STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article V. Privileges

February 1964

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

NOTE

This pamphlet begins on page 201. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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STATE OF CALIFORNIA EDMUND G. BROWN, *Governor*

CALIFORNIA LAW REVISION COMMISSION
SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA

December 1963

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article V (Privileges) of the Uniform Rules of Evidence and the research study relating thereto. This report is one in a series of reports being prepared by the Commission, each report covering a different portion of the Uniform Rules of Evidence.

The major portion of the research study was prepared by the Commission's research consultant, Professor James H. Chadbourn of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

HERMAN F. SELVIN
Chairman

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article V. Privileges

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article V of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 23 through 40, relates to privileges.

The word "privileges," within the meaning of Article V of the URE and this tentative recommendation, refers to the exemptions which are granted by law from the general duty of all persons to give evidence when required to do so. A privilege may take the form of (1) an exemption from the duty to testify—as in the case of the defendant's privilege in a criminal action; or (2) an exemption from the duty to testify about certain specific matters—as in the case of the privilege that every person has to refuse to testify about incriminating matters; or (3) a right to keep another person from testifying concerning certain matters—such as the privilege of a client to prevent his lawyer from revealing the client's confidential communications.

Because privileges operate to withhold relevant information, they necessarily handicap the court or jury in its effort to reach a just result. Nevertheless, courts and legislatures have determined from time to time that it is so important to keep certain information confidential that the needs of justice should be sacrificed to that end. The investigation of truth and the dispensation of justice, however, demand restricting the privileges that are granted within the narrowest limits required by the purposes they serve; every step beyond these limits provides an obstacle to the administration of justice. On the other hand, when it is necessary to grant a privilege, the privilege granted must be broad enough to accomplish its purpose—it must not be subject to exceptions that strike at the very interest the privilege is created to protect.

[1] A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

Much of California's existing statutory law in regard to privileges is found in Section 1881 of the Code of Civil Procedure. This section sets forth the privileges arising out of the relationship of husband and wife, attorney and client, clergyman and confessor, and physician and patient. The section also sets forth the newsman's privilege with respect to his sources of information and the public officer's privilege in regard to confidential governmental information. Some of the remaining California law concerning privileges is found in the Constitution and in statutes scattered throughout the codes.

The statutory and constitutional provisions relating to privileges are incomplete and defective. Much of the law can be found only in judicial decisions. For example, the existing statutes make no mention of the many exceptions that exist to the lawyer-client privilege. Whether a particular exception exists in California can be determined in some instances only after hours of painstaking research; in other instances, it cannot be determined at all for the case law on the subject is incomplete. Even in those areas covered by statute, the statutory language is frequently imprecise and confusing.

Moreover, the existing law is in some instances out of harmony with modern conditions. For example, the existing privileges have not protected against testimony by eavesdroppers because in an earlier day an individual could be expected to take precautions against others overhearing his confidential communications. With the development of electronic methods of eavesdropping, however, he can no longer assume that a few simple precautions will prevent others from overhearing his statements and, hence, consideration should be given to extending some privileges to protect against this danger. Then, too, existing law has not recognized the problems peculiar to the psychiatrist-patient relationship and the need for protecting the confidential communications made in the course of that relationship.

REVISION OF URE ARTICLE V

The Commission tentatively recommends that URE Article V, revised as hereinafter indicated, be enacted in California.[2] The substitution of detailed statutory rules relating to privileges for the existing statutory and court-made rules would eliminate much of the uncertainty that now exists. In the formulation of these detailed rules, anachronisms may be eliminated from the California law and the law may be brought into harmony with modern conditions.

Although the Commission approves the general format of the rules on privilege contained in URE Article V, the Commission has concluded that many changes should be made in the rules. In some cases, the suggested changes go only to language. For example, in some instances, different language is used in different URE rules when, apparently, the same meaning is intended in the rules. The Commission has eliminated these unnecessary differences in order to assure uniformity of interpretation. In other cases, however, the changes proposed reflect a different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such in-

[2] The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

stances, the rule proposed by the Commission provides a broader privilege than that proposed by the Commissioners on Uniform State Laws. In some cases, the tentative recommendation also provides broader privileges than those provided by existing California law; in a few cases, the tentative recommendation would restrict the scope of existing privileges.

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Where language has merely been shifted from one part of a rule to another, however, the change has not been shown in strikeout and italics; only language changes are so indicated. The text of several additional rules tentatively recommended by the Commission but not included in the URE is shown in italics. Each rule is followed by a Comment setting forth the major considerations that influenced the Commission in recommending important substantive changes in the rule or in the corresponding California law. For a detailed analysis of the various URE rules and the California law relating to privileges, see the research study beginning on page 301.

Rule 22.3. Definitions

RULE *22.3. As used in this article:*

(1) "Civil proceeding" means any proceeding except a criminal proceeding.

(2) "Criminal proceeding" means an action or proceeding brought in a court by the people of the State of California, and initiated by complaint, indictment, information, or accusation, either to determine whether a person has committed a crime and should be punished therefor or to determine whether a civil officer should be removed from office for wilful or corrupt misconduct, and includes any court proceeding ancillary thereto.

(3) "Disciplinary proceeding" means a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity) should be revoked, suspended, terminated, limited, or conditioned, but does not include a criminal proceeding.

(4) "Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

(5) "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 to do so) in which, pursuant to law, testimony can be compelled to be given.

(6) "Public employee" means an officer or employee of a public entity.

(7) "Public entity" means the United States, this State, or any public entity in this State.

(8) "Public entity in this State" means the Regents of the University of California, a county, city, district, public authority, public agency, or other political subdivision or public corporation in this State.

Comment

Because the revised privileges article applies in all proceedings of any kind in which testimony can be compelled by law to be given (see Proposed Rule 22.5 and the Comment thereto), it is necessary to use terms that do not appear in the URE rules. These terms are defined in this rule. Certain terms used in connection with but one rule are defined in the rule using the term. Most of the definitions are self-explanatory, but four of them deserve special comment.

"Criminal proceeding." The definition of "criminal proceeding" closely follows the definition in Penal Code Section 683. The definition is broadened, however, so that it includes a proceeding by accusation for the removal of a public officer under Government Code Section 3060 *et seq.* The definition also includes ancillary proceedings, such as writ proceedings to test the sufficiency of the evidence underlying an indictment or information or to attack a judgment of conviction. These proceedings are included in the definition so that the rules of privilege in such proceedings will be the same as they are in the criminal action itself.

"Disciplinary proceeding." The definition of "disciplinary proceeding" follows the definition of the kind of proceeding initiated by accusation in Government Code Section 11503. The definition has been modified to make it clear that it covers not only license revocation and suspension proceedings, but also personnel disciplinary proceedings.

"Presiding officer." "Presiding officer" is defined so that reference may be made to the person who makes rulings on questions of privilege in nonjudicial proceedings. The term includes arbitrators, hearing officers, referees, and any other person who is authorized to make rulings on claims of privilege. It, of course, includes the judge or other person presiding in a judicial proceeding.

"Proceeding." "Proceeding" is defined to mean all proceedings of whatever kind in which testimony can be compelled by law to be given. It includes civil and criminal actions and proceedings, administrative proceedings, legislative hearings, grand jury proceedings, coroners' inquests, arbitration proceedings, and any other kind of proceeding in which a person can be compelled by law to appear and give evidence. The definition is broad because a question of privilege can arise in any situation where a person can be compelled to testify.

Generally speaking, a person's duty to testify in a particular proceeding arises by reason of the issuance of a subpoena by any of the numerous agencies, commissions, departments, and persons authorized to issue subpoenas for a variety of purposes. Compliance with a subpoena, or, in other words, the legal compulsion of testimony, may be accomplished by several means. By far the most common means is the contempt power. The power to hold a recalcitrant witness in contempt may be exercised directly by some authorities, such as courts, certain constitutionally authorized administrative bodies, and the Legislature when in session, while other authorities exercise this power only indirectly by appeal to the courts. For other means by which testimony can

be legally compelled, see, *e.g.*, GOVT. CODE § 27500 (making it a misdemeanor to fail "wilfully and without reasonable excuse" to attend and testify at an inquest in response to a subpoena issued by a coroner); *Priestly* v. *Superior Court*, 50 Cal.2d 812, 330 P.2d 39 (1958), and *People* v. *McShann*, 50 Cal.2d 802, 330 P.2d 33 (1958) (enforcing the duty to testify by making an adverse order or finding of fact against the offending party, including dismissal of the action).

Rule 22.5. Scope of the Privileges Article

RULE *22.5. Except as otherwise provided by statute, the provisions of this article apply in all proceedings.*

Comment

The URE rules as proposed are applicable only to court proceedings. They are not applicable in other kinds of proceedings. The URE rules are so limited partly because they are designed for adoption by courts under their rulemaking authority, as well as by legislation, and there would be a question whether the courts could impose their rules on other bodies. See UNIFORM RULE 2 and the Comment thereto.

Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to a trier of fact who is not trained to sift the reliable from the unreliable. Privilege rules, however, are different from other rules of evidence. Privileges are granted for reasons of policy unrelated to the reliability of the information that is protected by the privilege. As a matter of fact, privileges have a practical effect only when the privileged information is relevant to the issues in a pending proceeding.

Privileges are granted because it is necessary to permit some information to be kept confidential in order to carry out certain socially desirable policies. Thus, for example, it is important to the attorney-client relationship or the marital relationship that confidential communications made in the course of such relationships be kept confidential; and, to protect such relationships, a privilege to prevent disclosure of such communications is granted.

If confidentiality is to be effectively protected by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be illusory if a court were the only place where the privilege could be invoked. Every officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information if the privilege rules were applicable only in judicial proceedings.

Therefore, the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given. Proposed Rule 22.5 makes the privilege rules applicable to all such proceedings. In this respect, it follows the precedent set in New Jersey when revised URE privilege rules were enacted. See N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49).

Whether Proposed Rule 22.5 is declarative of existing law is uncertain. No California case has decided the question whether the existing

judicially recognized privileges are applicable in nonjudicial proceedings. By statute, however, they have been made applicable in all adjudicatory proceedings conducted under the terms of the Administrative Procedure Act. GOVT. CODE § 11513. And the reported decisions indicate that, as a general rule, privileges are assumed to be applicable in nonjudicial proceedings. See, *e.g.*, *McKnew* v. *Superior Court*, 23 Cal.2d 58, 142 P.2d 1 (1943); *Ex parte McDonough*, 170 Cal. 230, 149 Pac. 566 (1915); *Board of Educ.* v. *Wilkinson*, 125 Cal. App.2d 100, 270 P.2d 82 (1954); *In re Bruns*, 15 Cal. App.2d 1, 58 P.2d 1318 (1936). Thus, Proposed Rule 22.5 appears to be declarative of existing practice, but there is no authority as to whether it is declarative of existing law. Its enactment will remove the existing uncertainty concerning the right to claim a privilege in a nonjudicial proceeding.

Rule 23. Privilege of Defendant in Criminal Proceeding

RULE 23. (1) ~~Every person has~~ *A defendant* in ~~any~~ *a* criminal ~~action~~ *proceeding* ~~in which he is an accused~~ *has* a privilege not to be called as a witness and not to testify.

(2) ~~An accused in a criminal action has 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, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.~~

~~(3)~~ ~~An accused~~ *A defendant* in a criminal ~~action~~ *proceeding* has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of ~~the~~ fact, except to refuse to testify.

~~(4) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom.~~

Comment

Rules 23, 24, and 25 generally. In California, as in most other states, the Constitution grants a privilege against self-incrimination. This privilege, guaranteed by Article I, Section 13 of the California Constitution, has two aspects. First, the defendant in a criminal case has a privilege not to be called as a witness and not to testify. This privilege is recognized in Revised Rule 23. Second, every person, whether or not accused of a crime, has a privilege when testifying in any proceeding to refuse to give information that might tend to incriminate him. This privilege is contained in Revised Rules 24 and 25.

Because the privileges stated in Revised Rules 23, 24, and 25 are derived from the Constitution, these privileges would exist whether or not these rules were enacted in statutory form. Nonetheless, approval of these rules is desirable in order to codify, and thus summarize and collect in one place, a number of existing rules and principles that today must be extracted from a large amount of case materials and statutes.

Rule 23. Revised Rule 23 restates without substantive change the existing California law. CAL. CONST., Art. I, § 13; *People* v. *Clark,* 18 Cal.2d 449, 116 P.2d 56 (1941), *People* v. *Tyler,* 36 Cal. 522 (1869); *People* v. *Talle,* 111 Cal. App.2d 650, 245 P.2d 633 (1952). Subdivision (2) of the revised rule—originally subdivision (3) of URE Rule 23—states in statutory form what these cases make clear, *i.e.,* that a defendant in a criminal case can be required to demonstrate his identifying characteristics so long as he is not required to testify. The URE reference to "an accused" has been replaced with language more technically accurate in California practice in light of Penal Code Sections 683 and 685.

Subdivision (2) of URE Rule 23 has been deleted because it deals with confidential communications between spouses. The entire subject of confidential communications between spouses is covered by Revised Rule 28. See also Proposed Rule 27.5, dealing with the privilege of a spouse not to testify against the other spouse.

Subdivision (4) of URE Rule 23 has been deleted because the matter of commenting on the exercise of the privilege provided by Rule 23 is covered by Revised Rule 39(2).

Rule 24. Definition of Incrimination

RULE 24. *(1)* A matter will incriminate a person within the meaning of these rules if it *:*

(a) Constitutes ~~, or forms an essential part of, or, taken in connection with other matters disclosed, is~~ *an element of a crime under the law of this State or the United States; or*

(b) Is a circumstance which with other circumstances would be a basis for a reasonable inference of *the commission of* such a ~~violation of the laws of this State as to subject him to liability to punishment therefor,~~ *crime; or*

(c) Is a clue to the discovery of a matter that is within paragraph (a) or (b) . ~~unless~~

(2) Notwithstanding subdivision (1), a matter will not incriminate a person if he has become ~~for any reason~~ permanently immune from ~~punishment~~ *conviction* for ~~such violation~~ *the crime .*

(3) In determining whether a matter is incriminating, other matters in evidence or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors shall be taken into consideration.

Comment

The Commission has substituted for the URE rule a definition of incrimination that is similar in form to the version of this rule enacted in New Jersey. N.J. REV. STAT. § 2A:84A-18. However, unlike the rule recommended here, the New Jersey rule extends the definition of incrimination to include matter that constitutes an element of a crime under the law of a sister state.

Subdivision (1). This subdivision makes it clear that the revised rule provides protection against possible incrimination under a federal law, but not under a law of another state or foreign nation. The scope of the privilege as it now exists in California is not clear, for no decision has been found indicating whether or not the existing California privilege provides protection against incrimination under the laws of a sovereignty other than California. The inclusion of protection against possible incrimination under a federal law is desirable to give full meaning to this privilege, for all persons subject to California law are at the same time subject to federal law. Expansion of protection to include the law of sister states or foreign nations seems unwarranted.

Whether a matter is incriminating is not left to the uncontrolled discretion of the person invoking the privilege; the court ultimately must decide whether a matter is incriminating. In making this determination, not only the other matters disclosed, but also the context of the question, the nature of the information sought, and many other pertinent factors must be considered. See subdivisions (1) and (3) of the revised rule.

The word "crime" is used in the revised rule instead of "violation" to indicate that the privilege is not available to protect a person from civil—as opposed to criminal—punishment. Thus, the privilege provides no protection against the disclosure of facts which might involve merely civil liability, economic loss, or public disgrace. See WITKIN, CALIFORNIA EVIDENCE 518 (1958).

Subdivision (2). The word "conviction" is used instead of "punishment" in the revised rule to indicate that the possibility of criminal conviction alone, whether or not accompanied by punishment, is sufficient to warrant invocation of the privilege. On the other hand, if a person has become permanently immune from conviction for the crime, he no longer has the privilege. This is existing law. "If, at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense, or, if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness 'against himself.'" *Ex parte Cohen,* 104 Cal. 524, 528, 38 Pac. 364, 365 (1894).

Subdivision (3). Subdivisions (1) and (3) of the revised rule make it clear that other links in the chain of incrimination need not be disclosed before the privilege may be invoked. For example, the witness may be aware of other matters which, when taken in connection

with the information sought, are a basis for a reasonable inference of the commission of a crime. The protection of the privilege would be substantially impaired if such other matters had to be disclosed before the privilege against self-incrimination could be invoked. In this respect, Revised Rule 24 states existing California law. See, *e.g.*, *People* v. *Reeves*, 221 Cal. App.2d ___, ___, 34 Cal. Rptr. 815, 820 (1963); *People* v. *Lawrence*, 168 Cal. App.2d 510, 516, 336 P.2d 189, 193 (1959); *People* v. *McCormick*, 102 Cal. App.2d Supp. 954, 960, 228 P.2d 349, 352 (1951).

Rule 25. Self-Incrimination Privilege

RULE 25. ~~Subject to Rules 23 and 37,~~ Every natural person has a privilege ~~, which he may claim,~~ to refuse to disclose ~~in an action or to a public official of this state or any governmental agency or division thereof~~ any matter that will incriminate him *if he claims the privilege*, except that under this rule ~~,~~ *:*

~~(a) If the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness ; and~~

(1) ~~(b)~~ No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics ~~,~~ or his physical or mental condition . ~~;~~ ~~and~~

(2) No person has the privilege to refuse to demonstrate his identifying characteristics, such as, for example, his handwriting, the sound of his voice and manner of speaking, or his manner of walking or running.

(3) ~~(c)~~ No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis . ~~,~~ ~~and~~

(4) ~~(d)~~ No person has the privilege to refuse ~~to obey an order made by a court~~ to produce for use as evidence or otherwise a document, chattel, or other thing under his control constituting, containing, or disclosing matter incriminating him if ~~the judge finds that, by the applicable rules of the substantive law,~~ some other person , ~~or a~~ corporation, ~~or other~~ association , *or other organization (including a public entity) owns or* has a superior right to the possession of the thing ~~ordered~~ to be produced . ~~,~~ ~~and~~

~~(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and~~

~~(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and~~

(5) No person has the privilege to refuse to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection for the purpose of aiding or facilitating the supervision or regulation by a public entity of an office, occupation, profession, or calling when such production is required in the aid of such supervision or regulation.

(6) ~~(g)~~ Subject to Rule 21,[3] a defendant in a criminal ~~action~~ *proceeding* who ~~voluntarily~~ testifies in ~~the action~~ *that proceeding* upon the merits before the trier of fact ~~does not have the privilege to refuse to disclose any matter relevant to any issue in the action~~ *may be cross-examined as to all matters about which he was examined in chief.*

(7) Except for the defendant in a criminal proceeding, a person who, without having claimed the privilege under this rule, testifies in a proceeding before the trier of fact with respect to a matter does not have the privilege under this rule to refuse to disclose in such proceeding anything relevant to that matter.

Comment

Revised Rule 25 sets forth the privilege, derived from Article I, Section 13 of the California Constitution, of a person when testifying to refuse to give information that might tend to incriminate him. This privilege should be distinguished from the privilege stated in Revised Rule 23, which is the privilege of a defendant in a criminal case to refuse to testify at all. As in the case of Revised Rule 23, the Commission recommends that the law relating to the privilege against self-incrimination be gathered together and articulated in a statute such as Revised Rule 25.

Introductory clause. The words "in an action or to a public official of this state or any governmental agency or division thereof" have been deleted from the statement of the privilege because they are unnecessary in view of Proposed Rule 22.5, which makes all privileges available in all proceedings where testimony can be compelled. Rules of evidence cannot speak in terms of a privilege not to disclose in those situations where there is no duty to disclose; evidentiary privileges exist only when a person would, but for the exercise of a privilege, be under a duty to speak. For example, such rules are not concerned with inquiries by a police officer regarding a crime nor with the rights, duties, or privileges that a person may have at the police station. Thus, the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary privilege because he is under no legal duty to talk to the police officer. Whether such an accusation and the accused's response thereto are admissible evidence is a separate

[3] Rule 21 is the subject of a separate study and recommendation by the Commission. The rule as contained in the URE is as follows:

RULE 21. *Limitations on Evidence of Conviction of Crime as Affecting Credibility.* Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

problem with which Revised Rule 25 does not purport to deal. See, however, Revised Rule 63(6) (confession or admission of defendant in criminal case) and Revised Rule 62(1) in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 319-320, 309 (1963).

The reference to Rules 23 and 37 has been omitted because subdivisions (6) and (7) of Revised Rule 25 indicate the extent to which this privilege is subject to waiver.

Subdivisions (1), (2), and (3). These subdivisions declare existing California law. *People* v. *Lopez*, 60 Cal.2d ___, ___, 32 Cal. Rptr. 424, 435-436, 384 P.2d 16, 27-28 (1963) (acts mentioned in subdivisions (1) and (2) of Revised Rule 25 not privileged); *People* v. *Duroncelay*, 48 Cal.2d 766, 312 P.2d 690 (1957); *People* v. *Haeussler*, 41 Cal.2d 252, 260 P.2d 8 (1953) (no privilege to prevent taking samples of body fluids). Of course, nothing in these subdivisions authorizes the violation of constitutional rights in regard to the manner in which such evidence is obtained. See *Rochin* v. *California*, 342 U.S. 165 (1951).

