#34(L) 10/27/64

Memorandum 64-85

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 8)

Attached are two exhibits containing comments we received on Division 8.

In addition, Mr. Westbrook sent us a copy of an analysis he prepared of a portion of Division 8 for the State Bar Committee. Although we have not reproduced his analysis for you, we note in this memorandum those provisions of Division 8 that caused him some concern. The only matter that seriously concerned him was the definition of "psychotherapist" for the purpose of the psychotherapist-patient privilege. He wrote to inquire whether the Commission has considered limiting this definition to psychiatrists and certified psychologists. We advised him that the Commission had considered this question on three occasions and indicated that the Commission would consider it again if the State Bar Committee shared his opinion that it should be so limited.

We also indicate in this memorandum some staff suggestions for revision of Division 8 and some matters called to our attention by Commissioner McDonough (who reviewed this division).

Substitution of "court" for "judge"

We plan to substitute "court" for "judge" in Division 8 in accordance with the decision of the Commission that this substitution should be made. This substitution creates no problems.

Applicability of Division 8 to proceedings of Industrial Accident Commission

Exhibit II (Yellow pages) is a letter from David I. Lippert, Referee, Industrial Accident Commission. He discusses the Privileges Division on pages 3-6 of his letter. See also my letter in response to his letter and his letter in response to mine. Both letters are attached to Exhibit II.

Summarizing Mr. Lippert's letter, he first correctly notes that the Privileges Division is applicable to proceedings before the Industrial Accident Commission. He suggests that--while such privileges as the husband-wife, attorney-client, clergyman-penitent, and the like, would probably be followed in most cases even without statutory declaration--to so require represents a departure from the rule of Labor Code Sections 5708 and 5709 (text of these sections on first page of his comments).

Sections 5708 and 5709 might be construed as making privileges inapplicable in proceedings before the Industrial Accident Commission. Although we believe that a court would hold that the Privileges Division applies to Industrial Accident Commission proceedings, we suggest that the bill be drafted to make this clear. This can be accomplished, we believe, by adding the following to Section 910:

> The provisions of any statute relaxing rules of evidence in particular proceedings, or making rules of evidence not applicable in such proceedings, do not make this division inapplicable to such proceedings.

We believe that this language, taken together with Section 920, will satisfactorily clarify the statute.

Mr. Lippert suggests that Sections 901 and 914 be clarified so as to exclude from their operation the proceedings before the Industrial Accident Commission. The staff believes that the Comment to Section 910 makes a convincing case for the recognition of the privileges in nonjudicial proceedings, including proceedings of the Industrial Accident Commission. It would

seem to be contrary to the basic philosophy of Division 8 to provide that such privileges as the attorney-client privilege do not apply in an Industrial Accident Commission proceeding. In connection with Section 914, see his letter dated October 23 (attached to Exhibit II).

It is apparent that Mr. Lippert is most concerned with the physician-patient privilege and the psychotherapist-patient privilege. He correctly notes that Section 996 provides an exception for cases where the patient tenders his condition (as he does in an Industrial Accident Commission proceeding), but states that "this provision does not by its terms contemplate a proceeding before the Industrial Accident Commission." Of course, Section 996 is intended to cover the Industrial Accident Commission proceedings and all other nonjudicial proceedings in which the patient tenders an issue concerning his condition. We would be reluctant to include a specific exception to the physician-patient privilege for Industrial Accident Commission proceedings because the specific exception might create an implication that Section 996 does not apply to other nonjudicial proceedings where the patient tenders the issue of his condition.

The staff believes that Section 996 clearly provides an exception for any type of nonjudicial proceeding in which the patient tenders the issue of his condition. Hence, we see no need to modify the language of Section 996, nor do we see any need to modify the language of the similar exception to the psychotherapist-patient privilege (Section 1016). The Commission may wish, however, to revise the Comment to Section 996 to include the following at the end of the paragraph at the bottom of page 836:

> The exception provided by Section 996 already is recognized in various types of administrative proceedings where the patient tenders the issue of his condition. E.g., LABOR CODE §§ 4055, 6407, 6408, 5701, 5703 (proceedings before

the Industrial Accident Commission). Of course, the exceptions to the various privileges, including Section 996, are applicable to any proceeding in which the privilege is claimed unless the exception itself makes clear that it is more limited. See EVIDENCE CODE § 901, defining "proceeding."

Applicability of Chapter 2 (commencing with Section 911) to Newsman's Immunity

Under the Evidence Code, as under existing law, the newsman's immunity from contempt for refusing to disclose a news source is not a "privilege." See the Comment to Evidence Code Section 1072. However, it is necessary that Section 915 be applicable to a claim for protection under Section 1072. The best way to deal with this problem would seem to be to add the following sentence to subdivision (a) of Section 914:

> A claim of a newsman under Section 1072 for protection against having to disclose the source of news shall be determined in the same manner as a claim of privilege, but nothing in this chapter is intended to affect the scope of the protection afforded by Section 1072.

We also suggest that the phrase "or on a claim under Section 1072 for protection against having to disclose the source of news" be substituted for "or under Section 1072 (newsmen's privilege)" in lines 32 and 33 on page 42 of the bill.

Section 900

Mr. McDonough suggests that in line 26 (page 40), the word "and" be deleted and the following inserted: ". They". This seems to be a desirable revision.

