevant evidence which would be subserved by the rule as proposed by the Commissioners on Uniform Laws. On the other hand, it was felt that if the privilege is to have full meaning, both spouses should have the privilege and that it should continue after marriage.

Accordingly the Committee voted to approve the changes made by the Law Revision Commission in the foregoing respects. It followed that the words "the other spouse or the" which appears in the last sentence of paragraph (1) of the draft of the Commissioners on Uniform Laws should be eliminated, as proposed by the Law Revision Commission, and that the words "having the privilege" appearing at the end of that sentence should likewise be eliminated as proposed by the Law Revision Commission.

In view of the fact that no action lies in California for damages for alienation of affections or for criminal conversation the Committee agreed that subparagraph (b) of paragraph (2) of Rule 28, as proposed by the Commissioners on Uniform Laws, should be eliminated as proposed by the Law Revision Commission.

The Committee further agreed that subparagraphs (d) and (e) of paragraph (3) of the rule, as proposed by the Law Revision Commission respectively, dealing with an action or proceeding to commit either spouse or place him under the control of another or others because of his alleged mental or physical condition and to establish the competence of the spouse, as proposed by the Law Revision Commisssion, are salutary and substantially in accordance with the present California law.

Subparagraph (e) of paragraph (2) of the rule, as proposed by the Commissioners on Uniform Laws, as revised in paragraph (4) of the rule as proposed by the Law Revision Commission, was approved except that the Committee disapproves the elimination by the Law Revision Commission of the words "sufficient evidence, aside from the communication, has been introduced to warrant a finding that". In this respect the Committee has disapproved the proposed elimination of this language in Rules 26 and 27

and believes that consistency, as well as policy, requires the Committee's recommendation that this language be retained.

The Law Revision Commission's proposed elimination of paragraph (3) of the rule, as proposed by the Commissioners on Uniform Laws, was approved as no longer necessary in view of the amendment conferring the privilege upon both spouses.

The Committee then turned back to paragraph (2) of Rule 23 which accords an accused in a criminal action a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife. This paragraph was apparently intended by the Commissioners on Uniform Laws to broaden the privilege in a criminal action as compared with the privilege as proposed by the Commissioners in Rule 28. The Law Revision Commission has proposed to eliminate paragraph (2) of Rule 23 as no longer necessary in view of the proposed broadening of the privilege under Rule 28. The Committee agreed with this.

Whereupon the meeting adjourned with the understanding that the next meeting would be called upon notice by the Chairman.

LAWRENCE C. BAKER
Chairman of the Northern Section