Subdivision (2) makes it clear that a person can be required to demonstrate his identifying physical characteristics even though such action may incriminate him. Under subdivision (2), the privilege against self-incrimination cannot be invoked against a direction that a person demonstrate his handwriting, or speak the same words as were spoken by the perpetrator of a crime, or demonstrate his manner of walking so that a witness can determine if he limps like the person observed at the scene of a crime, and the like. This matter may be covered by subdivision (1) of the revised rule; but subdivision (2) will avoid any problems that might arise because of the phrasing of subdivision (1). Also, the addition of subdivision (2) to this rule makes it clear that a defendant in a criminal case can be required to demonstrate his identifying characteristics the same as any other person so long as he is not required to *testify* in violation of Rule 23(1).

Subdivision (4). Subdivision (d) of the URE rule, now subdivision (4), has been revised to indicate more clearly that organizations other than corporations are included among those who may have a superior right of possession. This subdivision probably states existing law insofar as it denies the privilege to an individual who would be personally incriminated by surrendering public documents or books of a private organization in his possession. See *Wilson* v. *United States*, 221 U.S. 361 (1911), and cases collected in Annot., 120 A.L.R. 1102, 1109-1116 (1939). See also 8 WIGMORE, EVIDENCE § 2259b (McNaughton rev. 1961). Although there apparently is no California case holding that an individual has no privilege with respect to other types of property in his custody but owned by another, the logic supporting the unavailability of the privilege in this situation is persuasive. The word "owns" has been added to avoid a possible problem where, for example, articles of incorporation vest exclusive custody of books and records in a corporate officer, even though they are the property of the corporation.

Subdivision (5). Subdivisions (e) and (f) in the URE rule are deleted because they provide that public officials and others who engage

in any form of activity, occupation, or business that is subject to governmental regulation may be deprived of the privilege against self-incrimination by regulations and statutes requiring them to report or disclose certain matters. No cases have held that the privilege against self-incrimination can be so easily destroyed. The cases interpreting the privilege have held only that a record that is actually kept pursuant to a statutory or regulatory requirement is not subject to the privilege if the production of the record is sought in connection with the governmental supervision and regulation of the business or activity. *Shapiro* v. *United States,* 335 U.S. 1 (1948). Subdivision (5), which has been included in the revised rule in lieu of subdivisions (e) and (f), expresses this rule.

The cases have also held that public employees and persons engaged in regulated activities may be required by statute or regulation to disclose information relating to the regulated activity and may be disciplined for failure or refusal to make the required disclosure, but such cases have never held that such persons have lost their privilege against self-incrimination. See *Shapiro* v. *United States,* 335 U.S. 1 (1948). See also *People* v. *Diller,* 24 Cal. App. 799, 142 Pac. 797 (1914). Under the revised rule, public employees may still be required to make disclosures concerning their administration of public affairs, and may still be discharged if they refuse to do so; but, under the revised rule, it is clear that they do not surrender the privilege against self-incrimination as a condition of their employment. See *Christal* v. *Police Commission,* 33 Cal. App.2d 564, 92 P.2d 416 (1939).

Subdivision (6). Subdivision (g) of the URE rule, now subdivision (6) of the revised rule, has been revised to incorporate the substance of the present California law (Section 1323 of the Penal Code). See *People* v. *McCarthy,* 88 Cal. App.2d 883, 200 P.2d 69 (1948). Subdivision (g) of the URE rule conflicts with Section 13, Article I of the California Constitution as interpreted by the California Supreme Court. See *People* v. *O'Brien,* 66 Cal. 602, 6 Pac. 695 (1885). See also *People* v. *Arrighini,* 122 Cal. 121, 54 Pac. 591 (1898).

Subdivision (7). The Commission has included a specific waiver provision in subdivision (7). URE Rule 37 provides a waiver provision that applies to all privileges. However, the waiver provision of Rule 37 probably would be unconstitutional if applied to the privilege against self-incrimination. Thus, Rule 37 has been revised so that it does not apply to Revised Rule 25, which has been expanded to include a special waiver provision.

Under subdivision (7) of Revised Rule 25, the privilege against self-incrimination is waived only in the *same* action or proceeding, not in a subsequent action or proceeding. California cases interpreting Article I, Section 13 of the California Constitution appear to limit waiver of the privilege against self-incrimination to the particular proceeding in which the privilege is waived. See *Overend* v. *Superior Court,* 131 Cal. 280, 63 Pac. 372 (1900); *In re Sales,* 134 Cal. App. 54, 24 P.2d 916 (1933). A person can claim the privilege in a subsequent case even though he waived it in a previous case. *In re Sales, supra.*

Subdivision (7) does not apply to a defendant in a criminal action or proceeding; the extent of the waiver by a defendant in a criminal case is governed by subdivision (6) of the revised rule.

Rule 26. Lawyer-Client Privilege

RULE 26. *(1)* ~~(3)~~ As used in this rule *:*

(a) "Client" means a person, ~~or~~ corporation, ~~or other~~ association, *or other organization (including a public entity)* that, directly or through an authorized representative, consults a lawyer ~~or the lawyer's representative~~ for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity,~~;~~ and includes an incompetent *(i) who himself so consults the lawyer or (ii)* whose guardian *or conservator* so consults the lawyer ~~or the lawyer's representative~~ in behalf of the incompetent.~~;~~

(b) *"Confidential* communication *between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and* includes advice given by the lawyer in the course of *that relationship.* ~~representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship;~~

(c) *"Holder of the privilege" means (i) the client when he is competent, (ii) a guardian or conservator of the client when the client is incompetent, (iii) the personal representative of the client if the client is dead, and (iv) a successor, assign, trustee in dissolution, or any similar representative of a corporation, partnership, association, or other organization (including a public entity) that is no longer in existence.*

(d) ~~(c)~~ "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation ~~the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer~~.

(2) ~~(1)~~ Subject to Rule 37 and except as otherwise provided ~~by Paragraph 2 of~~ *in* this rule, ~~communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client~~ *the client, whether or not a party,* has a privilege ~~(a) if he is the witness~~ to refuse to disclose, *and to prevent another from disclosing,* ~~any such~~ *a confidential* communication ~~and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in~~

~~a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative. The privilege available to a corporation or association terminates upon dissolution.~~ *between client and lawyer if the privilege is claimed by:*

(a) The holder of the privilege; or

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

(3) The lawyer who received or made a communication subject to the privilege under this rule shall claim the privilege whenever he:

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

(4) ~~(2) Such privileges shall not extend~~ *There is no privilege under this rule:*

(a) ~~to a communication~~ If ~~the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was~~ *the services of the lawyer were* sought or obtained ~~in order~~ to enable or aid ~~the client~~ *anyone* to commit or plan to commit a crime or ~~a tort, or~~ *to perpetrate or plan to perpetrate a fraud.*

(b) *As* to a communication relevant to an issue between parties ~~all of whom~~ *who* claim through ~~the~~ *a deceased* client, regardless of whether the ~~respective~~ claims are by testate or intestate succession or by inter vivos transaction.~~, or~~

(c) *As* to a communication relevant to an issue of breach ~~of duty~~, by the lawyer ~~to his client,~~ or by the client ~~to his lawyer~~, *of a duty arising out of the lawyer-client relationship.* ~~or~~

(d) *As* to a communication relevant to an issue concerning *the intention or competence of a client executing* an attested document, *or concerning the execution or attestation of such a document,* of which the lawyer is an attesting witness.~~, or~~

(e) As to a communication relevant to an issue concerning the intention of a deceased client with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

(f) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased client, purporting to affect an interest in property.

(g) As to a communication between a physician and a client who consults the physician or submits to an examination by the physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental condition if the communication, including information obtained by an examination of the client, is not privileged under Rule 27.

(h) As to a communication between a psychotherapist and a client who consults the psychotherapist or submits to an examination by the psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition if the communication, including information obtained by an examination of the client, is not privileged under Rule 27.3.

(5) ~~(c) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.~~ *Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them may claim a privilege under this rule as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between such clients.*

Comment

This rule sets forth the lawyer-client privilege now found in subdivision 2 of Section 1881 of the Code of Civil Procedure. This rule, however, contains a much more accurate statement of the privilege than does the existing statute.

The URE rule has been rearranged and rewritten to conform to the form and style of the other rules relating to privileged communications. The definitions, for example, have been placed in subdivision (1), as they are in Rules 27 and 29. The language of the rule has been modified in certain respects, too, so that precisely the same language is used in this rule as is used in other rules when the same meaning is intended.

Subdivision (1)—Definitions

Paragraph (a)—"Client." The definition of "client" has been revised to make it clear that governmental organizations are considered clients for the purpose of the lawyer-client privilege. This change makes it clear that the State, cities, and other public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned. This is existing law in California. See *Holm* v. *Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954).

The definition of "client" has also been extended by adding the words "other organization." The language of the revised rule is intended to cover such unincorporated organizations as labor unions, so-

cial clubs, and fraternal societies when the organization (rather than its individual members) is the client.

The reference to "lawyer's representative" has been deleted. This term was included in the URE rule to make it clear that a communication to an attorney's stenographer or investigator for the purpose of transmitting the information to the attorney is protected by the privilege. This purpose is better accomplished by a modification of the definition of "confidential communication" in paragraph (b). Under the proposed revisions of these definitions, communications to other persons for transmission to an attorney are clearly protected, whereas the protection afforded by the URE rule would depend on whether such persons could be called a "lawyer's representative."

The definition of "client" has also been modified to make it clear that the term includes an incompetent who himself consults a lawyer. Subdivision (1)(c) and subdivision (2) of the revised rule provide that the guardian of an incompetent can claim the privilege for the incompetent client and that, when the incompetent client is again competent, the client may himself claim the privilege.

Paragraph (b) — "Confidential communication." "Confidential communication between client and lawyer" has been defined. The term is used to describe the type of communications that are subject to the lawyer-client privilege. The definition permits the defined term to be used in the general rule stated in subdivision (2), and conforms the style of this rule to the style of other rules in the privileges article.

In accord with existing California law, the revised rule provides that the communication must be in the course of the lawyer-client relationship and must be confidential. See *City and County of San Francisco* v. *Superior Court,* 37 Cal.2d 227, 234-235, 231 P.2d 26, 29-30 (1951). Confidential communications also include those made to third parties, such as accountants or similar experts, for the purpose of transmitting such information to the lawyer. Thus, the phrase, "reasonably necessary for the transmission of the information," restates existing California law. See, *e.g., City and County of San Francisco* v. *Superior Court, supra,* which involved a communication to a physician. Although the rule of this case would be changed by subdivision (4)(g) and (h) insofar as it applies to communications to physicians and psychotherapists consulted as such, subdivision (1)(b) retains the rule for other expert consultants. (See Comment to subdivision (4)(g) and (h), *infra.*) A lawyer at times may desire to have a client reveal information to an expert consultant and himself at the same time in order that he may adequately advise the client. The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" makes it clear that these communications, too, are confidential and within the scope of the privilege, despite the presence of the third party. This part of the definition probably restates existing California law. See *Attorney-Client Privilege in California,* 10 STAN. L. REV. 297, 308 (1958). See also *Himmelfarb* v. *United States,* 175 F.2d 924, 938-939 (9th Cir. 1949).

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person, such as a spouse, business associate, or joint

client, who is present to aid the consultation or to further their common interest in the subject of the consultation. These words may change existing California law, for under existing law the presence of a third person will sometimes be held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. See *Attorney-Client Privilege in California,* 10 STAN. L. REV. 297, 308 (1958), and authorities there cited in notes 67-71.

Paragraph (c)—"Holder of the privilege." The substance of the sentence found in URE Rule 26(1), reading "The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative," has been stated in the form of a definition in subdivision (1)(c) of the revised rule. This definition is similar to the definition of "holder of the privilege" found in URE Rule 27, relating to the physician-patient privilege. It makes clear who can waive the privilege for the purposes of Rule 37. It also makes subdivision (2) of the revised rule more concise.

Under subdivision (1)(c)(i) and (ii) of the revised rule, the guardian of the client is the holder of the privilege if the client is incompetent, and an incompetent client becomes the holder of the privilege when he becomes competent. For example, if the client is a minor of 20 years of age and he or his guardian consults the attorney, the guardian under subdivision (1)(c)(ii) is the holder of the privilege until the client becomes 21; thereafter, the client himself is the holder of the privilege. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer. The existing California law is uncertain. The statutes do not deal with the problem and no appellate decision has discussed it.

Under subdivision (1)(c)(iii), the personal representative of the client is the holder of the privilege when the client is dead. He may either claim or waive the privilege on behalf of the deceased client. This may be a change in the existing California law. Under the California law, it seems probable that the privilege survives the death of the client and that no one can waive it after the client's death. See *Collette* v. *Sarrasin,* 184 Cal. 283, 289, 193 Pac. 571, 573 (1920). Hence, the privilege apparently must be recognized even though it would be clearly to the interest of the estate of the deceased client to waive it. If this is the present California law, the URE provision would be a desirable change. Under the URE rule and under the revised rule, the personal representative of a deceased client may waive the privilege when it is to the advantage of the estate to do so. The purpose underlying the privilege—to provide a client with the assurance of confidentiality—does not require the recognition of the privilege when to do so is detrimental to his interest or to the interests of his estate.

Under subdivision (1)(c)(iv), the successor, assign, trustee in dissolution, or any other similar representative of a corporation, partnership, association, or other organization that has ceased to exist is the holder of the privilege after these nonpersonal clients lose their former identity. This changes the effect of the last sentence of URE Rule 26(1), which has been omitted from the revised rule, since there is no reason to deprive such entities of a privilege when there is only a change in form while the substance remains.

The definition of "holder of the privilege" should be considered with reference to subdivision (2) of Revised Rule 26 (specifying who can claim the privilege) and Revised Rule 37 (relating to waiver of the privilege).

Paragraph (d)—"Lawyer." The Commission approves the provision of the URE rule that defines "lawyer" to include a person "reasonably believed by the client to be authorized" to practice law. Since the privilege is intended to encourage full disclosure by giving the client assurance that his communication will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney should be sufficient to justify application of the privilege. See 8 WIGMORE, EVIDENCE § 2302 (McNaughton rev. 1961), and cases there cited in note 1. See also MCCORMICK, EVIDENCE § 92 (1954).

The Commission has omitted the requirement of the URE that the client must reasonably believe that the lawyer is licensed to practice in a jurisdiction that recognizes the lawyer-client privilege. Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions. The California client should not be required to determine at his peril whether the jurisdiction licensing his particular lawyer recognizes the privilege. He should be entitled to assume that the lawyer consulted will maintain his confidences to the same extent as would a lawyer in California. The existing California law in this regard is uncertain.

Subdivision (2)—General Rule

The substance of the general rule contained in URE Rule 26(1) has been set out in the revised rule as subdivision (2). The rule has been revised to conform to the form and style of Rule 27 so that precisely the same language is used where the same meaning is intended.

Privilege must be claimed. Revised Rule 26, as well as the original URE rule, is based upon the premise that the privilege must be claimed by a person who is authorized to claim the privilege. If there is no claim of privilege by a person with authority to make the claim, the evidence is admissible. To make this meaning clear, the words "are privileged" have been deleted from the preliminary language of subdivision (2). Subdivision (2) sets forth the persons authorized to claim the privilege, and, under Proposed Rule 36.5, a judge is required to exclude a confidential attorney-client communication on behalf of an absent holder.

Since the privilege is recognized under the revised rule only when claimed by or on behalf of the holder of the privilege, the privilege will exist under these rules only for so long as there is a holder in existence. Hence, the privilege ceases to exist when the client's estate is finally distributed and his personal representative discharged. This is apparently a change in the California law. Under the existing law, it seems likely that the privilege continues to exist after the client's death and no one has authority to waive the privilege. See *Collette* v. *Sarrasin, supra,* 184 Cal. 283, 193 Pac. 571 (1920). See also *Paley* v. *Superior Court,* 137 Cal. App.2d 450, 290 P.2d 617 (1955), and discussion of the analogous situation in connection with the physician-patient privilege in the Study, *infra* at 408-410. Although there is good reason for maintaining the privilege while the estate is being administered—particularly if the estate is involved in litigation—there is little reason to

preserve secrecy at the expense of justice after the estate is wound up and the representative discharged. Thus, the better policy seems to be expressed in the URE and the revised rule, which terminates the privilege upon discharge of the client's personal representative.

Persons entitled to claim the privilege. Paragraphs (a), (b), and (c) of revised subdivision (2) state the substance of the sentence in URE Rule 26(1) reading, "The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative," with some changes.

Under paragraph (a) of revised subdivision (2), the "holder of the privilege" may claim the privilege. Under paragraph (b) of revised subdivision (2), persons authorized to do so by the holder may claim the privilege. Thus, the guardian, the client, or the personal representative (when the "holder of the privilege") may authorize another person, such as his attorney, to claim the privilege. Paragraph (c) of revised subdivision (2) states more clearly the substance of what is contained in URE Rule 26(1), which provides that the privilege may be claimed by "the client in person or by his lawyer."

"Eavesdroppers." Paragraph (c) of URE Rule 26(1) was drafted by the Commissioners on Uniform State Laws to make it clear that the lawyer-client privilege can be asserted to prevent eavesdroppers from testifying concerning the confidential communications they have intercepted. See UNIFORM RULE 26 Comment. Although this paragraph has been deleted from the revised rule, its substance has been retained by the provision of subdivision (2) that permits the privilege to be claimed to prevent *anyone* from testifying to a confidential communication. Probably, this will change the existing California law. See *People* v. *Castiel,* 153 Cal. App.2d 653, 315 P.2d 79 (1957). See also *Attorney-Client Privilege in California,* 10 STAN. L. REV. 297, 310-312 (1958), and cases there cited in note 84. However, the rule stated in the revised rule and the URE rule is a desirable one. Clients and lawyers should be protected against the risks of wrongdoing of this sort. See PENAL CODE § 653i, making it a felony to eavesdrop upon a conversation between a person in custody of a public officer and that person's lawyer. No one should be able to use the fruits of such wrongdoing for his own advantage by using them as evidence in court. The extension of the privilege to prevent testimony by eavesdroppers would not, however, affect the rule that the making of the communication under circumstances where others could easily overhear is some evidence that the client did not intend the communication to be confidential. See *Sharon* v. *Sharon,* 79 Cal. 633, 677, 22 Pac. 26, 39 (1889).

Revisions in URE language. The words "if he is the witness" have been deleted from subdivision (2) of the revised rule because they impose a limitation that is neither necessary nor desirable. Inasmuch as these rules apply in any type of proceeding, they apply at times when the person from whom information is sought cannot be regarded technically as a witness—as, for example, on a request for admissions under California discovery practice.

The word "another" has been used instead of "witness" in the preliminary language because "witness" is suggestive of testimony only at a trial. The existence of privilege makes it possible for the client

to prevent a person from disclosing the communication at a pretrial proceeding as well as at the trial.

Paragraphs (a), (b), and (c) of URE Rule 26(1)—subdivision (2) of the revised rule—have been deleted. Those paragraphs indicate the persons against whom the privilege may be asserted. The privilege, where applicable, should be available against any witness. Hence, the limitations of these paragraphs have been deleted as unnecessary and undesirable.

Subdivision (3)—When Lawyer Must Claim Privilege

Under subdivision (3) of the revised rule, the lawyer *must* claim the privilege on behalf of the client unless otherwise instructed by a person authorized to permit disclosure. Subdivision (3) is included to preclude any implication, from the authorization in subdivision (2)(c), that a lawyer may have discretion whether or not to claim the privilege for his client. Compare BUS. & PROF. CODE § 6068(e).

Subdivisions (4) and (5)—Exceptions

The exceptions to the general rule, which were stated in subdivision (2) of the URE rule, have been set forth in subdivisions (4) and (5) of the revised rule. None of these exceptions is expressly stated in the existing California statute. However, most of them are recognized to some extent by judicial decision.

Subdivision (4)(a)—Crime or fraud. Paragraph (a) of subdivision (4) provides that the privilege does not apply where the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. *Abbott* v. *Superior Court,* 78 Cal. App.2d 19, 177 P.2d 317 (1947). URE Rule 26 extends this exception to bar the privilege in case of consultation with the view to commission of *any tort.* The Commission has not adopted this extension of the traditional scope of this exception. Because of the wide variety of torts, and the technical nature of many, extension of the exception to include all torts would present difficult problems for an attorney consulting with his client and would open up too large an area for nullification of the privilege. A recent California decision similarly rejected this extension of the exception. *Nowell* v. *Superior Court,* 223 Cal. App.2d ___, 36 Cal. Rptr. 21 (1963).