Section 912

In accordance with a suggestion of Mr. McDonough, we suggest that subdivision (b) of Section 912 be revised to read:

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), ~~the right of~~ a particular joint holder of the privilege ~~is~~ may claim the privilege ~~is not waived~~ unless the privilege of that joint holder has been waived, even though the right of another joint holder to claim the privilege has been waived. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), ~~the right of~~ one spouse ~~is~~ may claim the privilege ~~is not waived~~ unless the privilege of that spouse has been waived, even though the right of the other spouse to claim the privilege has been waived.

Mr. McDonough suggests also that consideration be given to combining the second sentence with the first sentence of subdivision (b). We prefer two sentences for several reasons: First, the privilege provided by Section 980 is not the typical joint holder situation; each spouse has a privilege in his own right. As a matter of fact, Section 980 is so framed. Second, we believe subdivision (b) is easier to understand when the idea is expressed in two sentences because the second sentence can then be drafted in terms of "one spouse" and the "other spouse", rather than in the more vague terms of "joint holder."

Mr. McDonough also notes that subdivision (c) of Section 1040 and subdivision (c) of Section 1041 provide in substance that official information or the identity of an informer is not privileged unless due care is exercised to protect the confidentiality of the information. He questions whether a similar requirement should not be imposed in the case of the other confidential communication privileges. In other words, if the client does not use due care to protect the confidentiality of his communication to his lawyer--instead he leaves a carbon copy of his letter to the lawyer in a place open to the public--should that letter be privileged. If this suggestion meets Commission approval, we suggest that Section 912 be amended to add, before the period at the end of line 29 (page 41), the following: "and his failure to exercise due care to protect the confidentiality of the information"

We have mixed feelings about this suggested revision. We agree that the matter should not be privileged if the client (or other holder of the privilege) allows the information to be disclosed to a third person through carelessness. At the same time, we have some concern that this addition might put an undue burden on the client (or other privilege holder) in a case where the information is acquired by a third person.

Section 913

Mr. McDonough suggests the substance of the following revisions of this section and we believe the revisions are desirable:

> 913. (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer ~~and~~ nor counsel may ~~not~~ comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.
>
> (b) The judge, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises ~~with respect to~~ upon the exercise of ~~the~~ a privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Section 914

Mr. McDonough suggests that subdivision (b) of Section 914 be revised in substance to read in part as follows:

> (b) Subject to Section 1042, no person may be held in contempt , or otherwise subjected to any adverse consequences, for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a judge that he disclose such information.

We believe that this is a desirable revision.

Section 915

Mr. McDonough suggests that the first portion of subdivision (b) be revised to read:

> (b) When a ~~judge is~~ court ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or on a claim under Section 1072 ~~(newsmen's privilege) and~~ for protection against having to disclose the source of news is unable to ~~rule on the claim~~ do so without requiring disclosure of the information claimed to be privileged, the ~~judge~~ court may require the person from whom disclosure is sought or. . . .

We have included the language we previously suggested be added to this subdivision so that you will be able to see the subdivision in its revised form. When this additional language is added we wonder if the section would not be clearer if it were merely revised to add "the court" before the phrase "is unable to rule on the claim."

Section 916

Mr. McDonough comments with reference to this section: "How does the rationale apply where there are joint holders and one is present and does not claim the privilege? Should the presiding officer claim on behalf of the other? If not, why not?"

The staff was aware of this problem. The answer is that the presiding officer is not authorized under Section 916 to claim the privilege on behalf of the absent joint holder. There are several reasons why we prefer the section in its present form. First, we would not want to complicate the section by attempting to deal with the joint holder problem. Second, we do not think that it is unreasonable to admit the evidence; this is a risk one bears if he is a joint holder. (Ordinarily, the absent joint

holder can assume the other joint holder will claim the privilege when it is in their interest to do so.) Third, the evidence could not be used in another proceeding against the joint holder who was not present (see Section 912(b)). Fourth, it seems undesirable to impose on the presiding officer the burden of ascertaining whether there are joint holders of the privilege who are not present when a person who is entitled to claim the privilege offers the evidence or does not object to its admission. In summary, Section 916 seems to provide adequate protection to persons not present at the proceeding in its present form. Even in its present form, the judges do not like the section because they believe it imposes an undue burden on them.

Section 917

Mr. McDonough asks with reference to this section: "Shouldn't this presumption logically also apply to the question of whether the communication was made in the course of the relationship?" We do not believe that it should. The party claiming the privilege can easily establish that the communication was made in the course of the relationship, if in fact it was. However, he may not be able to show that it was intended to be confidential, because the question of confidence may not have been in the mind of either person at the time the communication was made. Should the mere claim of the privilege put on the party seeking to obtain evidence of the communication the burden of showing that it was not in the course of the relationship, a fact that he may find is impossible to establish by admissible evidence?

Section 919

Mr. McDonough suggests that the words "of privileged information" be inserted after the word "disclosure" in line 19. We believe this is a desirable addition.

Mr. McDonough suggests that ", although requested to do so," be inserted after "presiding officer" in Section 919(b). If this change is made, it will make the right of the absent privilege holder depend on whether a party to the action in which disclosure is made called the attention of the presiding officer to the fact that the information was privileged and requested that the information be excluded. Thus, the holder's right to protection will depend on whether a party to the former proceeding had such an interest that such party sought to have the information excluded. This seems to depart from the purpose of Section 916 which is to insure protection to the privilege holder. All that Section 919 does in its present form is to make the information wrongfully disclosed in violation of Section 916 inadmissible against the holder in a subsequent proceeding. This seems to be desirable as a matter of policy since the holder had no opportunity to claim the privilege in the prior proceeding.

Section 951

Mr. Westbrook points out that Section 951 expressly provides that consulting a lawyer for the purpose "of retaining the lawyer" is within the privilege while Sections 991 (physician-patient privilege) and 1011 (psychotherapist-patient privilege) do not contain a parallel provision. He comments:

> No reason for the difference in language is apparent. Absent the above quoted language ["of retaining the lawyer"], consultation for the "purpose of securing" professional services would certainly be interpreted as embracing preliminary consultation for the purpose of retaining the professional. Hence, deletion of the above quoted language is recommended.

If the language is deleted, the Comment to Section 951 should be revised to indicate that the privilege includes protection of communications made

in the course of a discussion held with a view to possibly retaining the lawyer.

Section 952

Mr. Westbrook comments on Section 952 in part as follows:

> 2. The presence of third persons to further the interest of the "client or patient" does not destroy confidentiality. This works a desirable clarification and perhaps changes existing law. The language ought to be and seemingly is broad enough to cover not only joint clients but communications between one lawyer and his client and another lawyer and his client and [sic] the the respective clients are jointly interested in the subject matter of the communication. However it is desirable that the comment to this section recognize this situation.

The kind of case that illustrates the point Mr. Westbrook makes is the following: An injured person sues both an employee and his employer for an injury resulting from an act of the employee. The employee has his lawyer and the employer has his lawyer. The two clients and two lawyers have a joint meeting at which they discuss the pending law suit and the role each lawyer will play in its defense. A number of confidential communications take place at this conference. Section 952 provides protection against disclosure of these confidential communications. We have adjusted the Comment to Section 952 to add a sentence that so indicates. We agree with Mr. Westbrook that the language of Section 952 is satisfactory, and we believe that we have taken care of the matter by adding the sentence to the Comment as he suggests.

Section 953

Mr. McDonough suggests that the word "while" be inserted for "when" in line 20. This change, if made, should be made in all comparable sections. We think that the word "when" is satisfactory when considered in connection with line 19.

Section 954

Mr. McDonough suggests that the words "the client or by another person on behalf of the client who is" be inserted after "by" in line 32. We consider this change unnecessary and undesirable. Section 953 defines "holder" to include the client under certain circumstances, and we do not believe that a client should be able to claim the privilege when he has a guardian because he is incompetent and cannot act reasonably in his own interest. Mr. McDonough notes that there is a joint holder problem under Section 954(c)(and also under comparable sections). To meet this problem, the staff suggests that consideration be given to revising Section 954(c)(and comparable sections) to read:

> (c) The person who was the lawyer at the time of the confidential communication, but ~~such person~~ the lawyer may not claim the privilege if:
> (1) There is no holder of the privilege in existence; or ~~if he~~
> (2) The lawyer is otherwise instructed by a person authorized to ~~permit disclosure~~ claim the privilege, but in the case of joint holders of the privilege, the lawyer shall claim the privilege if any joint holder instructs him to do so, even though he is otherwise instructed by any other joint holder.

This revision might be rejected on the ground that it unduly complicates the section to cover a case that may never arise. If the problem of the joint holders is to be met, however, the suggested revision is the desirable solution. We believe that the lawyer will, whenever he has the opportunity, check with all joint holders before he discloses a confidential communication and the revised provision requires the communication to be excluded if any one of the joint holders objects to its disclosure. If time does not permit the lawyer to check with all the joint holders, the joint holder has some protection under the provisions that permit him to claim the privilege if the communication is offered against him in a subsequent

proceeding.

An alternative solution to the problem would be to revise the section to require the consent of all joint holders. But this would make the evidence inadmissible if one holder was willing to have the communication come into evidence and the others could not be found. And the joint holder willing to have the communication disclosed could accomplish his purpose merely by being present at the time the claim of privilege would otherwise be made, for subdivision (c) would not then be applicable. In most cases, it is probably safe to assume that the single joint holder will have the interest of both joint holders in mind when he determines whether to instruct the lawyer not to claim the privilege. If this is true, a case can be made for retaining the subdivision as set out in the bill. In any case, we believe that we should not go any further in protecting the joint holder than the subdivision set out in its revised form.

Section 956

Mr. McDonough suggests that lines 48 and 49 be revised to read: "to commit or plan to commit a crime or ~~to perpetrate or plan to perpetrate~~ a fraud." We have no strong objection to this revision although we believe that the provision as drafted is more precise.

Section 958

Mr. McDonough suggests that "alleged" be substituted for "issue of" in line 4. We have used "issue of" or similar language in the other exceptions.

Section 959

Mr. McDonough suggests that this section be revised to read:

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

Section 985

We suggest that the phrase ", whether committed before, during, or after marriage" be added before the period at the end of subdivisions (a) and (b). This will make the subdivisions conform to paragraphs (1) and (2) of subdivision (e) of Section 972, which retain comparable language taken from the existing statute. Of course, the privilege in Section 972 does not apply after the marriage has terminated so that the phrase we suggest be added to Section 985 is broader than the phrase in Section 972.

Section 994

Mr. McDonough asks: "Why not define this privilege as being applicable only in civil proceedings instead of drafting broadly and then creating exceptions (998)?" The staff prefers the article in its present form. We like to have an exception covering both criminal and "quasi-criminal" proceedings, i.e., Section 998. It makes the basic privilege section easier to read and states similar material in the same exception. Moreover, the exception in Section 999 makes more sense when it follows Section 998. We urge the Commission to retain the article in its present form.