The URE rule requires the judge to find that "the legal service was sought or obtained in order to enable or aid *the client* to commit or plan to commit a crime or a tort." The Commission has substituted the word "anyone" for the reference to "the client." The applicability of the privilege and the exception should not depend upon who is going to commit the crime. The privilege should not provide a sanctuary for planning crimes by anyone. The broader term is also used in Rule 27 (in both the URE and the revised versions).

The original URE rule required the judge to find that "sufficient evidence, aside from the communication, has been introduced to warrant a finding" that the legal service was sought for a fraudulent or illegal purpose. This requirement has been eliminated from revised subdivision 4(a) as unnecessary in view of Proposed Rule 37.5.

Subdivision (4)(b)—Parties claiming through deceased client. Subdivision (4)(b) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through a deceased client. Under existing California law, all must claim through the client by testate or intestate succession in order for the exception to be applicable; a claim by inter vivos transaction apparently is not within the exception. *Paley* v. *Superior Court,* 137 Cal. App.2d 450, 460, 290 P.2d 617, 623 (1955). The URE and the revised rule include inter vivos transactions within the exception.

The traditional exception between claimants by testate or intestate succession was based on the theory that the privilege is granted to protect the client's interests against adverse parties and, since claimants in privity within the estate claim *through* the client and not adversely, the client presumably would want his communications disclosed in litigation between such claimants in order that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. Yet, there is no reason to suppose, for example, that a client's interests and desires are not represented by a person claiming under an inter vivos transaction—*e.g.,* a deed—executed by a client in full possession of his faculties while those interests and desires are necessarily represented by a claimant under a will executed while the claimant's mental stability was dubious. Therefore, the Commission can perceive no basis in logic or policy for refusing to extend the exception to cases where one or more of the parties is claiming by inter vivos transaction. See the discussion in the Study, *infra* at 392-396.

The URE rule does not require the client to be deceased before the exception applies. The revised rule restores the requirement of existing law that the client be deceased. The exception is based on the client's presumed intent; hence, while the client is living, his claim of privilege should be recognized, for it effectively dispels any belief that he desires disclosure.

Subdivision (4)(c)—Breach of duty. The breach of duty exception stated in subdivision (4)(c) has not been recognized by a holding in any California case, although a dictum in one opinion indicates that it would be. *Pacific Telephone and Telegraph Co.* v. *Fink,* 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956). The exception is approved because it would be unjust to permit a client to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge. The subdivision has been revised to make it clear that the duty involved must be one arising out of the lawyer-client relationship, *e.g.,* the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services.

Subdivision (4)(d), (e), and (f)—Attesting witness; dispositive instruments. The exception stated in subdivision (4)(d) has been confined to the type of communication about which one would expect an attesting witness to testify. Merely because an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the documents attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. Under existing law, the attesting witness excep-

tion has been used as a device to obtain information from a lawyer relating to dispositive instruments when the lawyer received the information in his capacity as a lawyer and not merely in his capacity as an attesting witness. See generally *In re Mullin,* 110 Cal. 252, 42 Pac. 645 (1895).

Although the attesting witness exception stated in paragraph (d) is limited to information of the kind to which one would expect an attesting witness to testify, there is merit in making the exception applicable to all dispositive instruments. One would normally expect that a client would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Accordingly, two new exceptions—paragraphs (e) and (f)—have been created relating to dispositive instruments generally. Under these exceptions, the lawyer—whether or not he is an attesting witness—will be able to testify concerning the intention or competency of a deceased client and will be able to testify to communications relevant to the validity of various dispositive instruments that have been executed by the client.

Subdivision (4)(g) and (h)—Communications to physicians and psychotherapists. These exceptions make the lawyer-client privilege inapplicable to protect a communication between the lawyer's client and a physician or psychotherapist consulted as such if the communication is not independently privileged under the substantive rules relating to physicians (Rule 27) and psychotherapists (Rule 27.3), respectively. This changes existing California law. In *City and County of San Francisco* v. *Superior Court,* 37 Cal.2d 227, 231 P.2d 26 (1951), the court held that, even though a client's communication to a physician was not privileged under the physician-patient privilege, the communication nevertheless was privileged under the lawyer-client privilege because the purpose of the client's consultation with the physician was to assist the lawyer in preparing the client's lawsuit. The broader implications of this decision in regard to a conduit theory of communications between client and lawyer are not affected by the exceptions stated in paragraphs (g) and (h), for it is clear under subdivision (1)(b) that either the client or the lawyer may communicate with each other through agents. However, in the specific situations covered by paragraphs (g) and (h)—communications between a client and a physician or psychotherapist consulted as such—other rules spell out in detail the conditions and circumstances under which communications to physicians (Revised Rule 27) and psychotherapists (Proposed Rule 27.3) are privileged. Where a client's communication to either of these persons is not protected by the privilege granted these relationships, there is no reason to protect the communication by applying a different privilege in circumvention of the policy expressed in the privilege that ought to be applied. The admissibility of relevant and material evidence bearing upon substantive issues in a given case should not be determined on the basis of whether a lawyer is consulted before a client sees his physician or psychotherapist for diagnosis or treatment.

Subdivision (5)—Joint clients. Subdivision (5) of the revised rule—the joint-client exception—states existing California law. *Harris* v. *Harris,* 136 Cal. 379, 69 Pac. 23 (1902). The exception as proposed by the Commissioners on Uniform State Laws has been modified because,

under the original language of the URE, the exception appears to apply only to communications *from* one of the clients to the lawyer. Under the revised rule, the exception applies to communications either from or to the lawyer.

Rule 27. Physician-Patient Privilege

RULE 27. (1) As used in this rule~~,~~*:*

(a) ~~(d)~~ "Confidential communication between *patient and* physician ~~and patient~~" means ~~such~~ information, *including information obtained by an examination of the patient,* transmitted between *a patient and his* physician ~~and patient, including information obtained by an examination of the patient, as is transmitted~~ in *the course of that relationship and in* confidence ~~and~~ by a means which, so far as the patient is aware, discloses the information to no third persons other than those *who are present to further the interest of the patient in the consultation or those* reasonably necessary for the transmission of the information or the accomplishment of the purpose for which ~~it~~ *the physician* is ~~transmitted~~ *consulted, and includes advice given by the physician in the course of that relationship.*

(b) ~~(c)~~ "Holder of the privilege" means *(i) the patient when he is competent, (ii) a guardian or conservator of the patient when the patient is incompetent, and (iii) the personal representative of the patient if the patient is dead.* ~~the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient;~~

(c) ~~(a)~~ "Patient" means a person who~~,~~ *consults a physician or submits to an examination by a physician* for the ~~sole~~ purpose of securing *a diagnosis or* preventive, palliative, or curative treatment~~, or a diagnosis preliminary to such treatment,~~ of his physical or mental condition.~~, consults a physician, or submits to an examination by a physician;~~

(d) ~~(b)~~ "Physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in ~~the~~ *any* state or ~~jurisdiction in which the consultation or examination takes place;~~ *nation.*

(2) *Subject to Rule 37 and* except as *otherwise* provided ~~by paragraphs (3), (4), (5) and (6) of~~ *in* this rule, ~~a person~~ *the patient,* whether or not a party, has a privilege ~~in a civil action or in a prosecution for a misdemeanor~~ to refuse to disclose, and to prevent ~~a witness~~ *another* from disclosing, ~~a communication, if he claims the privilege and the judge finds that (a) the communication was~~ a confidential communication between patient and physician~~, and (b) the patient or the physician reasonably believed the communication to be necessary~~

~~or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is~~ *if the privilege is claimed by:*

(a) The holder of the privilege*;* or

(b) A person *who is* authorized to claim the privilege ~~for him~~ *by the holder of the privilege; or*

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

(3) The physician who received or made a communication subject to the privilege under this rule shall claim the privilege whenever he:

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

(4) ~~(3)~~ There is no privilege under this rule ~~as to any relevant communication between the patient and his physician~~*:*

(a) ~~(6) No person has a privilege under this rule~~ If ~~the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that~~ the services of the physician were sought or obtained to enable or aid anyone to commit or ~~to~~ plan to commit a crime or or a tort~~,~~ or to escape detection or apprehension after the commission of a crime or a tort.

(b) ~~(c)~~ *As to a communication relevant to* ~~upon~~ an issue between parties ~~claiming~~ *who claim through a deceased patient, regardless of whether the claims are* by testate or intestate succession *or by inter vivos transaction* ~~from a deceased patient.~~

(c) As to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

(d) As to a communication relevant to an issue concerning the intention of a deceased patient with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

(e) ~~(b)~~ *As to a communication relevant to* ~~upon~~ an issue ~~as to~~ *concerning* the validity of a ~~document as a will of the patient, or~~ *deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.*

(f) ~~(a) upon an issue of the patient's condition~~ In ~~an action~~ *a proceeding* to commit ~~him~~ *the patient* or otherwise place him *or his property, or both,* under the control of another ~~or others~~ because of *his* alleged mental ~~incompetence,~~ or *physical condition.*

(g) In ~~an action~~ *a proceeding brought by or on behalf of the patient* in which the patient seeks to establish his competence. ~~or~~

(h) In a criminal proceeding.

(i) In ~~an action~~ *a proceeding* to recover damages on account of conduct of the patient which constitutes a ~~criminal offence~~ *crime.* ~~other than a misdemeanor, or~~

(j) In a disciplinary proceeding.

(k) ~~(4) There is no privilege under this rule~~ In ~~an action~~ *a proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure,* in which *an issue concerning* the condition of the patient ~~is an element or factor of the claim or defense of~~ *has been tendered (i) by* the patient, or *(ii)* ~~of~~ *by* any party claiming through or under the patient, or *(iii) by any party* claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(l) ~~(5) There is no privilege under this rule~~ As to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute, *charter, ordinance, administrative regulation, or other provision* requiring the report or record specifically provides that the information shall not be disclosed.

~~(7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.~~

Comment

The privilege created by Rule 27 is very similar to the privilege created by subdivision 4 of Code of Civil Procedure Section 1881. The URE rule is, however, a clearer statement of the privilege.

Subdivision (1)—Definitions

Paragraph (a)—"Confidential communication." The definition of "confidential communication" has been revised to include language taken from the URE version of Rule 26. As revised, the definition requires that the information be transmitted in confidence between a pa-

tient and his physician in the course of the physician-patient relationship. This requirement eliminates the need for subdivision (2)(b) of the URE rule, which required the judge to find that the patient or physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis or to prescribe or render treatment. This definition probably includes more communications than does the URE language. For example, it would be difficult to fit the statement of the doctor to the patient giving his diagnosis within the provisions of URE subdivision (2)(b), whereas such statements are clearly within the definition of "confidential communication" as revised. It is uncertain whether the doctor's statement is covered by the existing California privilege.

Paragraph (b)—"Holder of the privilege." The definition of "holder of the privilege" has been rephrased in the revised rule to conform to the similar definition in Revised Rule 26. Under this definition, a guardian of the patient is the holder of the privilege if the patient is incompetent. This differs from the URE rule which makes the *guardian* of the *person* of the patient the holder of the privilege. Under the revised definition, if the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege. The provision making the personal representative of the patient the holder of the privilege when the patient is dead may change the existing California law. Under the present California law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. See the discussion in the Study, *infra* at 408-410. If this is the existing California law, it would be changed because the personal representative of the patient will have authority to claim or waive the privilege after the patient's death. The change is desirable, for the personal representative can protect the interest of the patient's estate in the confidentiality of these statements and can waive the privilege when the estate would benefit by waiver. And, when the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy.

This definition of "holder of the privilege" should be considered with subdivision (2) of the revised rule (specifying who can claim the privilege) and Rule 37 (relating to waiver of the privilege).

Paragraph (c)—"Patient." The Commission disapproves the requirement of the URE rule that the patient must consult the physician for the *sole* purpose of treatment or diagnosis *preliminary to treatment* in order to be within the privilege. This requirement does not appear to be in the existing California law. See *McRae* v. *Erickson*, 1 Cal. App. 326, 332-333, 82 Pac. 209, 212 (1905). Since treatment does not always follow diagnosis, the limitation of diagnosis to that which is "preliminary to treatment" is undesirable. Also, inclusion of the limitation "sole" with respect to the purpose of the consultation would eliminate some statements fully within the policy underlying the privilege even though made while consulting the physician for a dual purpose. For example, a repairman might visit a physician both for the purpose of obtaining treatment from the physician and for the purpose

of repairing the physician's equipment. Statements made by the patient during the course of the visit to enable the physician to diagnose and treat him would seem to be as deserving of protection as statements made by another person whose sole purpose was to obtain treatment. Of course, statements made for another purpose, such as repairing the equipment, would not be protected by the privilege.

Paragraph (d)—"Physician." Paragraph (d) of subdivision (1) defines physician to include a person "reasonably believed by the patient to be authorized" to practice medicine. This changes existing California law, which requires the physician to be licensed. CODE CIV. PROC. § 1881(4). If this privilege is to be recognized, it should protect the patient from reasonable mistakes as to unlicensed practitioners. The privilege also should be applicable to communications made to a physician authorized to practice in any state or nation. When a California resident travels outside the State and has occasion to visit a physician during such travel, or where a physician from another state or nation participates in the treatment of a person in California, the patient should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California physician in California. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate to the physician.

Subdivision (2)—General Rule

The basic statement of the physician-patient privilege is set out in the revised rule as subdivision (2). The following modifications of this provision of the URE rule have been made in the revised rule:

(1) The rule has specifically been made subject to Rule 37 (waiver) and subdivision (7) of URE Rule 27 has been omitted as unnecessary.

(2) Under subdivision (4)(h) of the revised rule, the privilege is not applicable in criminal actions and proceedings. The URE rule would have extended the privilege to a prosecution for a misdemeanor. The existing California statute makes the privilege unavailable in *any* criminal action or proceeding. CODE CIV. PROC. § 1881(4). The Commission is unaware of any criticism of the existing California law. In addition, if the privilege were applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, as under the URE rule, it would be possible for the prosecutor in some instances to prosecute for a felony in order to make the physician-patient privilege not applicable. A rule of evidence should not be a significant factor in determining whether a defendant is to be prosecuted for a misdemeanor or a felony.

(3) The language of the URE rule indicating the persons who may be silenced by an exercise of the privilege has been omitted. The purpose of this language in the URE rule is to indicate that the privilege may not be exercised against an eavesdropper. For the reasons appearing in the discussion of Revised Rule 26, an eavesdropper should not be permitted to testify to a statement that is privileged under this rule. The revised rule will permit the privilege to be asserted to prevent an eavesdropper from testifying. The existing California law probably does not provide this protection against testimony by eavesdroppers.

See generally *Kramer* v. *Policy Holders Life Ins. Assn.*, 5 Cal. App.2d 380, 393, 42 P.2d 665, 671 (1935); *Horowitz* v. *Sacks*, 89 Cal. App. 336, 265 Pac. 281 (1928).

(4) The language of subdivision (2)(d) of the URE rule has been revised to state more clearly who is authorized to exercise the privilege.

Subdivision 3—When Physician Must Claim Privilege

Subdivision (3), which has been added to the revised rule, directs the physician to claim the privilege on behalf of the patient unless otherwise instructed by a person authorized to permit disclosure. Under the language of the URE rule, it is not clear that the physician is a person "authorized to claim the privilege" for the holder of the privilege.

Subdivision (4)—Exceptions

The exceptions to the physician-patient privilege have been gathered together in subdivision (4). The language has been conformed to that used in Rule 26 and the order in which the exceptions appear has been altered so that they are in the same order in which comparable exceptions appear in Rule 26.

Paragraph (a)—Crime or tort. While Revised Rule 26 provides that the lawyer-client privilege does not apply when the communication was made to enable anyone to commit or plan to commit a crime or a fraud, subdivision (4)(a) of Revised Rule 27 creates an exception to the physician-patient privilege where the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a *tort*, or to escape detection or apprehension after the commission of a crime or a *tort*. This difference in treatment of the physician-patient privilege stems from the fact that persons do not ordinarily consult their physicians in regard to matters which might subsequently be determined to be a tort or crime. On the other hand, people ordinarily consult lawyers about precisely these matters. The purpose of the privilege—to encourage persons to make complete disclosure of their physical and mental problems so that they may obtain treatment and healing—is adequately served without broadening the privilege to provide a sanctuary for planning or concealing crimes or torts. Because of the different nature of the lawyer-client relationship, a similar exception to the lawyer-client privilege would substantially impair the effectiveness of the privilege. Whether this exception exists in California law has not yet been decided, but it probably would be recognized in an appropriate case in view of the similar court-created exception to the lawyer-client privilege.

Paragraph (b)—Parties claiming through deceased patient. The language of subdivision (4)(b) of the revised rule has been revised to conform to the language of the comparable exception in Revised Rule 26. See the discussion of this exception in the Comment to Revised Rule 26.

Paragraph (c)—Breach of duty. Subdivision (4)(c) has been added to the revised rule. It expresses an exception similar to that found in subdivision (4)(c) of Revised Rule 26. If a patient charges a doctor with a breach of duty, he should not be privileged to withhold from the doctor evidence material to the doctor's defense.

Paragraphs (d) and (e)—Dispositive instruments. In subdivision (4)(d) and (e) of the revised rule, the URE exception relating to the validity of a will is broadened to provide an exception for communications relevant to an issue concerning the validity of *any* dispositive instrument executed by a now deceased patient or concerning his intention or competency with respect to such instrument. Where this kind of issue arises in a lawsuit, communications made to his physician by the person executing the instrument become extremely important. Permitting these statements to be introduced in evidence after the patient's death will not materially impair the privilege granted to patients by this rule. Existing California law provides an exception virtually coextensive with that provided in the revised rule. CODE CIV. PROC. § 1881(4).

Paragraph (f)—Guardianship proceedings. The exception provided in subdivision (4)(f) of the revised rule is broader than the URE rule; it covers not only commitments of mentally ill persons but also covers such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the privilege should not apply because the proceedings are being conducted for the benefit of the patient. In such proceedings, he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare. There is no similar exception in existing California law. *McClenahan* v. *Keyes,* 188 Cal. 574, 584, 206 Pac. 454, 458 (1922) (dictum). *But see* 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege where the physician acts pursuant to court appointment for the explicit purpose of giving testimony.

Paragraph (g)—Competency proceedings. Language has been added to subdivision (4)(g) of the revised rule to distinguish the proceedings referred to in this subdivision from commitment proceedings covered by the exception stated in subdivision (4)(f). This exception, too, is new to California law; but, when a patient's condition is placed in issue by instituting such a proceeding, the patient should not be permitted at the same time to withhold from the court the most vital evidence relating to his condition.

Paragraphs (h) and (i)—Criminal conduct. The URE rule, in subdivision (2), provides that the privilege does not apply in felony prosecutions. The revised rule, in subdivision (4)(h), retains the existing California rule that the privilege is inapplicable in all criminal prosecutions. CODE CIV. PROC. § 1881(4). See also *People* v. *Griffith,* 146 Cal. 339, 80 Pac. 68 (1905).

The URE rule, in subdivision (3), provides also that the privilege is inapplicable in civil actions to recover damages for the patient's felonious conduct. As revised, this exception is found in subdivision (4)(i), which makes the privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. The exception is provided in the URE rule because of the inapplicability of the privilege in felony prosecutions, and its broadened form appears in the revised rule because of the inapplicability of the revised privilege in all criminal prosecutions. Under the URE article relating to hearsay, the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. See UNIFORM RULE 63(3). Thus, if this exception did not exist,

the evidence subject to the privilege under this rule would be available in a civil trial only if a criminal trial were conducted first; it would not be available if the civil trial were conducted first. The admissibility of evidence should not depend on the order in which civil and criminal matters are tried. This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried.

Paragraph (j)—Quasi-criminal proceedings. Because the URE rules do not purport to apply in nonjudicial proceedings, nothing in the rules indicates whether this privilege should apply in such proceedings. The revised rules, however, apply in all proceedings except as otherwise provided by statute. Therefore, subdivision (4)(j) has been included in the rule to provide that the privilege may not be claimed in those administrative proceedings that are comparable to criminal proceedings, *i.e.*, proceedings brought for the purpose of imposing discipline of some sort. Under existing law, this privilege is available in all administrative proceedings conducted under the Administrative Procedure Act because it has been incorporated in Government Code Section 11513(c) by reference; but it is not specifically made available in administrative proceedings not conducted under the Administrative Procedure Act because the statute granting the privilege in terms applies only to civil actions. The revised rule sweeps away this distinction, which has no basis in reason, and substitutes a distinction that has been found practical in judicial proceedings.