Section 996

The phrase "a communication relevant to" should be added before "an issue" in line 11 (page 48) to conform to the other exceptions.

Mr. McDonough suggests that subdivision (c) be revised to read:

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

This subdivision is intended to cover a suit on an insurance policy for the death of the patient. However, it also covers other situations where it could not properly be said that the party is a "beneficiary of a contract" as opposed to being a "beneficiary of the patient." For example, an heir who sues to recover the balance due on a contract of sale between the patient and the defendant. The plaintiff is a beneficiary of the patient only, not of the contract. The revision would appear to limit it to third party beneficiary contracts only, which is not necessarily the intent of the exception as drafted. The present language is taken from the URE.

Sections 998, 999, 1004, and 1005

Mr. McDonough asks why we do not have provisions parallel to these sections as exceptions to the other privileges. The answer is that we have evaluated each particular privilege in terms of the scope of protection needed for the kinds of communication involved. Thus, the lawyer-client privilege provides broad protection, and these exceptions should not be included. Similarly, we give more protection to a psychotherapist because of the nature of the relationship, and recognize these exceptions to a limited extent. And the confidential marital communications privilege has its own exceptions, specifically designed for that relationship.

The staff believes that the Commission acted properly when it undertook to review each privilege and the interest protected and to draft exceptions in the light of the interest protected. We would not like to see the exceptions

in Sections 998, 999, 1004, and 1005 added to all the privileges, for we already have provided somewhat similar exceptions where justified.

Mr. McDonough questions whether the exceptions in Sections 1004 and 1005 should not apply to the lawyer-client privilege. If these exceptions were added to the lawyer-client privilege, a person could not obtain legal counsel to defend a commitment proceeding or institute a proceeding to establish his competence and still fully communicate with his attorney concerning such proceeding. And it might inhibit free consultation with an attorney if the client were fearful that his relatives might institute a commitment proceeding. Moreover, a patient consulting a physician concerning a physical (not mental or emotional) condition will not have the fear of a commitment proceeding that a person consulting a lawyer concerning the proceeding will have. Note also that we deal with the commitment problem in the psychotherapist privilege in Sections 1024 and 1025.

Section 1016

The phrase "a communication relevant to" should be added before "an issue" in line 13 (page 50) to conform to the other exceptions.

Section 1032

Mr. McDonough asks why this section states "in the presence of no third person" while the other communication privileges use a different form? We suggest that no change be made in Section 1032.

Section 1040

Mr. McDonough suggests that subdivision (a) of this section be revised to read:

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

We think the revised section is ambiguous. Moving the last clause makes unclear what the word "theretofore" means. As drafted, the section means that the information has not been officially disclosed to the public prior to the time disclosure is sought. As revised, it may mean that the information has not been officially disclosed prior to the time it was acquired by the employee.

Exhibit I (attached) raises the question whether we intentionally omitted repealing various statutory provisions that provide that information is privileged, such as Section 1094 of the Unemployment Insurance Code. We specifically saved these sections from repeal by so providing in Section 920. We assume that the Commission does not want to reverse the decision in Crest Catering Company v. Superior Court which is referred to in Exhibit I.

Section 1042

Mr. McDonough points out that the phrase "as is appropriate" in lines 12 and 13 "is a very general phrase which does not suggest what we are driving at without reference to the comment. Couldn't we find a better way to express the idea, at least roughly?"

The problem with drafting language for Section 1042 is, of course, the fact that the particular order the judge should make depends upon the circumstances. "Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure

on cross-examination, the People must either disclose his identity or incur a dismissal." People v. McShann, 50 Cal.2d 802, 808 (1958)(so holding). "When the prosecution relies . . . on communications from an informer to show reasonable cause [to make an arrest or search] and has itself elicited testimony as to those communications on direct examination, it is essential to a fair trial that the defendant have the right to cross-examine as to the source of those communications. If the prosecution refuses the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to the communications from the informer." Priestly v. Superior Court, 50 Cal.2d 812, 818-819 (1958)(so holding).

The McShann and Priestly cases are a guide to the application of Section 1042. It would be very difficult, however, to formulate from these cases a general principle that could be stated in the statute.

Section 1060

Mr. McDonough comments: "We seem to assume that trade secret is a term of recognized meaning. Should we define it? Cf. first sentence of comment." Attempting to define a "trade secret" raises very difficult problems because, for example, it is necessary to indicate in some manner when there has been such disclosure that the matter is no longer a secret. Obviously, some disclosure is necessary. We would prefer not to attempt to define "trade secret," thus leaving the matter to case law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

JAMES H. DENISON
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EDWARD S. STUTMAN

October 7, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crowthers Hall
Stanford, California

Dear Mr. DeMoully:

Philip Westbrook has suggested that I should write to you regarding a matter which he and I had been discussing in connection with the new proposed Evidence Code, in particular with respect to Sections 1040-42 thereof.

As you will see from reading the opinion in Crest Catering Company vs. Superior Court, which is printed in the Advance California Appellate Reports, 229 ACA 4, page 831, the District Court of Appeal reversed Judge Philbrick McCoy of Los Angeles County on a discovery matter. Judge McCoy had authorized inspection by my client (Real Party in Interest) of certain copies of California Employer Tax Returns, which copies were in the possession of defendant Crest, having been secured by Crest from the Director of Unemployment Insurance at Crest's request following the complete destruction of all other payroll records by fire.

In looking over the proposed Code of Evidence, it seemed to me that Sections 1040-42 in the new Code do not deal with Section 1094 Unemployment Insurance Code, even though this Section clearly says "information furnished to the Director by an employing unit . . . shall not be open to the public nor admissible in evidence in any accounting or special proceedings, other than one arising out of the provisions of this division".

I asked Phil Westbrook if it was his understanding that the Law Revision Commission had intentionally omitted repealing 1094 insofar as it was in conflict with the new Code. He referred me to you.

I also asked Phil whether I was correct in my interpretation of the new Code in thinking that a privilege of a type similar to that raised by Section 1094 Unemployment Insurance Cose was only for the

benefit of the public entity and could be claimed by the public entity only, that it was not for the benefit of the employer-taxpayer, and could not be claimed by him.

The District Court of Appeal in Herndon's opinion in Crest Catering Company stretches Webb to cover the privilege granted by 1094, even though Herndon admits that Webb represents the minority view in the United States with respect to Federal Tax returns and is in direct conflict with the Federal decisions on the point.

Personally I cannot see how the "tax return privilege" statutes are meant to do more than prevent the harassment of public officials via depositions and subpoenas. I do not believe these statutes were intended to shield an employer from giving true data on demand, and to be subject to audit as to the correctness of his contributions to welfare and retirement funds, maintained for the benefit of his employees. I think the new Code of Evidence expresses this view too. Am I completely in error in my interpretation of the new Code?

It also appears to me that the drafters of the Code in Section 912 do not deal with any tax return privilege, such as 1094 Unemployment Insurance Code, for example. Was this the intent? I do not believe the new Code presupposes as explicit a waiver as Herndon requires in the Crest opinion, in which a specific reference to the statute giving rise to the privilege is made a prerequisite to any valid waiver.

I perceive that Section 920 does not repeal by implication any other statute relating to privilege, but if 1094 is not repealed by the new Code should it not be so repealed?

If Herndon's opinion stands, a long range consequence would appear to be that once an employer-taxpayer had recorded his payroll data on a State or Federal tax form, it would not merely be the tax return itself that would be privileged because the Statute 1094 says nothing about the returns being privileged, but refers only to "information furnished to the Director". Already attorneys for the employers are arguing that the opinion in Crest interprets 1094 to mean that even the payroll stubs become privileged under the Statute even if they are not destroyed by fire as was the case in Crest.

I would appreciate your opinion of the questions I am asking in this letter and would suggest that if the Law Review Commission has not contemplated some reference to 1094 Unemployment

Insurance Code (as interpreted by Herndon and the District Court of Appeal) it certainly ought to do so in the new Code of Evidence.

I am, at Phil's request, sending him a copy of this letter and I would be most interested in hearing the reaction of your Commission and the State Bar Committee to these problems.

Sincerely yours,

JAMES H. DENISON

JHD/jds

cc: Philip F. Westbrook, Jr., Esq.

Memo 64-85

EXHIBIT II

INDUSTRIAL ACCIDENT COMMISSION
4107 Los Angeles State Office Building
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Los Angeles 90012

October 20, 1964

John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford University
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Stanford, Calif. 94305

Dear Mr. DeMoully:

This is in response to your letter of Sept. 21, 1964 and the previous correspondence on the proposed Evidence Code. I have prepared and submit herewith my comments on hearsay and privileges from the standpoint of Workmen's Compensation Law. I thank you for inviting me to make this study and am grateful that your invitation spurred me to do it.

With the thought in mind that the Commission may desire the broadest and most authoritative commentary from the workmen's compensation viewpoint, it may be of interest to you to know that Gus Mack, President of the State Bar, has announced the formation of a State Bar Committee on workmen's compensation. I do not believe that the membership has yet been announced, but it is conceivable that a study of the Evidence Code may very well be an appropriate item of business, if the matter were referred to the Committee.

Sincerely yours,

s/

DAVID I. LIPPERT
Referee

COMMENT ON THE HEARSAY AND PRIVILEGE PROVISIONS OF THE PROPOSED EVIDENCE CODE FROM THE STANDPOINT OF WORKMEN'S COMPENSATION LAW

The rules of evidence applicable in proceedings before the Industrial Accident Commission are as set forth in the Labor Code as follows:

> "5708. All hearings and investigations before the commission, panel, a commissioner, or a referee, are governed by this division and by the rules of practice and procedure adopted by the commission. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter."

> "5709. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure."

The proposed Evidence Code does not by its terms purport to affect these provisions. Moreover, a repeal by the hearsay sections is specifically precluded. (Evidence Code Section 1205) Section 300 (referring to the applicability of the Evidence Code) does not indicate otherwise. Its allusion to a "referee" obviously refers to an officer of the courts mentioned therein.

HEARSAY

It may be assumed from the foregoing that the two Labor Code sections quoted will continue to govern the admissibility of hearsay before the Industrial Accident Commission. They have been

interpreted as indicating that there is no constitutional basis for objection to the admission of such evidence. (Western Indemnity Co. v. IAC, 174 Cal 315). It is not only admissible but it may be sufficient to establish any fact at issue, even though it be the only evidence in the case. (State Compensation Ins. Fund v. IAC, 195 Cal 174) But it must have probative value. (Continental Casualty Co. v. IAC, 195 Cal 533)

The Labor Code does not define hearsay. However the definition set forth in Evidence Code 1200(a) may come to be considered as a guide to the meaning of the term. It provides:

> "1200.(a) 'Hearsay evidence' is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated."