Paragraph (k)—Patient-litigant exception. The URE rule provides that there is no privilege in an action in which the condition of the patient is an element or factor of the claim "or defense" of the patient. The revised rule—subdivision (4)(k)—does not extend the patient-litigant exception this far. Instead, it provides that the privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. A plaintiff should not be empowered to deprive a defendant of the privilege merely by bringing an action or proceeding and placing the defendant's condition in issue. But, if the patient himself tenders the issue of his condition, he should do so with the realization that he will not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege. A limited form of this exception is recognized in existing statutory law by making the privilege inapplicable in personal injury actions. CODE CIV. PROC. § 1881(4). The exception as revised states the existing California law in extending the statutory exception to other situations where the patient himself has raised the issue of his condition. *In re Cathey,* 55 Cal.2d 679, 12 Cal. Rptr. 762, 361 P.2d 426 (1961) (prisoner in state medical facility waived physician-patient privilege by putting his mental condition in issue by application for habeas corpus). See also *City and County of San Francisco* v. *Superior Court,* 37 Cal.2d 227, 232, 231 P.2d 26, 28 (1951) (personal injury case).

The revised rule—subdivision (4)(k)—provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (wrongful death). The URE rule does not contain this provision. Under the existing California statute, a person authorized to bring the wrongful death action may consent to the testimony by the physi-

cian. CODE CIV. PROC. § 1881(4). As far as testimony by the physician is concerned, there is no reason why the rules of evidence should be different in a case where the patient brings the action and a case where someone else sues for the patient's wrongful death.

The revised rule—subdivision (4)(k)—also provides that there is no privilege in an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to child). In this case, as in a case under the wrongful death statute, the same rule of evidence should apply when the parent brings the action as applies when the child is the plaintiff.

Paragraph (*l*)—Required reports. The provision of the URE rule providing that the privilege does not apply as to information required by statute to be reported to a public officer or recorded in a public office has been extended in subdivision (4)(*l*) to include information required to be reported by other provisions of law. The privilege should not apply where the information is public, whether it is reported or filed pursuant to a statute or an ordinance, charter, regulation, or other provision. There is no comparable exception in existing California law; it is a desirable exception, however, because no valid purpose is served by preventing the use of relevant information that is required to be reported and made public.

Rule 27.3. Psychotherapist-Patient Privilege

RULE *27.3. (1) As used in this rule:*

(a) "Confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes advice given by the psychotherapist in the course of that relationship.

(b) "Holder of the privilege" means (i) the patient when he is competent, (ii) a guardian or conservator of the patient when the patient is incompetent, and (iii) the personal representative of the patient if the patient is dead.

(c) "Patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition.

(d) "Psychotherapist" means (i) a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation or (ii) a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(2) Subject to Rule 37 and except as otherwise provided in this rule, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege; or

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

(3) The psychotherapist who received or made a communication subject to the privilege under this rule shall claim the privilege whenever he:

(a) Is authorized to claim the privilege under paragraph (c) of subdivision (2); and

(b) Is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

(b) As to a communication relevant to an issue between parties who claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(c) As to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

(d) As to a communication relevant to an issue concerning the intention of a deceased patient with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.

(f) In a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence.

(g) In a proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the mental or emotional condition of the patient has been tendered (i) by the patient, or (ii) by any party claiming through or under the patient, or (iii) by any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(h) If the psychotherapist is appointed by order of a court to examine the patient.

(i) As to information which the psychotherapist or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information shall not be disclosed.

Comment

Neither the URE nor the existing California law provides any special privilege for psychiatrists other than that which is enjoyed by physicians generally. On the other hand, persons who consult psychologists have a broad privilege under the terms of Business and Professions Code Section 2904. Yet, the need for a privilege broader than that provided to patients of medical doctors is as great for persons consulting psychiatrists as it is for persons consulting psychologists. Adequate psychotherapeutic treatment is dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Unless a patient can be assured that such information will be held in utmost confidence, he will be reluctant to make the full disclosure upon which his treatment depends. The Commission has received several reports indicating that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, the Commission recommends that a new privilege be established that would grant to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege will operate to withhold relevant information in some situations where such information would be crucial, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

Proposed Rule 27.3 is designed to provide this additional privilege. The privilege applies also to psychologists and supersedes the psychologist-patient privilege provided in the Business and Professions Code. The new privilege will be one for psychotherapists generally.

Definition of "psychotherapist." In subdivision (1)(d), "psychotherapist" is defined as any medical doctor or certified psychologist. The privilege is not confined to those medical doctors whose practice is limited to psychiatry because many medical doctors who do not specialize in the field of psychiatry nevertheless practice psychiatry to a certain extent. Some patients cannot afford to go to specialists and must obtain treatment from doctors who do not limit their practice to psychiatry. Then, too, because the line between organic and psychosomatic illness is indistinct, a physician may be called upon to treat both physical and mental or emotional conditions at the same time. Disclosure of a mental or emotional problem will often be made in the first instance to a family physician who will refer the patient to someone else for further specialized treatment. In all of these situations, the psycho-

therapist privilege should be applicable if the patient is seeking diagnosis or treatment of his mental or emotional condition.

Scope of the privilege. Generally, the new privilege follows the physician-patient privilege and the comments made under Revised Rule 27 will apply to the provisions of Proposed Rule 27.3. The following differences, however, should be noted:

(1) The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal actions and similar proceedings. See Revised Rule 27(4)(h). Since the interests to be protected are somewhat different, this difference in the scope of the two privileges is justified, particularly since the Commission is advised that proper psychotherapy often is denied a patient solely because of a fear that the psychotherapist may be compelled to reveal confidential communications in a criminal proceeding.

Although the psychotherapist-patient privilege applies in a criminal proceeding, the privilege is not available to a defendant who puts his mental or emotional condition in issue, as, for example, by a plea of insanity or diminished responsibility. The exception provided in paragraph (g) of subdivision (4) makes this clear. This is only fair. In a criminal proceeding in which the defendant has tendered his condition, the trier of fact should have available to it the best information that can be obtained in regard to the defendant's mental or emotional condition. That evidence most likely can be furnished by the psychotherapist who examined or treated the patient-defendant.

(2) There is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. See Revised Rule 27(4)(f). There is no similar exception in the psychotherapist-patient privilege. A patient's fear of future commitment proceedings based upon what he tells his psychotherapist would inhibit the relationship between the patient and his psychotherapist almost as much as would the patient's fear of future criminal proceedings based upon such statements. If a psychotherapist becomes convinced during a course of treatment that his patient is a menace to himself or to others because of his mental or emotional condition, he is free to bring such information to the attention of the appropriate authorities. The privilege is merely an exemption from the general duty to *testify* in a proceeding in which testimony can ordinarily be compelled to be given. The only effect of the privilege would be to enable the patient to prevent the psychotherapist from testifying in any commitment proceedings that ensue.

(3) The physician-patient privilege does not apply in civil actions for damages arising out of the patient's criminal conduct. See Revised Rule 27(4)(i). Nor does it apply in administrative disciplinary proceedings. No similar exceptions are provided in the psychotherapist-patient privilege. These exceptions appear in the physician-patient privilege because that privilege does not apply in criminal proceedings. Therefore, an exception is also created for comparable civil and administrative cases. The psychotherapist-patient privilege, however, does apply in criminal cases; hence, there is no similar exception in civil actions or administrative proceedings involving the patient's criminal conduct.

Court appointed psychotherapist. Subdivision (4)(h) provides an exception if the psychotherapist is appointed by order of a court to examine the patient. Where the relationship of psychotherapist and patient is created by court order, there is not a sufficiently confidential relationship to warrant extending the privilege to communications made in the course of that relationship. Moreover, when the psychotherapist is appointed by the court, it is most often for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition. Therefore, it would be inappropriate to have the privilege apply to that relationship. See generally 35 OPS. CAL. ATTY. GEN. 226 (1960), regarding the unavailability of the present physician-patient privilege under these circumstances.

Rule 27.5. Privilege Not to Testify Against Spouse

RULE *27.5. (1) A married person has a privilege not to testify against his spouse in any proceeding except:*

(a) A proceeding to commit or otherwise place his spouse or his property, or both, under the control of another because of his alleged mental or physical condition.

(b) A proceeding brought by or on behalf of a spouse to establish his competence.

(c) A criminal proceeding in which one spouse is charged with (i) a crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage, or (ii) a crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage, or (iii) bigamy or adultery, or (iv) a crime defined by Section 270 or 270a of the Penal Code.

(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(2) Subject to the exceptions listed in subdivision (1), a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this subdivision.

(3) Unless wrongfully compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this rule in the proceeding in which such testimony is given.

(4) There is no privilege under this rule in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment

Proposed Rule 27.5

Under this rule, a married person has two privileges: (1) a privilege not to testify against his spouse in any proceeding and (2) a privilege not to be called as a witness in any proceeding to which his spouse is a party. No similar privileges are contained in the URE.

Privilege not to testify. The privilege not to testify—subdivision (1)—is recommended because compelling a married person to testify against his spouse would in many cases seriously disturb if not completely disrupt the marital relationship of the persons involved. Society stands to lose more from such disruption than it stands to gain from the testimony which would be made available if the privilege did not exist.

The privilege provided by this subdivision is based in part on a 1956 recommendation and study made by the Commission. See *Recommendation and Study Relating to The Marital "For and Against" Testimonial Privilege,* 1 CAL. LAW REVISION COMM'N., REP., REC. & STUDIES, Recommendation and Study at F-1 (1957).

Privilege not to be called as witness. The privilege not to be called as a witness—subdivision (2)—is somewhat similar to the privilege given the defendant in a criminal case under Rule 23. This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution calling the defendant's wife as a witness, thus forcing her to object before the jury. The privilege not to be called does not apply, however, in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding, but he may refuse to answer a question that would compel him to testify against his spouse because of the subdivision (1) privilege.

Exceptions. The exceptions to the privileges under this rule are similar to those contained in Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, but the exceptions in this rule have been made consistent with those provided in Revised Rule 28 (the marital communications privilege).

Waiver. Subdivision (3) contains a special waiver provision for the privileges provided by Proposed Rule 27.5. Under this subdivision, a married person who testifies in a proceeding to which his spouse is *a party* waives both privileges provided for in this rule. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and expect that spouse to invoke the privilege provided in subdivision (1) to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and invoke the privilege not to testify against his spouse as to other matters. In any proceeding where a married person's spouse is *not a party,* the privilege not to be called as a witness is not available and subdivision (3) provides that the privilege not to testify against a spouse is waived when a person *testifies against* his spouse in that proceeding. Thus, for example, in a grand jury proceeding a married person may testify the same as any other witness without waiving the privilege provided under subdivision (1) so long as he does not *testify against* his spouse.

Subdivision (4) precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony

under Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives all marital privileges. *Tobias* v. *Adams,* 201 Cal. 689, 258 Pac. 588 (1927); *Schwartz* v. *Brandon,* 97 Cal. App. 30, 275 Pac. 448 (1929). *But cf. Marple* v. *Jackson,* 184 Cal. 411, 193 Pac. 940 (1920). And when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. *Hagen* v. *Silva,* 139 Cal. App.2d 199, 293 P.2d 143 (1956). Similarly, when the spouses join as plaintiffs in an action to recover damages to one of them, the cause of action being community property at the time the case was decided, each has been held to have waived the privilege as to the testimony of the other. *In re Strand,* 123 Cal. App. 170, 11 P.2d 89 (1932). However, the privilege is available to the plaintiff spouse who sues alone to recover for his personal injuries, even when the recovery would have been community property. *Rothschild* v. *Superior Court,* 109 Cal. App. 345, 293 Pac. 106 (1930). *But cf. Credit Bureau of San Diego, Inc.* v. *Smallen,* 114 Cal. App.2d Supp. 834, 249 P.2d 619 (1952). This rule has seemingly been developed to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse under Section 1881 (1). It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. *Ayres* v. *Wright,* 103 Cal. App. 610, 284 Pac. 1077 (1930).

Present Law

Under Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

The "for" privilege. The Commission has concluded that the marital testimonial privilege provided by existing law as to testimony by one spouse *for* the other should be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his *favor.* If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in *favor* of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction.

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege

to prevent his spouse from testifying against him in a civil action. The privilege under Proposed Rule 27.5 is given exclusively to the witness spouse because he instead of the party spouse is more likely to make the determination of whether to claim the privilege on the basis of its probable effect on the marital relationship. For example, because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of *People* v. *Ward,* 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 13-year-old sister. He had threatened to murder his wife—and it seems likely that he would have done so had she not fled. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

Rule 28. Marital Privilege for Confidential Communications

RULE 28. (1) Subject to Rule 37 and except as otherwise provided in ~~Paragraphs (2) and (3) of~~ this rule, a spouse *(or his guardian or conservator when he is incompetent)* ~~who transmitted to the other the information which constitutes the communication~~, *whether or not a party,* has a privilege during the marital relationship *and afterwards* ~~which he may claim whether or not he is a party to the action,~~ to refuse to disclose, and to prevent *another* ~~the other~~ from disclosing, *a* communication ~~s found by the judge~~ *if he claims the privilege and the communication was* ~~to have been had or~~ made in confidence between ~~them~~ *him and the other spouse* while *they were* husband and wife. ~~The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.~~

(2) ~~Neither spouse may claim such privilege~~ *There is no privilege under this rule:*

(a) ~~(c)~~ If ~~the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that~~ the communication was made, in whole or in part, to enable or aid anyone to commit or ~~to~~ plan to commit a crime or ~~a tort~~ *to perpetrate or plan to perpetrate a fraud.*

(b) In a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

(c) In a proceeding brought by or on behalf of either spouse in which the spouse seeks to establish his competence.

(d) ~~(a)~~ In ~~an action~~ *a proceeding* by one spouse against the other spouse, or *in a proceeding by a person claiming by testate or intestate*

succession or by inter vivos transaction from a deceased spouse against the other spouse. ~~(b) In an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or~~

(e) ~~(c)~~ In a criminal ~~action~~ *proceeding* in which one ~~of them~~ *spouse* is charged with *(i)* a crime against the person or property of the other *spouse* or of a child of either, or *(ii)* a crime against the person or property of a third person committed in the course of committing a crime against *the person or property of* the other *spouse*, or *(iii)* bigamy or adultery, or ~~desertion of the other or of a child of either~~ *(iv) a crime defined by Section 270 or 270a of the Penal Code.* ~~; or~~

(f) In a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(g) ~~(d)~~ In a criminal ~~action~~ *proceeding* in which the ~~accused offers evidence of a~~ communication ~~between him and his spouse, or~~ *is offered in evidence by a defendant who is one of the spouses between whom the communication was made.*

~~(3) A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.~~

Comment

Rule 28 expresses the privilege for confidential marital communications. Under existing law, the privilege for confidential marital communications is provided in subdivision 1 of Code of Civil Procedure Section 1881.

Subdivision (1)—General Rule

Who can claim the privilege. Under the URE rule, only the spouse who transmitted to the other the information which constitutes the communication can claim the privilege. Under existing California law, the privilege may belong only to the nontestifying spouse inasmuch as the statute provides: "[N]or can either . . . be, *without the consent of the other,* examined as to any communication made by one to the other during the marriage." (Emphasis added.) It is likely, however, that the statute would be construed to grant the privilege to both spouses. See generally *In re De Neef,* 42 Cal. App.2d 691, 109 P.2d 741 (1941). *But see People* v. *Keller,* 165 Cal. App.2d 419, 423-424, 332 P.2d 174, 176 (1958) (dictum).

Under the revised rule, both spouses are the holders of the privilege and either spouse may claim it. As a practical matter, it is often difficult to separate the subject matter of statements made from one spouse to another from the subject matter of the replies. Hence, if the privilege were only that of the communicating spouse, the nature of the privileged statement might be revealed by obtaining from the other spouse,

if willing to testify, what was said in return. Protection for each spouse can be provided only by giving the privilege to both.

Under the revised rule, a guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse.

Termination of marriage. Under existing California law, the privilege may be claimed as to confidential communications made during a marriage even though the marriage has terminated at the time the privilege is claimed. CODE CIV. PROC. § 1881(1); *People* v. *Mullings,* 83 Cal. 138, 23 Pac. 229 (1890). The URE rule, however, would permit the privilege to be claimed only during the marital relationship; no privilege would exist after the marriage is terminated by death or divorce. This portion of the URE rule has been revised to retain the existing California law. Free and open communication between spouses would be unduly inhibited if one of the spouses could be compelled to testify as to the nature of such communications after the termination of the marriage.

Eavesdroppers. The URE rule provides no protection against eavesdroppers. It provides that the privilege may be asserted only to prevent testimony by a spouse; hence, a person who has overheard a confidential communication between spouses may testify concerning what he overheard. The revised rule, however, permits the privilege to be exercised against anyone. Thus, eavesdroppers may be prevented from testifying by a claim of privilege. This constitutes a change in the existing law, for the existing law also provides no protection against eavesdroppers. See generally *People* v. *Peak,* 66 Cal. App.2d 894, 153 P.2d 464 (1944); *People* v. *Morhar,* 78 Cal. App. 380, 248 Pac. 975 (1926); *People* v. *Mitchell,* 61 Cal. App. 569, 215 Pac. 117 (1923). The change is desirable, however, for no one should be able to use the fruits of such wrongdoing for his own advantage. The protection afforded against eavesdroppers also changes the existing law that permits a third party to whom one of the spouses has revealed a confidential communication to testify concerning it. *People* v. *Swaile,* 12 Cal. App. 192, 195-196, 107 Pac. 134, 137 (1909); *People* v. *Chadwick,* 4 Cal. App. 63, 87 Pac. 384 (1906). See also *Wolfle* v. *United States,* 291 U.S. 7 (1934). Under Rule 37, such conduct would constitute a waiver of the privilege only as to the spouse who makes the disclosure; the privilege would remain intact as to the spouse not consenting to such disclosure.

Criminal cases. Rule 23(2), as proposed in the URE, provides a defendant in a criminal case with a special privilege as to confidential marital communications. About the only difference between Rules 28 and 23(2) of the URE as originally proposed is that under URE Rule 23(2) the privilege applies even though the person claiming the privilege is not the communicating spouse. Another possible difference is that URE Rule 23(2) would create a post-coverture privilege, although this is not altogether clear. In any event, the revisions of Rule 28 have eliminated any possible differences between Revised Rule 28 and URE Rule 23(2). Therefore, subdivision (2) of URE Rule 23 has become superfluous in the revised rules and has been eliminated.

Waiver. Since the revised rule gives each spouse the right to claim the privilege, subdivision (3) of the URE rule is no longer appropriate; hence, it is deleted. Revised Rule 37 covers the question of termination of the privilege.

Subdivision (2)—Exceptions

The exceptions provided in Rule 28 have been reorganized so that they appear in the same order in which the exceptions appear in the other communication privileges. These exceptions, for the most part, are recognized in existing California law. The exception provided in URE subdivision (2)(b) has been eliminated because there are no actions for alienation of affections or for criminal conversation in California. CIV. CODE § 43.5.

Paragraph (a)—Crime or fraud. In paragraph (a) of subdivision (2), the revised rule sets forth an exception when the communication was made to enable or aid anyone to commit or plan to commit a crime or fraud. The original URE version of the exception would have made the exception applicable whenever the communication was made for the purpose of committing or planning to commit a crime or a *tort.* The privilege is justified by the need for the freest sort of communication between spouses about all aspects of their business, social, and private lives. Because of the wide variety of torts and the technical nature of many, an extension of the exception to include all torts would nullify the privilege to too great an extent. This exception does not appear to have been recognized in the California cases dealing with this privilege. Nonetheless, the exception as revised does not seem so broad that it would impair the values the privilege is intended to preserve, and in many cases the evidence which would be admissible under this exception will be vital in order to do justice between the parties to a lawsuit.

Paragraphs (b) and (c)—Guardianship and competency proceedings. Paragraphs (b) and (c) of subdivision (2) have been added in the revised rule. These paragraphs express an exception contained in the existing California law. CODE CIV. PROC. § 1881(1) (exception added by Cal. Stats. 1957, Ch. 1961, p. 3504). Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, virtually all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. Therefore, inasmuch as these proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings, it would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information.

Paragraph (d)—Litigation between spouses. The exception for litigation between the spouses—subdivision (2)(d)—is recognized under existing law. CODE CIV. PROC. § 1881(1). The revised rule extends the principle of the exception to similar cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse. See generally *Estate of Gillett,* 73 Cal. App.2d 588, 166 P.2d 870 (1946).

Paragraphs (e) and (f)—Crime against spouse or children. Subdivision (2)(e) of the revised rule restates with minor variations an exception that is recognized under existing California law. CODE CIV.

PROC. § 1881(1). Paragraphs (e) and (f) of subdivision (2) of the revised rule together create an exception for all the proceedings mentioned in Section 1322 of the Penal Code. Unlike the similar exception stated in Proposed Rule 27.5, the exception stated in Revised Rule 28 applies without regard to whether the crimes mentioned in subdivision (e) are committed before, during, or after marriage.

Paragraph (g)—Communication offered by defendant spouse. The exception in subdivision (2)(g) of the revised rule does not appear to have been recognized in any California case. Nonetheless, it appears to be a desirable exception. When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his defense, his spouse (or his former spouse) should not be privileged to withhold the information. The privilege for marital communications is granted to enhance the confidential relationship between spouses. Yet, nothing would seem more destructive of marital harmony than to permit one spouse to refuse to give testimony which is material to establish the defense of the other spouse in a criminal proceeding.

Rule 28.5. Confidential Communications: Burden of Proof

RULE *28.5. Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof* [4] *to establish that the communication was not confidential.*

Comment

Revised Rules 26, 27, 27.3, and 28 all provide a privilege for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that such a communication is presumed confidential and the party objecting to the claim of privilege has the burden of showing that the communication was not made in confidence. See generally, with respect to the marital communication privilege, 8 WIGMORE, EVIDENCE § 2336 (McNaughton rev. 1961). See also *Blau* v. *United States,* 340 U.S. 332, 333-335 (1951). In adopting by statute the privileges article of the URE, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. REV. STAT. § 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52.

The rule is desirable. If the privilege claimant were required to show the communication was made in confidence, in many cases he would be compelled to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Proposed Rule 28.5 is submitted with the rules relating to privileged communications to establish the rule of presumptive confidence in California, if it is not the rule already. See *Sharon* v. *Sharon,* 79 Cal. 633, 678, 22 Pac. 26, 40 (1889); *Hager* v. *Shindler,* 29 Cal. 47, 63 (1865) ("*Prima facie,*

[4] "Burden of proof" is defined in Uniform Rule 1 as synonymous with burden of persuasion. The term does *not* refer merely to the burden of producing evidence.

all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

Rule 29. Priest-Penitent Privilege

RULE 29. (1) As used in this rule, :

(a) ~~(b)~~ "Penitent" means a *person* ~~member of a church or religious denomination or organization~~ who has made a penitential communication to a priest. ~~thereof;~~

(b) ~~(c)~~ "Penitential communication" means a ~~confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member~~ *communication made in confidence in the presence of no third person to a priest who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.*

(c) ~~(a)~~ "Priest" means a priest, clergyman, minister of the gospel, or other officer of a church or of a religious denomination or *religious* organization. ; ~~who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization;~~

(2) *Subject to Rule 37,* a *penitent* ~~person~~, whether or not a party, has a privilege to refuse to disclose, and to prevent ~~a witness~~ *another* from disclosing, a *penitential* communication if he claims the privilege ~~and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent~~.

(3) Subject to Rule 37, a priest, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

Comment

Rule 29 sets forth the privilege that is now granted by California law in subdivision 3 of Code of Civil Procedure Section 1881.

There may be several reasons for the granting of this privilege, but at least one underlying reason seems to be that the law will not compel a clergyman to violate—nor punish him for refusing to violate—the tenets of his church which require him to maintain secrecy as to confessional statements made to him in the course of his religious duties. See generally 8 WIGMORE, EVIDENCE §§ 2394-2396 (McNaughton rev. 1961). The rule has been revised in several respects in order to give adequate expression to this policy.

The definition of "penitential communication" has been revised so that it is no longer necessary to determine the *content* of the statement; a court need determine only that the communication was made in the presence of the priest only and that the priest has a duty to keep the communication secret. Under existing law, the communication must be

a "confession"; under the URE rule, the communication must be a "confession of culpable conduct."

The URE rule requires the penitent to be a member of the church, denomination, or religious organization of which the priest or clergyman receiving the confession is a member. The rule has been revised to eliminate this requirement, thus retaining the existing California law.

The revised rule permits the privilege to be claimed by either the penitent or the priest. The URE rule also permits either to claim the privilege, but the priest is permitted to claim the privilege only for an absent penitent. Under the revised rule, it is clear that the priest has a privilege in his own right. In this regard, the revised rule differs from existing California law in that the present statute gives a penitent a privilege only to prevent the priest from disclosing a confession. Literally construed, the statute would not give the penitent himself the right to refuse disclosure of the confession. However, similar privilege statutes have been held to grant a privilege both to refuse to disclose and to prevent the other communicant from disclosing the privileged statement. See *City and County of San Francisco* v. *Superior Court,* 37 Cal.2d 227, 236, 231 P.2d 26, 31 (1951) (attorney-client privilege); *Verdelli* v. *Gray's Harbor Commercial Co.,* 115 Cal. 517, 526, 47 Pac. 364, 366 (1897) ("a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose"). Hence, it is likely that the statute granting the priest-penitent privilege would be similarly construed.

Under the revised rule, a priest is under no legal compulsion to claim the privilege; hence, a penitential communication may be admitted if the penitent is deceased, incompetent, or absent and the priest fails to claim the privilege. This probably changes existing California law; but, if so, the change is desirable. For example, if a murderer had confessed the crime to a priest and then died, the priest might under the circumstances decide not to claim the privilege and, instead, give the evidence on behalf of an innocent third party who had been indicted for the crime. The extent to which a priest should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual priest involved and the discipline of the religious body of which he is a member.

Rule 30. Religious Belief

~~RULE 30. Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.~~

Comment

The net effect of URE Rule 30 is to declare that a person's theological or religious belief is inadmissible on the ground of privilege on the issue of his credibility as a witness. In *People* v. *Copsey,* 71 Cal. 548, 12 Pac. 721 (1887), the Supreme Court held that evidence of the lack of religious belief on the part of a witness is *incompetent* for impeachment purposes and, therefore, that objections to questions concerning

the witness' religious belief were properly sustained. Thus, the existing California law declares that the evidence stated by URE Rule 30 to be privileged is incompetent for impeachment purposes, while the URE rule provides that the evidence is privileged if sought to be introduced for that purpose.

The Commission disapproves the URE rule because it excludes evidence of religious belief on the issue of credibility only when the witness himself is asked for the objectionable information. Nothing in this rule would preclude the introduction of such evidence by means of other witnesses. The problem involved actually concerns what evidence is competent on the issue of credibility. The Commission will recommend a provision covering the question of religious belief when URE Rules 20-22, which deal with evidence as to credibility, are studied.

Rule 31. Political Vote

RULE 31. *If he claims the privilege,* ~~every~~ *a* person has a privilege to refuse to disclose the tenor of his vote at a ~~political~~ *public* election *where the voting is by secret ballot* unless ~~the~~ ~~judge~~ ~~finds~~ ~~that~~ ~~the~~ ~~vote~~ ~~was~~ ~~cast~~ *he voted* illegally *or he previously made an unprivileged disclosure of the tenor of his vote.*

Comment

Revised Rule 31 declares the existing California law. The California cases declaring such a privilege have relied upon the provision of the Constitution that "secrecy in voting be preserved." CAL. CONST., Art. II, § 5. See *Bush* v. *Head,* 154 Cal. 277, 97 Pac. 512 (1908); *Smith* v. *Thomas,* 121 Cal. 533, 54 Pac. 71 (1898). Since the policy of ballot secrecy extends only to legally cast ballots, the California cases and Revised Rule 31 recognize that there is no privilege as to the manner in which an illegal vote has been cast. *Patterson* v. *Hanley,* 136 Cal. 265, 68 Pac. 821 (1902).

The rule has been revised to cover the subject of waiver by prior disclosure because Revised Rule 37 applies only to the communication privileges (Revised Rules 26, 27, 27.3, 28, and 29).

Rule 32. Trade Secret

RULE 32. The owner of a trade secret has a privilege, which may be claimed by him or *by* his agent or employee, to refuse to disclose the secret and to prevent ~~other~~ ~~persons~~ *another* from disclosing it if ~~the~~ ~~judge~~ ~~finds~~ ~~that~~ the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Comment

Although no California case has been found holding evidence of a trade secret privileged, at least one California case has recognized that such a privilege may exist unless its holder has injured another and the disclosure of the secret is indispensable to the ascertainment of the truth and the ultimate determination of the rights of the parties. *Willson* v. *Superior Court,* 66 Cal. App. 275, 225 Pac. 881 (1924)

(trade secret held not subject to privilege because of plaintiff's need for information to establish case against the person asserting the privilege). Indirect recognition of such a privilege has also been given in Section 2019 of the Code of Civil Procedure, which provides that in discovery proceedings the court may make protective orders prohibiting inquiry into "secret processes, developments or research."

The privilege is granted so that secrets essential to the successful continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness' duty to testify as the means for injuring an otherwise profitable business. See generally 8 WIGMORE, EVIDENCE § 2212(3) (McNaughton rev. 1961). Nevertheless, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that may be classified as trade secrets. Recognizing the privilege as to such information would serve only to hinder the courts in determing the truth without providing the owner of the secret any needed protection. In many cases, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny.

Therefore, the privilege is recognized under this rule only if its application will not tend to conceal fraud or otherwise work injustice. It will not permit concealment of a trade secret when disclosure is essential in the interest of justice.

With the limitations expressed in the rule, the privilege deserves express recognition in the California law. The limits of the privilege are necessarily uncertain and will have to be worked out through judicial decisions.

Rule 33. Secret of State

~~RULE 33. (1) As used in this Rule, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations.~~

~~(2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not a secret of state, or (b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action.~~

Comment

The Commission disapproves URE Rule 33.

Federal laws provide adequate protection for military secrets and secrets relating to international relations or national security. See, *e.g.*, Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953). See also *United States* v. *Reynolds*, 345 U.S. 1 (1953). Such laws will prevail over any

state laws that might be deemed to require the disclosure of such information.

So far as secrets of the State and local entities are concerned, they are adequately protected by Revised Rules 34 and 36 and by various statutes prohibiting revelation of specific kinds of official information.

No privilege of this sort is now recognized by the California statutes. Under existing law, governmental secrets are protected either by subdivision 5 of Code of Civil Procedure Section 1881 (which, like Revised Rule 34, prohibits disclosure when the interest of the public would suffer thereby) or by specific statutes (such as the provisions of the Revenue and Taxation Code prohibiting disclosure of tax returns). See, *e.g.*, REV. & TAX. CODE §§ 19281-19289.

Rule 34. Official Information

RULE 34. (1) As used in this rule, "official information" means information not open, or theretofore officially disclosed, to the public ~~relating to internal affairs of this State or of the United States~~ acquired by a public *employee* ~~official of this State or the United States~~ in the course of his duty.~~, or transmitted from one such official to another in the course of duty.~~

(2) A ~~witness~~ *public entity* has a privilege to refuse to disclose ~~a matter on the ground that it is~~ official information, *and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity,* ~~and evidence of the matter is inadmissible,~~ if ~~the judge finds that the matter is official information,~~ *the privilege is claimed by a person authorized by the public entity to do so* and*:*

(a) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State~~,~~*;* or

(b) ~~disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity~~ *Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.*

(3) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this rule by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the

proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(4) Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal official information to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

Comment

Rules 34 and 36 generally

URE Rules 34 and 36 set forth the privilege that is now granted by subdivision 5 of Section 1881 of the Code of Civil Procedure. That subdivision says: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

URE Rule 34 provides that official information is privileged if its revelation would be harmful to the interest of the government—irrespective of the need for the information in the particular case. Under the existing law, the exercise of the privilege in a criminal case where the privileged information is material to the defense will result in a dismissal of some cases, and, in others, it will result in the striking of a witness' testimony or an item of evidence. See *Priestly* v. *Superior Court,* 50 Cal.2d 812, 330 P.2d 39 (1958); *People* v. *McShann,* 50 Cal.2d 802, 808, 330 P.2d 33, 36 (1958).

On the other hand, under URE Rule 36, a judge is required to hold the identity of an informer *un*privileged if revelation of his identity is needed to assure a fair determination of the issues—without regard for the interest of the public. This rule would be applied even in litigation between private parties. No reason appears for not permitting the public's interest to be considered—as it is under Code of Civil Procedure Section 1881 and URE Rule 34 for all other kinds of official information.

Revised Rules 34 and 36 eliminate the inexplicable difference between the official information privilege and the informer privilege as proposed in the URE. Under the revised rules, the admissibility of both official information generally and the identity of an informer will be determined under the same standard, which requires consideration of both the interest of the public in the confidentiality of the information and the interest of the public and the litigants in the just determination of the litigation. And under the revised rules, as under existing law, if either the official information privilege or the informer privilege is exercised in a criminal proceeding or in a disciplinary proceeding, the government must suffer an adverse order on the issue upon which the privileged information is material to the defense. However, the public entity bringing the action is not subject to an adverse order where disclosure is forbidden by federal statute. This is in accord with the present law as recently determined in *People* v. *Parham,* 60 Cal.2d ____, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of

Investigation; denial of motion to strike the witnesses' testimony affirmed).

Revised Rule 34

Subdivision (1). The phrase "relating to the internal affairs of this State or of the United States" has been deleted from subdivision (1) in order to broaden its coverage to include official information in the possession of local entities in California. The term "public employee," defined in Proposed Rule 22.3, has been substituted for "public official of this State or of the United States" in order to make it clear that the privilege exists for official information of local governmental entities as well as official information of the State or of the United States.

Subdivision (2). The phrase "and evidence of the matter is inadmissible" has been deleted from subdivision (2). The phrase was included in the original URE to indicate that the privilege could be claimed by anyone. The revised rule permits the privilege to be invoked by the public entity concerned with the disclosure of the information or by an authorized agent thereof. Since the privilege is granted to enable the government to protect its secrets, no reason exists for permitting the privilege to be exercised by persons who are not concerned with the public interest.

Under the revised rule, the privilege may be asserted only against persons who have acquired the information in an authorized manner. If, for example, a person reported by telephone a violation of the law, his identity would be privileged under Revised Rule 36 and the information furnished would be privileged under Revised Rule 34. If another person were present when the telephone call was made, the privileges granted by Revised Rules 34 and 36 could not be used to prevent that third person from testifying concerning what he heard and saw. No case has been discovered involving this issue, but the present language of subdivision 5 of Code of Civil Procedure Section 1881 indicates that no privilege exists under present law that would exclude such testimony.

Under Revised Rule 34, official information is absolutely privileged if its disclosure is forbidden by either a federal or state statute. Other official information is subject to a conditional privilege; the judge must determine in each instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweighs the other. The Commission recognizes that a statute cannot establish hard and fast rules to guide the judge in this process of balancing public and private interests. He should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information.

Subdivision (3). Subdivision (3) expresses the rule of existing law that in a criminal case, "since the Government which prosecutes an accused also has a duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953). In some cases, the privileged information will be material to

the issue of the defendant's guilt or innocence; in such cases, the court must dismiss the case if the State does not reveal the information. *People* v. *McShann,* 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the court will strike the testimony of a particular witness or make some other order appropriate under the circumstances if the State insists upon its privilege. *Priestly* v. *Superior Court,* 50 Cal.2d 812, 330 P.2d 39 (1958).

It should be noted that subdivision (3) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (3) does not require the imposition of its sanction if the privilege is invoked, and the information is withheld, by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (3) states existing California law. *People* v. *Parham,* 60 Cal.2d ____, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (4). This subdivision states the existing California law as declared in *People* v. *Keener,* 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Since Revised Rule 34 treats official information the same as the identity of an informer is treated under Revised Rule 36, this subdivision has been added to the URE rule. For a discussion of this subdivision in the precise situation that gives rise to its inclusion, see the Comment to Revised Rule 36.

Rule 35. Communication to Grand Jury

~~RULE 35. A witness has a privilege to refuse to disclose a communication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (a) the matter which the communication concerned was not within the function of the grand jury to investigate, or (b) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (c) disclosure should be made in the interests of justice.~~

Comment

The Commission disapproves URE Rule 35.

Sections 911 and 924.2 of the Penal Code require a grand juror to maintain secrecy concerning the testimony of witnesses examined before the grand jury. There are two exceptions to this statutory requirement: (1) a court may require a grand juror to disclose the testimony of a witness for the purpose of ascertaining whether it is consistent with the testimony given by the witness before the court, and (2) a

court may compel a grand juror to disclose the testimony given before the grand jury when the witness who gave such testimony is charged with perjury in connection therewith. PENAL CODE § 924.2.

Unlike the existing California law, the URE rule grants the privilege to the witness as well as to the members of the grand jury, and the exceptions provided in the URE rule are far more extensive than the exceptions provided in the existing California law. The existing California privilege exists only for the protection of the grand jurors; the witnesses before the grand jury cannot invoke the privilege and no one can predicate error upon the fact that a grand juror violated his obligation of secrecy and related what was said. On the other hand, the URE rule makes the evidence inadmissible. Hence, any party may object to the introduction of such evidence.

The Commission believes that the URE rule is not broad enough in one respect—that is, the exceptions are so sweeping that the secrecy of the grand jury proceedings is not adequately protected. On the other hand, the Commission believes that the provisions of the URE rule are too broad in another respect—that is, the right to claim the privilege is given to persons who have no legitimate interest in maintaining the secrecy of the grand jury proceedings.

In both respects, the existing California law seems superior to the URE rule. Hence, the Commission disapproves Rule 35.

Rule 36. Identity of Informer

RULE 36. *(1)* A ~~witness~~ *public entity* has a privilege to refuse to disclose the identity of a person who has furnished information *as provided in subdivision (2) of this rule* purporting to disclose a violation of ~~a provision of the laws~~ *a law* of this State or of the United States, ~~to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that~~ *and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity, if the privilege is claimed by a person authorized by the public entity to do so and:*

(a) ~~the identity of the person furnishing the information has already been otherwise disclosed~~ *Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State;* or

(b) ~~disclosure of his identity is essential to assure a fair determination of the issues~~ *Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.*

(2) This rule applies only if the information is furnished by the informer directly to a law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or is furnished by the informer to another for the purpose of transmittal to such officer or representative.

(3) There is no privilege under this rule if the identity of the informer is known, or has been officially revealed, to the public.

(4) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this rule by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(5) Notwithstanding subdivision (4), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal the identity of the informer to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

Comment

Under existing law, the governmental privilege as to the identity of an informer is granted by subdivision 5 of Code of Civil Procedure Section 1881. Under this section, information as to the identity of an informer is privileged to the same extent as is official information generally. There appears to be no reason to change the existing law in this regard, for the policy reasons requiring secrecy as to the identity of informers seem to be the same as those requiring secrecy as to all official information. Accordingly, Rule 36 has been revised to provide that the privilege may be claimed under the same conditions that the official information privilege may be claimed. See the Comment to Revised Rule 34.

The revised rule provides a privilege concerning the identity of an informer who furnishes information to a law enforcement officer or to a representative of an administrative agency charged with enforcement of the law. URE Rule 36 requires the informer to furnish the information to a governmental representative who is "charged with the duty of enforcing" the provision of law which is alleged to be violated. An informer, however, should not be required to run the risk that the official to whom he discloses the information is one "charged with the duty of enforcing" the law alleged to be violated. For example, under Revised Rule 36, if the informer discloses information concerning a violation of state law to a federal law enforcement officer, the identity of the informer is protected. However, his identity would not be protected under URE Rule 36.

The revised rule also applies when the information is furnished indirectly to a law enforcement officer as well as directly. The URE rule

might be construed to apply to informers who furnish information indirectly, but the revised language eliminates any ambiguity that may exist in this regard.

The language used in subdivision (5) of the revised rule conforms to the precise holding in *People* v. *Keener*, 55 Cal.2d 714, 12 Cal. Rptr. 859, 361 P.2d 587 (1961). Nothing in the rule affects the defendant's right to discover the identity of an informer where such information is material to the issue of the defendant's guilt. Where the issue concerns the legality of a search made pursuant to a warrant, however, there is sufficient protection afforded the defendant by the procedures relating to the circumstances under which a warrant may be obtained.

Rule 36.5. Claim of Privilege by Presiding Officer

RULE *36.5. (1) The presiding officer shall exclude, on his own motion, information that is subject to a claim of privilege under this article if:*

(a) The person from whom the information is sought is not a person authorized to claim the privilege; and

(b) There is no party to the proceeding who is a person authorized to claim the privilege.

(2) The presiding officer may not exclude information under this rule if:

(a) There is no person entitled to claim the privilege in existence; or

(b) He is otherwise instructed by a person authorized to permit disclosure.

Comment

This rule does not appear in the URE. A similar provision does appear, however, in the Model Code of Evidence. A.L.I., MODEL CODE OF EVIDENCE, Rule 105(e) (1942). It may have been omitted from the URE because the judge's power was regarded as inherent.

The rule is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, under Revised Rule 26, a third party—perhaps the lawyer's secretary—may have been present when a confidential communication was made. In the absence of both the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Proposed Rule 36.5. Thus, Proposed Rule 36.5 requires a judge to claim the privilege for the absent holder.

Proposed Rule 36.5 apparently is declarative of the existing California law. See *People* v. *Atkinson*, 40 Cal. 284, 285 (1870) (attorney-client privilege).

Rule 37. Waiver of Privilege

RULE 37. ~~A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted~~

~~with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.~~

(1) Except as otherwise provided in this rule, the right of any person to claim a privilege provided by Rules 26, 27, 27.3, 28, or 29 is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such a disclosure made by anyone. Consent to disclosure is manifested by a failure to claim the privilege in any proceeding in which a holder of the privilege has the legal standing and opportunity to claim the privilege or by any other words or conduct of a holder of the privilege indicating his consent to the disclosure.