As so defined there is no doubt that other provisions of the Labor Code expressly contemplate the admission of certain types of hearsay. Their admissibility does not depend upon any construction of Sections 5708 and 5709 but are specifically provided for, such as Section 5703 (a) authorizing receipt of physician's reports in evidence. However if received in evidence at the hearing and if not served twenty days or more prior thereto, an opportunity must be given to the adverse party, if requested, to cross-examine the person whose report is placed in evidence. (Fireman's Fund etc. Co. v. I.A.C. 223ACA 381) Similarly if received in evidence after the hearing. (Labor Code Section 5704, Massachusetts etc. Co. v. I.A.C. 74 CA 2d 911, 916, Caesar's Restaurant v. I.A.C. 175 CA 2d 850, 855)

Whether there is recognized by the Evidence Code a principle that hearsay that is admissible requires for its efficacy that an opportunity for cross-examination be given is not known. It might be argued that Section 1203 (a) so states. However, this writer is handicapped in interpreting this section. The situations that it contemplates are not envisaged and the cross-reference table prepared by the California Law Revision Commission merely states that there is no comparable provision in the Uniform Rules of Evidence, hence no comment to illuminate it. Should it prove equally puzzling to others it is feared that the lawyer or judge who must read and run during the conduct of a trial may not be able to utilize the section.

It may also be observed that the Tentative Recommendation and A Study re Article VIII, Hearsay Evidence, regrettably does not

evaluate the merits of a different rule for non-jury cases than that announced in Section 1200 (b). (Cf 50 ABA Journal 723)

As the illustrious scholar, Kenneth Culp Davis, asks "Is it not high time that we have rules of evidence for non-jury trials?" (Davis, Hearsay in Administrative Hearings, 32 George Washington Law Review 689, 693, April 1964) His approach is most thought provoking. That is to say, there is virtually no evaluation in the study of the years of experience in the making of judicial decisions on records that contain hearsay, although, admittedly, unobjected to hearsay is recognized by Evidence Code Section 354. This may, it is true, provide some means of comparison.

PRIVILEGE

The Labor Code contains no counterpart of the statutory provision governing hearings under the Administrative Procedure Act which states that the "rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions..." (Government Code, Sec. 11513 (c)) Moreover, the physician-patient privilege that applies in the courts is not mentioned in the Labor Code. However, the exception to the rule that applies in case of civil litigation concerning a patient's condition (C.C.P. 1881 (4)) is representative of the underlying philosophy of the Labor Code provisions and the rules promulgated in pursuance thereof. They contemplate complete disclosure without permission of the patient or the physician. For example, Sections 4055 and 5701 (duty of physician to testify), 5703 (admissibility of physician's reports), 6407 and 6408 (duty of physician to report), and 132 (enforcement by contempt proceedings). Implementing these are the Rules of Practice and Procedure of the Industrial Accident Commission as set forth in Title 8 of the California Administrative Code, such as Sections 10793 (form of physician's report), 10794 (duty to disclose physician's reports), 10796 (duty to file x-rays), 10798 (penalty for failure to disclose medical reports), and 10801 (inspection of hospital records).

The applicability of the proposed Evidence Code, in general, would appear to be confined to the courts mentioned in Section 300 and not to the Industrial Accident Commission. However, Division 8 of the Evidence Code concerning Privileges is given a deliberately larger scope:

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

And "proceeding" is so defined as to undoubtedly encompass proceedings before the Industrial Accident Commission:

> "901. 'Proceeding' means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."

> "914.(a) Subject to Section 915, the presiding officer shall determine a claim of privilege in any proceeding in the same manner as a judge determines such a claim under Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

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

The question therefore arises as to a possible conflict or a repeal by implication.

It may first be observed that the incorporation of the rules of privilege as between husband and wife, lawyer and client, clergyman-penitent, and the like, into the practice of the Industrial Accident Commission may not be theoretically objectionable and would probably be followed in most cases even without statutory declaration, nevertheless it represents a departure from the rule of Labor Code Sections 5708 and 5709. Where there is a statutory provision declaring that proceedings shall not be bound by statutory rules of evidence what is the effect of a statutory provision later in time that states that certain statutory provisions shall apply? Rather than to leave this problem to controversy and to the expensive course of litigation it may be well to clarify Sections 901 and 914 of the Evidence Code so as to exclude from its operation the proceedings before the Industrial Accident Commission. The alternative would be to create specific exceptions to Labor Code Sections 5708 and 5709.

As for the physician-patient privilege (Evidence Code Section 992) it may be argued that there is no conflict. The exception for litigation is clearly set forth in Section 996 of the Evidence Code, as follows:

> "996. There is no privilege under this article as to an issue concerning the condition of the patient if such issue has been tendered by:
>
> "(a) The patient;
>
> "(b) Any party claiming through or under the patient;
>
> "(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
>
> "(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient."

Although this provision does not by its terms contemplate a proceeding before the Industrial Accident Commission perhaps it should. Certainly, if the broad scope of Section 901 is to control, the opportunity for misunderstanding ought to be removed. The alternative would be to assert that as a matter of statutory interpretation the unprivileged status of medical reports under the Labor Code are in no wise affected by Evidence Code Sections 901 and 996. But if that be so why should there be a need for Section 901 to apply to the Industrial Accident Commission? Would it not be simpler to exclude it from the definition?