(2) Where two or more persons are the holders of a privilege provided by Rules 26, 27, 27.3, or 28, the privilege with respect to a communication is not waived by a particular holder of the privilege unless he or a person with his consent waives the privilege in a manner provided in subdivision (1), even though another holder of the privilege or another person with the consent of such other holder has waived the right to claim the privilege with respect to the same communication.

(3) A disclosure that is itself privileged under this article is not a waiver of any privilege.

(4) A disclosure in confidence of a communication that is protected by a privilege provided by Rules 26, 27, or 27.3, when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

Comment

This rule covers in some detail the matter of waiver of privileges. The language of the URE rule has been revised to state more clearly the manner in which a waiver is accomplished and to make some significant substantive changes in the URE rule.

Scope. URE Rule 37 applies to all of the privileges. The revised rule applies only to the communication privileges—Revised Rules 26, 27, 27.3, 28, and 29.

Revised Rules 25, 27.5, 31, 34, and 36 contain their own waiver provisions. Hence, it is unnecessary to make Rule 37 applicable to these privileges. It is also unnecessary to make Rule 37 applicable to Rule 32 (trade secrets), for a matter will cease to be a trade secret if the secrecy of the information is not guarded. The remaining rules either have been disapproved or are not appropriate subjects for a general waiver provision.

Subdivision (1). Subdivision (1) of the revised rule states the general rule with respect to the manner in which a privilege is waived. It makes it clear that failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the

privilege constitutes a waiver. This seems to be the existing California law. See *City and County of San Francisco* v. *Superior Court,* 37 Cal.2d 227, 233, 231 P.2d 26, 29 (1951); *Lissak* v. *Crocker Estate Co.,* 119 Cal. 442, 51 Pac. 688 (1897). There is, however, at least one case that is out of harmony with this rule. *People* v. *Kor,* 129 Cal. App.2d 436, 277 P.2d 94 (1954) (defendant's failure to claim privilege to prevent a witness from testifying as to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

Subdivision (2). Under the URE rule, a waiver by any person while a joint holder of the privilege waives the privilege for all joint holders. Under subdivision (2) of the revised rule, a waiver of the privilege by one joint holder does not operate to waive the privilege for any of the other joint holders of the privilege. Subdivision (2) declares the existing California law. See *People* v. *Kor, supra,* 129 Cal. App.2d 436, 277 P.2d 94 (1954) (at the time of the communication, the attorney was acting for both the defendant and the witness who testified); *People* v. *Abair,* 102 Cal. App.2d 765, 228 P.2d 336 (1951).

Subdivision (3). Subdivision (3) of the revised rule makes it clear that a privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his attorney-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence what it was that he told his wife. And a person does not waive the attorney-client privilege as to a communication related to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The concept of waiver is based upon the thought that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been such an abandonment of the secrecy to which the holder is entitled to deprive the holder of his right to maintain further secrecy.

Subdivision (4). Subdivision (4) has been added to maintain the confidentiality of communications in situations where the communications are disclosed to others in the course of accomplishing the purpose for which the communicant was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will be better able to advise his client, the disclosure is not a waiver under this rule. Nor would a physician's or psychotherapist's keeping of confidential records, such as confidential hospital records, necessary to diagnose or treat a patient be a waiver under this rule. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure. With respect to the interrelationship of the lawyer-client privilege with

the physician-patient and psychotherapist-patient privileges in cases where the same person is both client and patient, see the discussion in the Comment to Rule 26.

Knowledge of the privilege. The URE rule provides that a waiver is effective only if disclosure is made by the holder of the privilege "with knowledge of his privilege." This requirement has been eliminated because the existing California law apparently does not require a showing that the person knew he had a privilege at the time he made the disclosure. See *People* v. *Ottenstror,* 127 Cal. App.2d 104, 273 P.2d 289 (1954); *Rose* v. *Crawford,* 37 Cal. App. 664, 174 Pac. 69 (1918). *But cf. People* v. *Kor,* 129 Cal. App.2d 436, 447, 277 P.2d 94, 100-101 (1954) (concurring opinion). The privilege is lost because the seal of secrecy has in fact been broken and because the holder did not himself consider the matter sufficiently confidential to keep it secret. If the holder does not think it important to keep the matter secret, there is then no reason to permit him to exclude the communication when it is needed in order to do justice.

Waiver by contract. The URE rule provides that a privilege is waived if the holder has contracted to waive it. This has been omitted from the revised rule. Under the revised rule, the fact that a person has agreed to waive a particular privilege for a particular purpose—as, for example, an agreement to waive the physician-patient privilege in an application for insurance—does not waive the privilege generally unless disclosure is actually made pursuant to such authorization. The fact that a person has contracted not to claim a privilege should not be a determining factor as to the existence of the privilege in cases bearing no relationship to the contract. On the other hand, once disclosure is made pursuant to the contract, the seal of secrecy is broken and the holder of the privilege should no longer be able to claim it.

The omission of the provision for waiver by contract will not affect the rights of the contracting parties. Thus, under Revised Rule 37, the privilege still remains despite a contract to waive it; but Revised Rule 37 does not relieve a person from any liability that may exist for breach of the contract to waive the privilege. This makes applicable to the communication privileges a rule that has been applied in connection with the privilege against self-incrimination. See *Hickman* v. *London Assurance Corp.,* 184 Cal. 524, 195 Pac. 45 (1920) (recovery on fire insurance policy denied where insured refused on ground of self-incrimination to submit to examination provided for in the policy); *Christal* v. *Police Commission,* 33 Cal. App.2d 564, 92 P.2d 416 (1939); 8 WIGMORE, EVIDENCE § 2275 (McNaughton rev. 1961). There is no reason why a similar rule should not be made applicable to the communication privileges generally. Though no California cases involving this specific situation have been found, the logic of the rule expressed in Revised Rule 37 is persuasive.

Rule 37.5. Ruling Upon a Claim of Privilege

RULE *37.5. (1) Subject to subdivision (2), the presiding officer may not require disclosure of information claimed to be privileged under this article in order to rule on the claim of privilege.*

(2) When a court is ruling on a claim of privilege under Rule 32, 34, or 36 and is unable to rule on the claim without requiring disclosure of the information claimed to be privileged, the judge may require the person from whom disclosure is sought or the person entitled to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person entitled to claim the privilege and such other persons as the person entitled to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of the person entitled to claim the privilege, what was disclosed in the course of the proceedings in chambers.

Comment

This rule does not appear in the URE. Under this rule, as under existing law, revelation of the information asserted to be privileged may not be compelled in order to determine whether or not it is privileged, for such a coerced disclosure would itself violate the privilege. See *Collette* v. *Sarrasin*, 184 Cal. 283, 288-289, 193 Pac. 571, 573 (1920).

An exception to the general rule is provided for information claimed to be privileged under Rule 32 (trade secret), Rule 34 (official information), or Rule 36 (identity of an informer). Because of the nature of these privileges, it will sometimes be necessary for the judge to examine the information claimed to be privileged in order to balance the interest in seeing that justice is done in the particular case against the interest in maintaining the secrecy of the information. See cases cited in 8 WIGMORE, EVIDENCE § 2379, p. 812 n.6 (McNaughton rev. 1961). And see *United States* v. *Reynolds*, 345 U.S. 1, 7-11 (1953), and pertinent discussion thereof in 8 WIGMORE, EVIDENCE § 2379 (McNaughton rev. 1961). Even in these cases, the rule provides adequate protection to the person claiming the privilege: If the judge determines that he must examine the information in order to determine whether it is privileged, the rule provides that it be disclosed in confidence to the judge and shall be kept in confidence if he determines the information is privileged. Moreover, in view of Proposed Rule 37.7, disclosure of the information cannot be required (for example, in an administrative proceeding), for the exception in subdivision (2) of Proposed Rule 37.5 applies only when the judge of a court is ruling on the claim of privilege.

Rule 37.7. Ruling Upon Privileged Communications in Nonjudicial Proceedings

RULE *37.7. (1) No person may be held in contempt for failure to disclose information claimed to be privileged unless a court previously has determined that the information sought to be disclosed is not privileged. In a court proceeding brought to compel a person to disclose information claimed to be privileged, the judge shall determine whether*

the information is privileged in accordance with Rule 8 and Rule 37.5.

(2) This rule does not apply to any public entity 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.

Comment

This rule does not appear in the URE. The rule is needed to protect persons claiming privileges in nonjudicial proceedings. Because nonjudicial proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he runs the risk of being held in contempt for failing to disclose such information. That the determination of privilege in a judicial proceeding is a question for the judge is well established in the present California law. See, *e.g., Holm* v. *Superior Court,* 42 Cal.2d 500, 267 P.2d 1025 (1954).

This rule, of course, does not apply to any body—such as the Public Utilities Commission—that has constitutional power to impose punishment for contempt. See, *e.g.,* CAL. CONST., Art. XII, § 22. Nor does this rule apply to witnesses before the State Legislature or its committees. See GOVT. CODE §§ 9400-9414.

Rule 38. Admissibility of Disclosure Wrongfully Compelled

RULE 38. Evidence of a statement or other disclosure is inadmissible against ~~the~~ *a* holder of ~~the~~ *a* privilege if ~~the judge finds that he had and~~*:*

(1) A person entitled to claim the privilege claimed *it* ~~a privilege to refuse to make the disclosure~~ but ~~was~~ nevertheless *disclosure wrongfully was* required to *be made* ~~make it~~ *; or*

(2) The presiding officer failed to comply with Rule 36.5.

Comment

Revised Rule 38 protects a holder of a privilege from the detriment that might otherwise be caused when a judge erroneously overrules a claim of privilege and compels revelation of the privileged information. Under Revised Rule 38, the evidence is inadmissible against the holder in a subsequent proceeding. Compare *People* v. *Abair,* 102 Cal. App.2d 765, 228 P.2d 336 (1951) (prior disclosure by an attorney held inadmissible in a later proceeding where the holder of the privilege had first opportunity to object to attorney's testifying). Though Revised Rule 37 provides that such a coerced disclosure does not waive a privilege, it does not provide specifically that evidence of the prior disclosure is inadmissible; this rule makes clear the inadmissibility of such evidence.

URE Rule 38 does not cover the case in which some person other than the holder—as, for example, the lawyer who has received a confidential communication from a client—is compelled to make the disclosure of the privileged information. The URE rule has been revised to provide that a coerced disclosure may not be used in evidence against

the holder—whether the coerced disclosure was made by the holder himself or by some other person. As so revised, the rule probably states existing California law. See *People* v. *Kor,* 129 Cal. App.2d 436, 277 P.2d 94 (1954). However, there is little case authority upon the proposition.

The URE rule also has been revised to cover the situation where the presiding officer at the time the disclosure was made failed to comply with Proposed Rule 36.5, which requires the exclusion of privileged evidence where a person entitled to claim the privilege had no standing or opportunity to do so.

Rule 39. Reference to Exercise of Privileges

RULE 39. *(1)* Subject to ~~paragraph~~ *subdivisions (2) and (3)* ~~(4), Rule 23,~~ *:*

(a) If a privilege is exercised not to testify ~~or to prevent another from testifying, either in the action or~~ with respect to ~~particular matters~~ *any matter,* or to refuse to disclose or to prevent another from disclosing any matter, the ~~judge~~ *presiding officer* and 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 ~~adverse~~ inference therefrom *as to the credibility of the witness or as to any matter at issue in the proceeding.* ~~In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case,~~

(b) The ~~court~~ *judge*, at the request of ~~the~~ *a* party ~~exercising the~~ *who may be adversely affected because an unfavorable inference may be drawn by the jury because a* privilege *has been exercised,* ~~may~~ *shall* instruct the jury ~~in support of such privilege~~ *that no presumption arises with respect to the exercise of the 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.*

(2) In a criminal proceeding, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.

(3) In a civil proceeding, the failure of a person to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the presiding officer and by counsel and may be considered by the trier of fact.

Comment

URE Rule 39 generally expresses the California rule in regard to the comments that may be made upon, and the inferences that may be drawn from, an exercise of a privilege. See *People* v. *Wilkes,* 44 Cal.2d

679, 284 P.2d 481 (1955). The URE rule has been revised to clarify the restrictions upon the trier of fact and to *require,* rather than merely to permit, the court to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of the privilege. Whether such an instruction ought to be given should not be subject to the court's discretion. Also, the nature of the instruction required to be given is stated more specifically in the revised rule. The language of the URE rule—"in support of such privilege"—is somewhat ambiguous.

Subdivision (2) of Revised Rule 39 has been sustituted for URE Rule 23(4) to retain existing California law. CAL. CONST., Art. I, § 13; PENAL CODE § 1323. The Commission disapproves of subdivision (4) of URE Rule 23 because its language would permit inferences to be drawn from an exercise of the defendant's privilege to refuse to testify in a criminal case. The California Constitution, in Section 13 of Article I, provides that the failure or refusal of a defendant in a criminal case to explain or deny the evidence against him may be considered by the court or jury whether or not the defendant testifies. And the California cases have made it clear that it is the defendant's failure to explain or deny the evidence against him, not his exercise of any privilege, that may be commented upon and considered. See *e.g., People* v. *Adamson,* 27 Cal.2d 478, 488, 165 P.2d 3, 8 (1946), *aff'd sub nom., Adamson* v. *California,* 332 U.S. 46 (1947). Unfavorable inferences, if any, may be drawn only from the evidence in the case against him. No inferences may be drawn from the exercise of privileges.

Subdivision (3) has been added to provide a rule for civil cases equivalent to that applicable in criminal cases under subdivision (2). Subdivision (3) apparently declares the existing California law that is applicable to civil cases when a party invokes a privilege and refuses to deny or explain evidence in the case against him. See discussion in the Study, *infra* at 374-377 and 523. Language in some cases may indicate that the present rule in civil cases is broader and that inferences may be drawn from the claim of privilege itself. If that is the present rule, it will be changed by subdivision (3).

Subdivisions (1) and (3) together may modify the existing California law to some extent. In *Nelson* v. *Southern Pacific Co.,* 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in an exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. See *People* v. *Snyder,* 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958), overruling or disapproving several cases there cited. Revised Rule 39 will, in effect, overrule this holding in the *Nelson* case, for subdivision (1) declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue, and subdivision (3) provides only that subdivision (1) does not preclude the drawing of unfavorable inferences against a person because of his failure to explain or deny the evidence against him. The status of the rule in the *Nelson* case has been in doubt because of the recent holdings in criminal cases, and Revised Rule 39 will eliminate any remaining basis for applying a different rule in civil cases.

Rule 40. Effect of Error in Overruling Claim of Privilege

RULE 40. A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, *except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Rule 27.5*.

Comment

Revised Rule 40 states the existing California law. See *People* v. *Gonzales*, 56 Cal. App. 330, 204 Pac. 1088 (1922), and discussion of similar cases cited in the Study, *infra* at 525, note 5.

Rule 40.5. Savings Clause

RULE *40.5. Nothing in this article shall be construed to repeal by implication any other statute relating to privileges.*

Comment

No comparable provision is contained in the Uniform Rules. However, Proposed Rule 40.5 is both necessary and desirable to clarify the effect of this article.

Some of the existing statutes relating to privileges are recommended for repeal. Other statutes on this subject, however, are continued in force. See, *e.g.*, PENAL CODE §§ 266h and 266i, making the marital communications privilege inapplicable in prosecutions for pimping and pandering, respectively. Hence, Proposed Rule 40.5 makes it clear that nothing in this article makes privileged any information declared by statute to be unprivileged or makes unprivileged any information declared by statute to be privileged.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of the existing statutes on privileges which should be revised or repealed in light of the Commission's tentative recommendation concerning Article V (Privileges) of the Uniform Rules of Evidence.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may provide a somewhat narrower or broader privilege than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule than the existing law.

References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Business and Professions Code

Section 2904 provides:

> 2904. For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attor-

ney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.

This section should be repealed. It is superseded by Proposed Rule 27.3.

Code of Civil Procedure

Section 1747 should be revised to conform to the Uniform Rules. The revision merely substitutes a reference to Rule 34, which supersedes Section 1881(5), and makes no substantive change. The revised section would read as follows:

1747. Notwithstanding the provisions of Section 124 of the Code of Civil Procedure, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed ~~made to such officer in official confidence~~ *to be official information* within the meaning of ~~subdivision 5, Section 1881 of the Code of Civil Procedure~~ *Rule 34 of the Uniform Rules of Evidence.*

The files of the conciliation court shall be closed. The petition, supporting affidavit, reconciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the conciliation court.

Section 1880 should be revised to read:

1880. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

~~3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.~~

Subdivision 3 of Section 1880 is the California version of the so-called Dead Man Statute. Dead Man Statutes provide that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. These statutes appear to rest on the belief that to permit the survivor to testify in the proceeding would be unfair because the other party to the transaction

is not available to testify and, hence, only a part of the whole story can be developed. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally. See generally *Moul* v. *McVey,* 49 Cal. App.2d 101, 121 P.2d 83 (1942); *Recommendation and Study Relating to the Dead Man Statute,* 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at D-1 (1957).

Subdivision 3, which is part of a statute containing the rules relating to the incompetency of infants and insane persons, would appear to be a provision relating to competency. But this subdivision has, in effect, become a rule of privilege, for the courts have permitted the executor or administrator to waive the benefit of the subdivision. See, *e.g., McClenahan* v. *Keyes,* 188 Cal. 574, 206 Pac. 454 (1922). Hence, this subdivision is considered in connection with the other rules of privilege. The remaining subdivisions of the section will be considered when the URE rules relating to competency of witnesses (Article IV) are considered.

In 1957, the Commission recommended the repeal of the Dead Man Statute and the enactment of a statute providing that in certain specified types of actions written or oral statements of a deceased person made upon his personal knowledge were not to be excluded as hearsay. See *Recommendation and Study Relating to The Dead Man Statute,* 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at D-1 (1957). The 1957 recommendation has not been enacted as law. For the legislative history of this measure, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES IX (1957).

Although the Dead Man Statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial number of cases. As the Commission's 1957 recommendation and study demonstrates, the statute balances the scales of justice unfairly in favor of decedents' estates. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, pp. D-6, D-43 to D-45 (1957). Moreover, it has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered. For these reasons, the Commission again recommends that the Dead Man Statute be repealed.

However, repeal of the Dead Man Statute alone would tip the scales unfairly *against* decedents' estates by subjecting them to claims which could have been defeated, wholly or in part, if the decedent had lived to tell his story. If the living are to be permitted to testify, some steps ought to be taken to permit the decedent to testify, so to speak, from the grave. This can be done by relaxing the hearsay rule to provide that no statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding against an executor or administrator upon a claim or demand against the estate of such deceased person. This hearsay exception is more limited than that recommended in 1957 and will, it is believed, meet most of the objections made to the 1957 recommendation. Accordingly, the Commission recommends that the following additional subdivision be added to Rule 63 as revised by the Commission and set out in the tentative

recommendation on the Hearsay Evidence Article of the URE in 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 307-353 (1963):

> RULE 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:
>
> * * * * *
>
> (5.1). When offered in an action or proceeding brought against an executor or administrator upon a claim or demand against the estate of a deceased person, a statement of the deceased person if the judge finds it was made upon the personal knowledge of the declarant.

Section 1881 provides:

> 1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:
>
> 1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife; or in a hearing held to determine the mental competency or condition of either husband or wife.
>
> 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.
>
> 3. A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.
>
> 4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by

him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided further, that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

This section should be repealed. Subdivision 1 of Section 1881 is superseded by Rules 27.5 and 28; subdivision 2 is superseded by Rule 26; subdivision 3 is superseded by Rule 29; subdivision 4 is superseded by Rule 27; subdivision 5 is superseded by Rules 34 and 36.

No provision comparable to subdivision 6—the newsmen's privilege—is included in the Uniform Rules as proposed by the Uniform Commissioners or as revised by the Law Revision Commission. The Commission has concluded that there is no justification for retaining this privilege. See the Study, *infra* at 481-508.

Section 2065 provides:

2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have

> a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

Section 2065 should be repealed. Rule 7 [5] supersedes the first clause in this section. Insofar as this section permits a witness to refuse to give an answer having a tendency to subject him to punishment for a felony, it is superseded by Revised Rules 24 and 25, dealing with the self-incrimination privilege.

The language relating to an answer which would have a tendency to degrade the character of the witness is unnecessary. The meaning of this language seems to be that, whereas a witness must testify to non-incriminating but degrading matter that is relevant to the merits of the case,[6] nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However, this privilege seems to be largely—if not entirely—superfluous. Code of Civil Procedure Section 2051 provides that a witness may not be impeached "by evidence of particular wrongful acts." Manifestly, to the extent that the degrading matter referred to in Section 2065 is "wrongful acts," Section 2051 makes this portion of Section 2065 unnecessary. (The "wrongful acts" rule of Section 2051 would be continued in effect by Uniform Rule 22(d).) Moreover, since the witness is protected against impeachment by evidence of "wrongful acts," though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the "degrading matter" privilege. For criticisms of this privilege, see 8 WIGMORE, EVIDENCE §§ 2215, 2255 (McNaughton rev. 1961); 3 WIGMORE, EVIDENCE § 984 (3d ed. 1940); McGovney, *Self-Criminating and Self-Disgracing Testimony,* 5 IOWA LAW BULL. 174 (1920). This privilege seems to be seldom invoked in California opinions and, when invoked, it arises in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2051, or by virtue of both. See, for example, the following cases: *People* v. *Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956) (homicide case involving cross-examination as to defendant's efforts to evade military service; *held,* irrelevant *and* violative of Section 2065); *People* v. *T. Wah Hing,* 15 Cal. App. 195, 203,

[5] Rule 7 is the subject of a separate study and recommendation by the Commission. The rule as contained in the URE is as follows:

RULE 7. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

[6] Clark v. Reese, 35 Cal. 89 (1869) (breach of promise to marry; defense that plaintiff had immoral relations with X; *held,* X must answer to such relations, though answer degrading); San Chez v. Superior Court, 153 Cal. App.2d 162, 314 P.2d 135 (1957) (separate maintenance on ground of cruelty; defendant required to answer as to cruelty, albeit degrading).

114 Pac. 416, 419 (1911) (abortion case in which the prosecuting witness was asked on cross-examination who was father of child; *held,* immaterial—and, if asked to degrade, "equally inadmissible"); *People* v. *Fong Chung,* 5 Cal. App. 587, 91 Pac. 105 (1907) (defendant's witness in statutory rape case asked whether the witness was seller of lottery tickets and operator of poker game; *held,* improper, *inter alia,* on ground of Section 2065. Note, however, the *additional* grounds for exclusion, *viz.,* immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision.). Hence, this portion of Section 2065 is superfluous now; it would likewise be superfluous under the Uniform Rules.

The remainder of this section is superseded by Rules 21 and 22,[7] dealing fully with the subject of a witness' credibility.

Government Code

Section 11513 should be revised to read:

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effec-

[7] Rules 21 and 22 are the subject of a separate study and recommendation by the Commission. The rules as contained in the URE are as follows:

RULE 21. *Limitations on Evidence of Conviction of Crime as Affecting Credibility.* Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

RULE 22. *Further Limitations on Admissibility of Evidence Affecting Credibility.* As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

tive to the ~~same~~ extent that they are ~~now or hereafter may~~ *otherwise required by statute to* be recognized ~~in civil actions~~ *at the hearing,* and irrelevant and unduly repetitious evidence shall be excluded.

This revision is necessary because, under this tentative recommendation, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

Health and Safety Code

Section 3197 should be revised to conform to the Uniform Rules. The revision merely substitutes a reference to Rules 27, 27.5, and 28, which supersede subdivisions 1 and 4 of Section 1881, and makes no substantive change. The revised section would read as follows:

3197. In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, and ~~the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be~~ *Rules 27, 27.5, and 28 of the Uniform Rules of Evidence are not* applicable to or in any such prosecution or proceeding.

Penal Code

Section 270e should be revised to conform to the Uniform Rules. The revision makes no substantive change. The revised section would read as follows:

270e. No other evidence shall be required to prove marriage of husband and wife, or that a person is the lawful father or mother of a child or children, than is or shall be required to prove such facts in a civil action. In all prosecutions under either Section 270a or 270 of this code ~~any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife shall~~ *Rules 27.5 and 28 of the Uniform Rules of Evidence do* not apply, and both husband and wife shall be competent to testify to any and all relevent matters, including the fact of marriage and the parentage of a child or children. Proof of the abandonment and nonsupport of a wife, or of the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such abandonment and nonsupport or omission to furnish necessary food, clothing, shelter or medical attendance is wilful. In any prosecution under Section 270, it shall be competent for the people to prove nonaccess of husband to wife or any other fact establishing nonpaternity of a husband. In any prosecution pursuant to Section 270, the final establishment of paternity or nonpaternity in another proceeding shall be admissible as evidence of paternity or nonpaternity.

Section 688 should be revised to delete language that is superseded by Rules 23, 24, and 25. The revised section would read as follows:

688. No person ~~can be compelled, in a criminal action, to be a witness against himself; nor can a person~~ charged with a public offense *may* be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Section 1322 provides:

1322. Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section 270 and 270a of this code or under any provisions of the "Juvenile Court Law."

This section should be repealed. It is superseded by Proposed Rule 27.5.

Section 1323 provides:

1323. A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

This section should be repealed. It is superseded by Rules 23(1), 25(6), and 39(2).

Section 1323.5 provides:

1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

This section shall not be construed as compelling any such person to testify.

This section should be repealed. It is superseded by Rule 23, which retains the only effect the section has ever been given—to prevent the prosecution from calling the defendant in a criminal action as a witness. See *People* v. *Talle,* 111 Cal. App.2d 650, 245 P.2d 633 (1952).

Whether Section 1323.5 provides a broader privilege than Rule 23 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before the grand jury or at a coroner's inquest is not technically a person "accused or charged," and Section 1323.5 would appear not to apply to such proceedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under the tentative recommendation, for his claim of privilege cannot be shown to impeach him or to draw inferences against him in a subsequent civil or criminal proceeding.

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A STUDY RELATING TO THE PRIVILEGES ARTICLE OF THE UNIFORM RULES OF EVIDENCE*

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* This study was made at the request of the California Law Revision Commission, and, except as noted herein, was prepared by Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. Those portions of the study relating to the Scope of the Privileges Article (pp. 309-327, *infra*), the Psychotherapist-Patient Privilege (pp. 417-438, *infra*), and the Newsmen's privilege (pp. 481-508, *infra*) were prepared by the Commission's legal staff. The opinions, conclusions, and recommendations contained herein are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.[1]

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence relating to privileges—*i.e.*, Rules 23 through 40 and other related provisions of the Uniform Rules. This study considers each of the rules of privilege in numerical order (with minor variations) as they appear in the Uniform Rules and includes a discussion of other relevant provisions which affect their applicability. The study undertakes both to point up what changes would be made in the California law of evidence if the privilege provisions of the Uniform Rules were adopted and also to subject those provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of and additions to the provisions of the Uniform Rules are suggested. Similar studies of the other Uniform Rules have been made or are contemplated.[2]

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[1] Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Uniform Rules (sometimes referred to in the text as URE) are the subject of the following law review symposia: *Institute on Evidence,* 15 ARK. L. REV. 7 (1960-61); *Panel on Uniform Rules of Evidence,* 8 ARK. L. REV. 44 (1953-54); *Symposium — Minnesota and the Uniform Rules of Evidence,* 40 MINN. L. REV. 297 (1956); Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law,* 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence,* 10 RUTGERS L. REV. 479 (1956); Chadbourn, *The "Uniform Rules" and the California Law of Evidence,* 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence,* 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence,* 24 MODERN L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should be Interested in the Uniform Rules of Evidence,* 37 ORE. L. REV. 287 (1958); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law,* 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some High Lights of the Uniform Evidence Rules,* 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?,* 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions,* 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence,* 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a revised version of the Privileges Article of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. (N.J. LAWS 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to -49).)

After the present research study was prepared in printed form, a comprehensive report on the Uniform Rules was prepared by another special committee appointed by the New Jersey Supreme Court. See REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963). This report contains the text of the Privileges Article as enacted in New Jersey and a detailed analysis of each of the remaining Uniform Rules. This latest report should be consulted in connection with the references to the earlier reports hereinafter cited.

The new evidence article in the Kansas Code of Civil Procedure, enacted in 1963, is substantially the same as the Uniform Rules. See Kan. Laws 1963, Ch. 303, Art. 4 §§ 60-401 through 60-470, pp. 670-692.

[2] See, *e.g., Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence),* 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 301 (1963).

SCOPE OF THE PRIVILEGES ARTICLE

What Is Privilege?

The word "privilege" is used to refer to exemptions which are granted by law from the general duty of all persons to give evidence when required to do so. A privilege may take the form of (1) an exemption from the duty to testify—as in the case of the defendant's privilege in a criminal proceeding,[1] or (2) an exemption from the duty to testify about certain specific matters—as in the case of the privilege of anyone to refuse to testify about incriminating matters,[2] or (3) a right to keep another person from testifying concerning certain matters—such as the privilege of a client to prevent his lawyer from revealing the client's confidences.[3]

A privilege permits a person to refuse to reveal, or to prevent another person from revealing, reliable and relevant (and, perhaps, essential) evidence. Thus, the rules of privilege, unlike most other exclusionary rules of evidence (such as the hearsay rule), are not designed to exclude unreliable testimony. Instead, they are intended to provide protection in circumstances where the courts or the Legislature have determined from time to time that it is so important to keep information confidential that the needs of justice may be sacrificed in a given case to protect that needed secrecy.

Types of Proceedings in Which a Claim of Privilege May Be Made

For more than three centuries, it has been recognized as a fundamental maxim of the law that every person has a duty to bear knowledgeable testimony to the end that facts in issue may be ascertained with certainty.[4] In any particular proceeding, the testimonial duty arises by reason of a subpoena—the process by which a person may be compelled to appear and testify.[5] Since privileges are exceptions to the general duty of all persons to give evidence when required by law to do so, the possibility of a claim of privilege exists whenever a person may be compelled to give evidence, whether it be in a judicial, administrative or legislative proceeding.

There appear to be in excess of 100 separate California statutes authorizing a variety of agencies, commissions, departments and persons to compel attendance and testimony by subpoena. Without attempting to exhaust all such statutory provisions for the issuance of subpoenas, some of these are as follows:

Agricultural Code	
Section 1155	Director of Agriculture may issue subpoena for investigations concerning products held in common and cold storage.

[1] CAL. CONST., Art.I, § 13. See also CAL. PEN. CODE §§ 688, 1323, 1323.5; People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952).
[2] CAL. CONST., Art.I, § 13. See also CAL. CODE CIV. PROC. § 2065.
[3] CAL. CODE CIV. PROC. § 1881(2).
[4] 8 WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).
[5] CAL. CODE CIV. PROC. § 1985; CAL. PEN. CODE § 1326.

Agricultural Code—Continued

Sections 1267, 1268.1	Director of Agriculture may issue subpoena in connection with regulation of produce dealers.
Section 1300.3	Director of Agriculture may issue subpoena for investigation of processor's failure to pay supplier for farm products, or for hearing on such matter.
Section 1300.22	Processor or distributor subject to marketing order may be subpoenaed by Director of Agriculture.
Section 4175	Director of Agriculture may issue subpoena for investigation or hearing regarding marketing dairy products.
Section 5654	Table Grape Commission may apply to the court for subpoena to compel compliance with investigative rights in regard to enforcement and collection activities.

Business and Professions Code

Section 6049(c)	State Bar Board of Governors or Committee may issue subpoena.
Section 6052	Any member of the Board, or any committee, unit or section thereof may issue subpoena.
Section 6068 (Rule 1)	State Bar committee or subcommittee may issue subpoena.
Section 6085	Person complained against in State Bar investigation has a right to issuance of subpoena.
Section 8008(e)	Certified Shorthand Reporters Board may issue subpoena.
Section 18627	State Athletic Commission, the executive officer or any other employee duly authorized by the Commission may issue subpoena "in all matters appertaining to their duties or connected with the administration of the affairs of the Commission."
Section 19435	California Horse Racing Board, its secretary, or the stewards, may issue subpoena "as is necessary to enable any of them to effectually discharge [their] duties."

Civil Code

Section 1201	Officers authorized to take proof of instruments may issue subpoena.

Corporations Code

Section 25352	Commissioner of Corporations may issue subpoena for "any examination, audit, or investigation made or hearing conducted by him . . . ."

Corporations Code—Continued

Section 25355—Commissioner of Corporations may delegate the power vested in him by Section 25352 to anyone in the Division of Corporations.

Education Code

Section 155—State Board of Education may issue subpoena.

Section 13203—State Board of Education may issue subpoena for hearing to suspend or revoke certification.

Section 13425—Referees and parties may have subpoenas issued for hearing held by the State Board of Education regarding dismissal of a teacher.

Section 13749—Personnel commissions of certain school districts may issue subpoena.

Section 13862—Teachers Retirement Board may issue subpoena.

Section 23614—Trustees of the California State Colleges may issue subpoena.

Elections Code

Sections 18409, 18465—Election precinct boards or person who canvasses the returns may issue subpoena.

Section 20082—Court clerk shall issue subpoena in election contest "at the request of any party."

Financial Code

Section 1908—Superintendent of Banks and every examiner may issue subpoena.

Section 5253—Savings and Loan Commissioner may issue subpoena.

Section 9008—Savings and Loan Commissioner may issue subpoena for investigation or examination in connection with liquidation or conservatorship.

Section 17610—Commissioner of Corporations may issue subpoena in investigation regarding the revocation or suspension of an escrow agent's license.

Government Code

Section 9401—President of the Senate, Speaker of the House or the chairman of any committee may issue subpoena.

Section 11181—Head of each department of state government may issue subpoena.

Government Code—Continued

Section 11510—Agencies subject to Administrative Procedure Act shall issue subpoenas for hearings "at the request of any party" before the start of hearings, and may issue subpoena after hearings have commenced.

Section 12550—Attorney General has power of district attorney to issue subpoenas for investigations and prosecutions.

Section 12560—Attorney General, in connection with supervisory activities of sheriffs, may issue subpoenas regarding investigation or detection of crimes.

Section 12589—Attorney General may compel attendance and testimony with force of subpoena in regard to investigation of transactions and relationships of certain corporations and trustees.

Section 13910—Secretary or assistant secretaries of State Board of Control may issue subpoena for "any inquiry, investigation, hearing, or proceeding in any part of the State."

Section 13911—Examiners of State Board of Control may issue subpoena.

Section 15613—State Board of Equalization may issue subpoena.

Section 18671—State Personnel Board may issue subpoena.

Section 19581—Employee subject of State Personnel Board hearing may have subpoenas issued in his behalf.

Section 23442—Appointed commission for a new county may issue subpoena as "is required in the performance of [its] duties."

Section 25170—Chairmen of County Boards of Supervisors may issue subpoena.

Section 27498—Coroners may issue subpoena.

Section 37104—Legislative bodies of cities (city councils) may issue subpoenas.

Section 38085—Referees appointed under Park and Playground Act of 1909 may have subpoenas issued by court clerk.

Section 68750—Commission on Judicial Qualifications may issue subpoena.

Harbors and Navigation Code

Section 1155—The President of the Board of Pilot Commissioners for Bays of San Francisco, San Pablo and Suisun may issue subpoenas "in regard to any matter properly before" the Commission.

Harbors and Navigation Code—Continued

Section 1254	The President of the Board of Commissioners for Humboldt Bay has same power as vested by Section 1155.
Section 1354	The President of the Board of Commissioners for San Diego Harbor has same power vested by Section 1155.

Health and Safety Code

Section 102	State Board of Public Health may issue subpoena.
Section 1704(d)	Department of Public Health may issue subpoena.
Section 24315	The chairmen of hearing boards of Air Pollution Control Districts may issue subpoena.
Section 34318	Housing Authorities may issue subpoena.

Insurance Code

Section 1042	Insurance Commissioner may issue subpoena in matters relating to insolvency and delinquency.
Section 12924	Insurance Commissioner "may issue subpoenas for witnesses to attend and testify before him on any subject touching insurance business, or in aid of his duties."

Labor Code

Section 74	Chief of the Division of Industrial Welfare may issue subpoena in matters relating to the enforcement of a commission order or of the Labor Code.
Section 92	Commissioner of Labor may issue subpoena.
Section 130	Industrial Accident Commission may issue subpoena for "any inquiry, investigation, hearing, or proceeding in any part of the State."
Section 151	Chief of the Division of Labor Statistics and Research may issue subpoena.
Section 1419(g)	State Fair Employment Practice Commission may issue subpoena.
Section 1485	Housing Commission may issue subpoena for investigation or inquiry or in matters relating to the "settlement of controversies."

Military and Veterans Code

Section 460	Military court has power of superior court to subpoena witnesses "both civilian and military."

Penal Code	
Section 859b	Magistrate must issue subpoena for witnesses required by either party.
Section 939.2	District attorney or grand jury through superior courts may subpoena prosecution witness for appearance before grand jury.
Section 939.7	Grand jury may require district attorney to subpoena defense witness for appearance before grand jury.
Section 1326	Magistrate, clerk, district attorney and others may issue subpoena. Judge or clerk must issue blank subpoena at request of defendant.
Public Resources Code	
Section 3324	State Oil and Gas Supervisor may issue subpoena for hearings regarding plans of utilization.
Public Utilities Code	
Section 311	Public Utilities Commission, each member or secretary or assistant secretaries may issue subpoena for "any inquiry, investigation, hearing, or proceeding in any part of the State."
Section 4633	Public Utilities Commissioners and examiners may issue subpoena for proceedings relating to for-hire vessels.
Section 21692	Division of Aeronautics may issue subpoena.
Section 28773	San Francisco Bay Area Rapid Transit District Board of Directors may issue subpoena.
Revenue and Taxation Code	
Section 454	County Assessor may issue subpoena.
Section 1609	County Boards of Equalization may issue subpoena.
Sections 14503, 14533, 14534	Inheritance Tax Appraisers may issue subpoena.
Section 16533	Controller may issue subpoena for the determination of gift tax.
Sections 19254, 26423	Franchise Tax Board "may issue subpenas or subpenas duces tecum, which subpenas must be signed by any member of the Francise Tax Board and *may be served on any person for any purpose.*" (Emphasis added.)
Streets and Highways Code	
Section 4201	Referee appointed under Street Opening Act may cause clerk of court to issue subpoena.

Unemployment Insurance Code	
Section 1953	Appeals Board, referee or designee may issue subpoena "in any proceeding, hearing, investigation or in the discharge of any duties imposed under this division . . . ."
Water Code	
Section 1080	State Water Rights Board may issue subpoena "in any proceeding in any part of the State."
Section 70232	Levee District Boards, meeting as equalization boards, may issue subpoena.
Welfare and Institutions Code	
Section 529	Juvenile Justice Commission may have subpoena issued by judge of juvenile court for investigations.
Section 664	Juvenile Court *shall* issue a subpoena at the request of a probation officer, the minor or the minor's parent, guardian or custodian and *may* issue a subpoena on its own motion.

Some of the statutes pertaining to specific agencies appear to be unnecessarily broad in scope. For example, Revenue and Taxation Code Sections 19254 (pertaining to income taxes) and 26423 (pertaining to bank and corporation taxes) each provide that "The Franchise Tax Board may issue subpenas or subpenas duces tecum, which subpenas . . . *may be served on any person for any purpose.*" (Emphasis added.) Other statutes are more restrictive in regard to the purposes for which subpoenas may be issued. Thus, for example, Sections 18409 and 18465 of the Elections Code pertain to the issuance of subpoenas by election boards (or by certain specified persons performing identical functions) to members of precinct boards in regard to canvassing of returns. In addition to many statutes which, in the enumeration of other powers of the office, authorize an officeholder to issue subpoenas,[6] there are several specific statutes susceptible to the broad interpretation that the purpose for which subpoenas may be issued is coextensive with the power of the issuing authority. For example, Business and Professions Code Section 18627 authorizes the State Athletic Commission to issue subpoenas "in all matters . . . connected with the administration of the affairs of the commission." The California Horse Racing Board is authorized to issue subpoenas "as is necessary to enable [the board] to effectually discharge its . . . duties."[7] The Insurance Commissioner is authorized to issue subpoenas in regard to "any subject touching insurance business, or in aid of his duties."[8] The Public Utilities Commission may issue subpoenas "in any inquiry, investigation, hearing, or proceeding in any part of the State."[9] A review of these statutes at once reveals the broad scope of power vested in numerous agencies, departments and commissions—a power to compel attendance and testi-

[6] See, *e.g.*, CAL. GOVT. CODE § 11181, and the several statutes listed in the text.
[7] CAL. BUS. & PROF. CODE § 19435.
[8] CAL. INS. CODE § 12924.
[9] CAL. PUB. UTIL. CODE § 311.

mony within the ambit of their operation at least as broad as the power of a court in the exercise of its jurisdiction.

Some of the purposes for which subpoenas may be issued pursuant to these statutes lend themselves to easy classification on the basis of the somewhat limited function performed by the authority having the power to issue the subpoenas.[10] Because of their broad scope of operation, however, not all of the authorities mentioned in these examples are susceptible to such easy categorization. Thus, for example, Government Code Section 11181 vests the subpoena power in the head of each department in the state government, and Section 11182 permits broad delegation of that power to subordinates. Departments which perform adjudicatory, regulatory and enforcement functions are in one stroke granted a subpoena power at least equivalent to that exercised by the judiciary, the Legislature, and investigative bodies such as the grand jury. Because the statement of the subpoena power usually is not limited in terms of the specific function to be performed, extended classification by reference to the power alone is not feasible. Nonetheless, examples of materially different purposes may be illustrated by reference to the exercise of the subpoena power in specified situations. Thus, the types of proceedings in which the subpoena power is granted by statute in California may be roughly divided into three main categories: adjudicatory proceedings, legislative proceedings, and investigative or inquisitional proceedings. Each of these primary types of proceedings may be conveniently divided into several classes for the purpose of discussion.