The new privilege created by the Evidence Code, that between the psychotherapist and the patient (Sec. 1014) raises the question whether a report of a psychologist licensed under Section 2900 et seq. of the Business and Professions Code constitutes a report of a physician within the meaning of the Labor Code Sections cited. The term "physician" is defined as follows in Labor Code Section 3209.3:

> "3209.3 Physician includes physicians and surgeons, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law."

Inasmuch as the section does not purport to be exclusive it could be argued that a psychologist is included. To remove doubt it perhaps should be amended.

DAVID I. LIPPERT
Referee
Industrial Accident Commission

October 21, 1964

Mr. David I. Lippert
Industrial Accident Commission
4107 Los Angeles State Office Bldg.
107 South Broadway
Los Angeles 90012

Dear Mr. Lippert:

Thank you for your letter of October 20 forwarding your comments on the proposed Evidence Code.

In order to provide you with additional explanation concerning the proposed code, I am enclosing a preliminary draft of the Commission's recommendation to the Legislature on this subject. This recommendation is, of course, in preliminary form; but the Comments to each provision of Preprint Senate Bill No. 1 are in substantially final form. Both the bill and the recommendation will be adjusted to reflect changes made as a result of comments received from interested persons prior to the time we must send the report to the printer.

You are correct in your analysis that the Evidence Code provisions relating to hearsay will not govern the admissibility of hearsay before the Industrial Accident Commission. As you note, Section 300 of the Evidence Code expressly so provides. Hence, I assume that you have no objection to the bill on this ground.

The Commission has given thoughtful consideration to the suggestion of Professor Davis on several occasions. He has sent us several letters to state his position fully on the admission of hearsay evidence in nonjury cases. However, Professor Davis seems to be a voice crying in the wilderness on this suggestion. The typical reaction of members of the bar is indicated by the letter recently published in the ABA Journal in response to his article. See 50 ABA Journal 904. Although the Commission is recommending some important changes in existing evidence law, I hope that you can understand that if the proposed code is to have any chance for enactment by the Legislature such changes must be relatively modest in nature and must be fully justified by a showing of adverse experience under existing law. Some members of the Commission

rejected Professor Davis's suggestion on the merits; basically, they believe the suggestion would result in uncertainty and additional trial time and expense. Other Commission members believe that the passage of the Evidence Code should not be jeopardized by proposing so drastic a change in existing law.

On the matter of privileges, you are correct in your analysis that the privileges (and the exceptions thereto) provided in the Evidence Code would apply to proceedings before the Industrial Accident Commission. For the reasons indicated in the enclosed materials (Comment to Evidence Code Section 910), the Commission believes that it is essential for the privileges to be recognized in all proceedings in which testimony can be compelled and that appropriate exceptions be drafted to cover the cases where the privileges should not apply. Certainly, no one would suggest that an administrative agency should be permitted to inquire into confidential communications between attorney and client, and the same is true of the other privileges. The privileges provided in the Evidence Code were carefully drafted with a view to their use in administrative proceedings. Thus, Evidence Code Sections 996 and 1016 contain specific provisions to make the physician-patient privileges and the psychotherapist-patient privileges inapplicable in any proceeding before the Industrial Accident Commission where the patient, or someone claiming under him, is seeking relief.

In the view of the Commission, privileges are not statutory rules of evidence in the sense that they are designed to exclude untrustworthy or prejudicial evidence from court proceedings. They are expressions of the public policy that certain communications and information must be permitted to be kept secret from the courts and any other governmental agencies even though this will make it more difficult to determine the truth in certain instances. Hence, we think that the provision in the code that privileges apply in all proceedings probably states merely what a court would hold in the event a privilege were claimed in a proceeding before the Industrial Accident Commission. Accordingly, I personally would not regard this recommendation asas departure from the rule of Labor Code Sections 5708 and 5709.

Evidence Code Section 914 requires no more than does Labor Code Section 132. If a witness refuses to answer a question concerning a matter that is claimed to be privileged, Labor Code Section 132 requires that a court order be obtained before the witness may be held in contempt.

The above are my initial reactions to your comments on the proposed code. I plan to have your comments reproduced so that each member of the Commission will have an opportunity to study them when we discuss them at

our October meeting. I have sent you my initial reaction to your comments, however, in the hope that you may conclude that the proposed code is satisfactory in its present form.

I am sure that it would be helpful to the Commission if you would, after considering my comments on your suggestions, advise us:

(1). Is any change needed in the hearsay evidence provisions regarding admissibility of hearsay in your proceedings? (You correctly concluded that none was needed since these provisions do not apply to your proceedings by virtue of Labor Code Sections 5708 and 5709 and this analysis is further strengthened by Evidence Code Section 300 specifically so providing.)

(2). In view of the reaction of practicing lawyers to Professor Davis's article, do you object to the fact that the Evidence Code does not go as far as he suggests? (The Commission has, however, broadened some of the hearsay exceptions and has provided several new ones.)

(3). Do you object to the application of the privileges division to proceedings before the Industrial Accident Commission? (If so, what privileges do you believe should not be recognized in your proceedings? I would prefer not to add a specific exception to Evidence Code Sections 996 and 1016 because those sections seem clearly sufficient to exempt your proceedings and the addition of a specific exception might create some doubt that the present exception is broad enough to exclude other similar administrative proceedings.)

(4). Do you consider Evidence Code Section 914 satisfactory in view of my comments?

(5). The amendment to Labor Code Section 3209.3 would appear to be beyond the scope of the Evidence Code bill.

I assure you that I very much appreciate receiving your comments. I hope that this letter (and the attached material) will give you additional information that will allay any fears you may have concerning the proposed code. If it does not, I know that the Commission will want to know that when it considers your letter at its next meeting. Hence, it would be helpful to have your reaction to this letter in our hands by October 27, if possible, since the Commission will consider your letter at its October 29-31 meeting.

Sincerely,

John H. DeMoully
Executive Secretary

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STATE OF CALIFORNIA
INDUSTRIAL ACCIDENT COMMISSION
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DAVID I. LIPPERT
REFEREE

October 23, 1964

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

Dear Mr. DeMoully:

This is in response to your kind letter of October 21, 1964, re the proposed Evidence Code and workmen's compensation litigation. I shall answer the questions set forth on page 3 thereof.

1. Is any change needed in the hearsay evidence provisions regarding admissibility of hearsay in your proceedings?

   ANSWER: Not in my opinion.

2. In view of the reaction of practicing lawyers to Professor Davis' article, do you object to the fact that the Evidence Code does not go as far as he suggests?

   ANSWER: With all due respect to the highly qualified Law Revision Commission and staff, my point was that the study does not seem to discuss Professor Davis' suggestion. I am not yet fully prepared to state how, if at all, it should be implemented. However, there is a history of experience at the Federal level as well as in most states of the determinations of greatest importance in proceedings in which the strict rules of evidence did not control. There are daily tried before these tribunals many matters that involve rights and sums of money equal or greater than those in many civil actions in the Municipal or Superior Courts. To be more specific: the Annual Report of the Administrative Office of the California Courts, Judicial Statistics for the Fiscal Year 1962-63, p. 46, discloses that of the 525,199 civil filings in the Municipal Courts, the small claims matters ($200 or under) were 270,963, or more than half. According to the Los Angeles Superior Court statistical report of Feb. 1, 1962, for the years 1954-1961, over 56% of the jury verdicts and over 67% of the non-jury judgments were under $5,000.00. Yet, to refer only to the Industrial Accident Commission jurisdiction, the awards can involve very great sums, such as an estimated $117,968.46 for a totally disabled 18 year old, plus lifetime medical care of the value of approximately $182,000. This may be a rare case. The average award has been estimated as running between $4,500.00 to $7,200.00 in value, but there are many cases wherein the recovery is well over $25,000. and the statutory death benefit for a widow with minor children is now $20,500.00.

The many able practitioners who appear before state and Federal tribunals which function under relaxed rules of evidence in civil matters ought to be heard. The court decisions on review could be surveyed. It is not enough to merely consider a few "horrible examples" as a warning that no forward look should be made. The Law Revision Commission is obviously well aware of that in the light of the changes already suggested. The concern here must not be only justice but also the administration of justice and it is in this latter area that complaints of the courts are most frequently heard. There is now a body of experience available. It ought to be taken account of. Whether it persuasively indicates a need for change is something for the Law Revision Commission to then state.

3. Do you object to the application of the privileges division to proceedings before the Industrial Accident Commission?

ANSWER: Yes. It may be foreseen that whenever any procedural matters that affect the Industrial Accident Commission are not contained in the Labor Code, then some of the statutory rules of evidence excluded by Section 5708 will then be "included", but without specific cross-reference. This will tend to bring in "technicalities" that were thought to be kept out. If the Evidence Code is then interpreted or amended without reference to Industrial Accident Commission proceedings, further difficulties may result. It is my personal opinion (without benefit of debate on the subject) that it would be better to exclude Industrial Accident Commission proceedings from the division on privileges. The physician-patient subject is already covered by the Labor Code. The marital privilege is so rare that I have never encountered a request to invoke it. The constitutional privileges against self-incrimination exists without statutory statement, as sections 930 and 940 of the proposed Evidence Code seem to imply. Although, the lawyer-client privilege is rarely applicable or invoked before the Industrial Accident Commission, it should be considered further. I believe that it would generally be respected as a matter of good practice. The discretionary use is recommended by some authorities. (See Witkin, California Evidence 462.)

4. Do you consider Evidence Code Section 914 satisfactory in view of my comments?

ANSWER: Labor Code Section 132 not only contemplates referral to the Superior Court for punishment for contempt but also states:

> "The remedy provided by this section is cumulative, and shall not impair or interfere with the power of the commission or a commissioner to enforce the attendance of witnesses and the production of papers, and to punish for contempt in the same manner and to the same extent as courts of record."

Thus there would be a conflict between this and Evidence Code

Section 914 insofar as power to hold in contempt is limited to a judge.

5. The amendment to Labor Code Section 3209.3 would appear to be beyond the scope of the Evidence Code bill.

ANSWER: I agree.

Please note, Mr. DeMoully, that my comments are those of one Referee. I do not purport to speak for all of the Referees, nor for the Commission, nor for the Chairman of the Industrial Accident Commission, J. William Beard. In connection with further study I should like to also call to your attention to the fact that Governor Brown has appointed a Workmen's Compensation Study Commission to study and make suggestions to the Governor and the Legislature regarding the workmen's compensation system to determine whether it contributes most effectively to the original, fundamental purpose of the workmen's compensation laws, including nonlitigious determination of rights under the law. (Sections 6200 et seq of the Labor Code, added in 1963). The Chairman is Conrad J. Moss of Nossaman, Thompson, Waters & Moss, Wilshire Grand Building, Los Angeles 17.

I wish to thank you for the additional background material.

Sincerely yours,

DAVID I. LIPPERT
Referee

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