Adjudicatory Proceedings

As used here, "adjudicatory proceedings" refer to proceedings conducted by a tribunal convened for the purpose of deciding specific issues and resolving particular difficulties between adverse parties on the basis of the evidence presented by such parties. Generally, these are adversary proceedings conducted under rules of the particular tribunal governing specific rights and duties respecting the admissibility of evidence, the examination and cross-examination of witnesses, and the like.[1]

The most obvious and traditional type of adjudicatory proceeding is that conducted by the courts. That a court can compel the attendance and testimony of witnesses in all actions and proceedings before it is inherent in the nature of the judicial process. Several California statutes specifically declare the courts' subpoena power in all civil [2] and criminal [3] cases, as well as such special proceedings as those conducted under the Juvenile Court Law [4] and those relating to the commitment of mentally irresponsible persons.[5] Similarly, the courts

[10] For example, Elections Code Sections 18409 and 18465 authorize local election boards to issue subpoenas only to local precinct boards in connection with the canvassing of returns.

[1] See, *e.g.*, CAL. GOVT. CODE § 11500 *et seq.* regarding procedures for adjudicatory proceedings conducted by administrative agencies subject to the Administrative Procedure Act.

[2] CAL. CODE CIV. PROC. §§ 1985, 1986.

[3] CAL. PEN. CODE § 1326.

[4] CAL. WELF. & INST. CODE § 664.

[5] See, *e.g.*, CAL. WELF. & INST. CODE §§ 5053 (mentally ill persons), 5257 (mentally deficient persons), 5510 (sexual psychopaths), 7057 (psychopathic delinquents).

are vested with broad powers to compel compliance with its process by means of citation for contempt, both civil [6] and criminal.[7]

Moving away from the strictly judicial setting, similar adjudicatory power is vested in numerous governmental agencies, both state and local. [8] The wide range of licensing activity is but an example of this function. At the state level, the licensing activity ranges from accreditation of persons in regard to certain vocations—as widely divergent, for example, as teachers [9] and certified shorthand reporters [10]—through regulation of specific activities, such as the sale of corporate securities,[11] to control over large segments of industry, such as public utilities.[12] An elementary example of licensing at the local level is the burning permit issued under the authority of the various county air pollution control districts.[13]

Examples of the exercise of the subpoena power in adjudicatory proceedings conducted by governmental agencies are as numerous as the activities of the agencies are varied. Thus, every hearing involving license revocation or suspension involves an adjudicatory process wherein substantive rights are determined—just as in court proceedings. Disciplinary proceedings conducted by agencies or quasi-governmental authorities [14] charged with professional licensing responsibilities are in substance not unlike criminal proceedings conducted by a court.[15] A particularly isolated but interesting example of the adjudicatory function is the authority of the Division of Housing to issue subpoenas and hold hearings "for the purpose of reaching an amicable settlement of controversies" [16] arising in connection with the Division's broad investigative powers.

Arbitration is but another example of a type of adjudicatory proceeding. In this case, the occasion for the exercise of adjudicatory activities is created by agreement between private parties. Even here, however, California law authorizes the issuance of a subpoena. Thus, Code of Civil Procedure Section 1282.6 provides authority for a neutral arbitrator in any arbitration proceeding to issue a subpoena to compel the attendance and testimony of witnesses.

Legislative Proceedings

For the purpose of classification, "legislative proceedings" as used here refer to proceedings conducted for the purpose of advising a lawmaking body of matters upon which its legislative or quasi-legislative act may be based, whether it be the enactment of statutes, the adoption of rules, or the promulgation of regulations. There are no

[6] CAL. CODE CIV. PROC. § 1991. See also CAL. CODE CIV. PROC. § 1992 (forfeiture of $100 to party aggrieved for disobeying a subpoena, as well as damages suffered).
[7] CAL. PEN. CODE § 1331.
[8] See, *e.g.*, the agencies listed in Government Code Section 11501(b) as being subject to the administrative adjudicatory procedures contained in the Administrative Procedure Act.
[9] CAL. EDUC. CODE § 13101 *et seq.*
[10] CAL. BUS. & PROF. CODE § 8000 *et seq.*
[11] CAL. CORP. CODE § 25000 *et seq.*
[12] CAL. PUB. UTIL. CODE § 301 *et seq.*
[13] CAL. HEALTH & SAF. CODE § 24198 *et seq.*
[14] For example, the State Bar Association.
[15] In such proceedings, of course, substantive rights are determined and the penalty for violation of obligations imposed by the enforcement agency is not unlike a criminal penalty—to which, in many cases, the violator also may be subject, since violations or infractions of professional responsibilities often constitute crimes as well.
[16] CAL. LABOR CODE §§ 1484, 1485.

"parties" to the proceeding; witnesses are summoned and examined only by the lawmaking body itself; there are no rules assuring the reliability of information disclosed; no decisions need be rendered. Indeed, unlike an adjudicatory body, a lawmaking body is not required to act; even when it acts, it settles no issues in dispute between particular persons and its decision reflected in such action need not be based upon any evidence produced at the hearing.

Some types of proceedings are easily categorized as "legislative proceedings"—for example, hearings conducted by a state legislative committee in connection with pending legislation; but others shade into quasi-adjudicatory proceedings—such as zoning variance hearings. In all such proceedings, however, investigative activities are required, for factfinding is an integral part of the legislative process. Whether conducted by the governing body itself or by an administrative agency pursuant to delegated authority, these activities inherent in the nature of the legislative process are carried out at both the state and local levels of government. In aid of their legislative or quasi-legislative duties, these factfindings bodies of government uniformly are authorized to issue subpoenas requiring the attendance and testimony of witnesses.

At the state level of government, the Senate, the Assembly, and their various committees are authorized to issue subpoenas.[1] Between legislative sessions, compliance with a committee subpoena may be compelled only by appeal to the courts.[2] When the Legislature is in session, however, compliance with its process may be compelled without the aid of the judiciary, since commitment for contempt may then be accomplished by resolution.[3]

Numerous state administrative agencies also are empowered to issue subpoenas. As noted previously, the authority for the issuance of subpoenas seldom distinguishes between the nature of the function—whether quasi-judicial or quasi-legislative—to be performed by the agency.[4] However, the exercise of the subpoena power for a quasi-legislative function may, for the purpose of discussion, logically be separated from adjudicatory activities. Whenever, for example, the subpoena power is exercised in aid of an agency's rulemaking authority, a quasi-legislative rather than adjudicatory power is exercised. The State Franchise Tax Board, for example, exercises broad rulemaking authority in its administration of the state tax laws.[5] Its adoption of rules and regulations regarding classifications for taxing purposes is an example of such quasi-legislative activity.[6]

As indicated, the legislative process is not confined to the state level of government. County boards of supervisors[7] and city councils[8] are

[1] CAL. GOVT. CODE § 9401.
[2] CAL. GOVT. CODE § 9408.
[3] CAL. GOVT. CODE §§ 9406, 9407, 9409.
[4] See, *e.g.*, Revenue and Taxation Code Sections 19254 and 26423, providing that "The Franchise Tax Board may issue subpenas or subpenas duces tecum, which . . . may be served on any person for any purpose." The Board, of course, has broad powers involving adjudicatory (see, *e.g.*, CAL. REV. & TAX. CODE § 18592), quasi-legislative (see, *e.g.*, CAL. REV. & TAX. CODE § 19253), and investigative activities (see, *e.g.*, CAL. REV. & TAX. CODE § 19254).
[5] See, *e.g.*, General Electric Co. v. State Bd. of Equalization, 111 Cal. App.2d 180, 244 P.2d 427 (1952).
[6] *Ibid.*
[7] CAL. GOVT. CODE § 25170.
[8] CAL. GOVT. CODE § 37104.

authorized to issue subpoenas, as are local election boards,[9] air pollution control districts,[10] local housing authorities,[11] county boards of equalization,[12] and the like.[13] The governing body of any city, for example, "may issue subpenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it."[14]

Investigative and Inquisitional Proceedings

"Investigative proceedings" as used in this discussion are the most difficult to categorize. Legislative bodies investigate facts to determine the need for legislation and, in a sense, courts investigate the facts of the causes before them. What is meant here, though, is a proceeding conducted by a governmental officer or agency for the purpose of determining whether further official action in regard to any matter discovered in the course of the proceeding is warranted. There are no issues and no parties. No findings of fact or legislative act is contemplated. Generally, there are no boundaries to the scope of the proceeding other than the authority of the body conducting the investigation.

Perhaps the clearest example of an investigative or inquisitional proceeding is a grand jury proceeding. A grand jury is, of course, an integral part of the judicial system. But it does not perform an adjudicatory function. It is not bound by ordinary rules of court nor specific rules of procedure; there is no right to present evidence in defense; there is no right to cross-examine witnesses. Thus, a grand jury is "inherently a body of inquisition empowered to make full and diligent inquiry into public offenses . . . ."[15] In aid of this investigative duty, the grand jury is extended the subpoena power through the superior courts to compel attendance and testimony of witnesses.[16]

Another example of the investigative or inquisitional activity not closely related to either an adjudicatory or legislative function is the coroner's inquest. Government Code Sections 27498 and 27499 authorize the coroner to issue subpoenas for the examination of any person "who in his opinion or that of any of the jury has any knowledge of the facts." Failure without reasonable excuse to attend and testify is a misdemeanor.[17]

Civil Code Section 1201 provides officers authorized to take proof of instruments with authority for the issuance of subpoenas for the examination of witnesses. The same section vests such officers with contempt power to compel compliance.

A final example of investigative activities may be had by reference to the numerous authorizing statutes in regard to investigative functions of administrative agencies. Unlike grand jury proceedings and coroners' inquests, however, many of these investigative activities are

[9] CAL. ELEC. CODE §§ 18409, 18465.
[10] CAL. HEALTH & SAF. CODE §§ 24315, 24367.5.
[11] CAL. HEALTH & SAF. CODE § 34318.
[12] CAL. REV. & TAX. CODE § 1609.
[13] See, *e.g.*, Water Code Section 70232, authorizing levee district boards to issue subpoenas.
[14] CAL. GOVT. CODE § 37104.
[15] Irwin v. Murphy, 129 Cal. App. 713, 716, 19 P.2d 292, 293 (1933).
[16] CAL. PEN. CODE § 939.2.
[17] CAL. GOVT. CODE § 27500.

conducted by agencies charged with enforcement or regulative duties;[18] investigative activities conducted by these agencies may be only incidental to the performance of adjudicatory or legislative functions by the investigating authority. For example, the Director of Agriculture is authorized to issue subpoenas in regard to his investigation of the failure of a processor to make payment for farm products within the time specified in any contract of sale.[19] The same chapter of the Agricultural Code containing this authorization also details the licensing authority of the Director over processors.[20]

Summary

From the foregoing discussion, which is by way of example only and does not purport by any means to exhaust all statutory subpoena authority, it is apparent that the duty to testify in response to a subpoena can arise in a variety of ways and in numerous types of proceedings and forums. It ranges from the courtroom situation in a civil or criminal case conducted by a court, through pretrial and special proceedings incident to the judicial process, through the full range of legislative action by state and local governments, through a maze of administrative agencies, boards, commissions, and the like, to the local tax assessors and beyond. In every situation in which there arises a duty to testify, there arises an equivalent potential claim of privilege.

Types of Proceedings in Which Privileges Will Be Recognized Under Existing California Law

Section 13 of Article I of the California Constitution provides that "No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . ." This constitutional provision gives rise in practice to two distinct privileges. First, the defendant in a criminal case has a privilege not to be called as a witness and not to testify. Second, every person, whether or not accused of a crime, has a privilege when testifying to refuse to give information that might tend to incriminate him.

Though not specifically codified in such terms, the privilege against self-incrimination clearly applies in any type of proceeding, whether adjudicatory, legislative or investigative, for the constitutional guarantee precludes compelling a person to give self-incriminatory testimony in any proceeding where testimony can be compelled.[1]

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[18] For example, Government Code Section 11181 grants the subpoena power to the head of each department in the state government in connection with investigations *and prosecutions* of

> (a) All matters relating to the business activities and subjects under the jurisdiction of the department.
> (b) Violations of any law or rule or order of the department.
> (c) Such other matters as may be provided by law. [CAL. GOVT. CODE § 11180.]
>
> The diminishing practical effect of judicial limitation on the scope of records which can be required by administrative subpoena becomes apparent when it is recalled that many agencies with subpoena powers are authorized to conduct general or statistical investigations as well as investigations for law enforcement purposes. It would seem that such an agency could justify virtually any subpoena on the ground that it was gathering general information under congressional authorization. Nor would this necessarily be a fiction, since general investigations normally will center in the very fields where violations most commonly occur. [Note, 34 CAL. L. REV. 428, 429-430 (1946) (footnotes omitted).]

[19] CAL. AGRIC. CODE § 1300.3.
[20] See CAL. AGRIC. CODE, Div. 6, Ch. 9 (commencing with § 1299.18).
[1] CAL. CONST., Art. I, § 13.

Several statutes indicate the scope of the privilege of a person accused or charged with the commission of a crime or offense not to testify at all. Thus, Penal Code Sections 688, 1323 and 1323.5 provide:

§ 688. NO PERSON TO BE A WITNESS AGAINST HIMSELF IN A CRIMINAL ACTION, OR TO BE UNNECESSARILY RESTRAINED. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

§ 1323. A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

§ 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.

This section shall not be construed as compelling any such person to testify.

Section 688 applies to "criminal actions," a term that is defined in Penal Code Section 683 as "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment." Section 1323, likewise, is limited to criminal actions.[2] The scope of the similar privilege provided by Section 1323.5 [3] is uncertain, but apparently is broader, although the section would appear to be limited by the definitions of "crime" and "public offense" in Penal Code Section 15, which reads:

§ 15. "CRIME" AND "PUBLIC OFFENSE" DEFINED. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

[2] The section applies to a defendant in a "criminal action or proceeding." Penal Code Section 685 states: "The party prosecuted in a criminal action is designated in this Code as the defendant."

[3] This section was unknown in California law from 1872 until 1952, when People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952), was decided. It had been assumed that the section had been repealed by the enactment of the Penal Code in 1872, until the *Talle* case held that it still declared the law. The only purpose for invoking the section in People v. Talle, *supra*, was to hold it was error for the prosecution to call the defendant as its witness and to compel him to rely on this privilege. It seems likely that the same result could have been reached without relying on Section 1323.5.

The principal statutory recognition of other privileges in California is Section 1881 of the Code of Civil Procedure, which provides for the attorney-client privilege, the physician-patient privilege, the marital communication privilege, the priest-penitent privilege and the governmental secrets privileges. Section 1881(6) grants newsmen a privilege in regard to their news sources, and Business and Professions Code Section 2904 creates a psychologist-patient privilege equivalent to the lawyer-client privilege.[4] Except for the newsmen's privilege, these statutes contain no provision indicating the type of proceeding in which they may be applicable. Code of Civil Procedure Section 1881 provides simply that it is the policy of the law to encourage confidence in certain relationships and, therefore, a person cannot be examined in regard to the privileged matters listed in the section. Subdivision 6 of Section 1881, relating to the newsmen's privilege, however, is made applicable by specific language to judicial, legislative and administrative proceedings. From this, it could be argued that the omission of similar language from the other subdivisions indicates that they do not apply in all types of proceedings. But the other subdivisions were enacted in 1872; subdivision 6 was enacted in 1935. Little implication as to the intent of the Legislature in 1872 can be derived from the inclusion of more explicit language some 63 years later.

One might also argue that if it is the policy of the law to preserve confidences inviolate in regard to certain relationships, that policy requires the preservation of the confidences not only in court, but also when the confidential information is sought under any of the more than 100 statutes authorizing boards, officers, commissions, committees and other agencies to compel testimony.[5]

No direct authority on these statutory privileges being applicable in nonjudicial proceedings can be found in California. That they do apply in such proceedings apparently has never been questioned. The appellate reports contain a number of cases in which the applicability of various privileges in nonjudicial proceedings is assumed, and either a privilege is applied or the information sought is held to be outside the protection of the claimed privilege. Thus, the Supreme Court, in *Ex parte McDonough*,[6] held that an attorney was properly entitled to rely on the attorney-client privilege in a grand jury proceeding to justify

[4] These sections provide:

CAL. CODE CIV. PROC. § 1881(6):

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

CAL. BUS. & PROF. CODE § 2904:

For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.

[5] See representative statutes listed in the text, *supra* at 309-315.

[6] 170 Cal. 230, 149 Pac. 566 (1915). *Cf.* People *ex rel.* Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct. 1934) (attorney-client privilege recognized as available in grand jury proceedings, but that privilege does not extend to protection of a client's identity).

his refusal to disclose the identity of his client. In a later case,[7] the attorney-client privilege was recognized as being available in grand jury proceedings, but the communication itself was not privileged.

A recent federal case [8] applying the California law of privilege held that the identity of a client could be concealed under the attorney-client privilege in an investigative hearing held by a special agent of the Internal Revenue Service to determine the identity of a person who might be liable for the payment of taxes.

Other California cases have involved legislative proceedings,[9] administrative proceedings,[10] and local bar association disciplinary proceedings,[11] where various privileges—such as the marital communication privilege and the attorney-client privilege—apparently were assumed to be applicable, but the information sought was held unprivileged.

In other states, there is also little direct authority. A leading New York case [12] held explicitly that the physician-patient privilege applies in legislative proceedings. Authorities in other states are split as to the availability of the physician-patient privilege in such proceedings as workmen's compensation cases [13] and lunacy hearings; [14] however, in these kinds of proceedings, the patient's physical or mental condition is the ultimate issue and the substantive privilege may be inoperative even in judicial proceedings.

The rules of the House Committee on Un-American Activities recognize the availability of the marital privilege.[15] Other judicially recognized privileges also are generally respected in congressional committee proceedings.[16]

In some nonjudicial proceedings in California, specific statutes incorporate the privileges recognized in judicial proceedings. For example, Penal Code Section 939.6 requires a grand jury to base an indictment upon "legal evidence." Government Code Section 11513(c) requires the recognition of the privileges applicable in civil cases in all administrative adjudicatory proceedings conducted under the Administrative Procedure Act. Since the Administrative Procedure Act applies only to certain state agencies, and inasmuch as Section 11513 applies only to license application or disciplinary proceedings, this act supplies no clue as to the applicability of privileges in investigative or quasi-legislative proceedings conducted by administrative agencies, adjudicatory proceedings conducted by local administrative bodies, or any proceedings conducted by state agencies not subject to the act.

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[7] *In re* Bruns, 15 Cal. App.2d 1, 58 P.2d 1318 (1936). *Accord, In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954) (attorney-client privilege recognized as available in grand jury proceeding, but privilege does not attach to communications in furtherance of crime).

[8] Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

[9] See Board of Educ. v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 82 (1954).

[10] See 11 OPS. CAL. ATTY. GEN. 116 (1948).

[11] McKnew v. Superior Court, 23 Cal.2d 58, 142 P.2d 1 (1943).

[12] New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940).

[13] See, *e.g.*, cases collected in Annot., 133 A.L.R. 732 (1941). *Cf.* Case of Chernick, 286 Mass. 168, 189 N.E. 800 (1934) (marital privilege recognized in workmen's compensation case).

[14] See, *e.g., In re* Fleming, 196 Iowa 639, 195 N.W. 242 (1923), and *In re* Harmsen, 167 N.W. 618 (Iowa 1918). *Cf. In re* Gates, 170 App. Div. 921, 154 N.Y. Supp. 782 (1915).

[15] House Comm. on Un-American Activities, *Rules of Procedure,* 87th Cong., 1st Sess., Rule XII at 8 (1961).

[16] See, *e.g.,* Comment, 45 CAL. L. REV. 347 (1957).

From the foregoing, it appears that no one can state with confidence that the privileges provided by Section 1881 do not apply to nonjudicial proceedings. In fact, it is as logical to assume its applicability in nonjudicial proceedings as it is to accept its applicability in judicial proceedings, since the section in terms is not made specifically applicable to any type of proceeding.

Types of Proceedings in Which Privileges Will Be Recognized Under the Uniform Rules of Evidence

Although it is not surprising that the ordinary exclusionary rules of evidence (such as the hearsay rule) are rarely applied in nonjudicial proceedings,[1] and are sometimes "relaxed"[2] in certain types of judicial proceedings,[3] one would expect that privileges would be recognized in all types of proceedings. In fact, as the preceding discussion suggests,[4] the practice in California appears to be to recognize privileges in administrative and legislative proceedings as well as in judicial proceedings.

Nonetheless, with one exception,[5] the privileges under the Uniform Rules of Evidence apply only in proceedings "both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."[6] The rules are not made specifically applicable, for example, to administrative proceedings; in the absence of some other statute, they would not apply to such proceedings.[7]

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[1] Government Code Section 11513(c), part of the Administrative Procedure Act, states in part:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

See also, for example, CAL. LABOR CODE § 5708. On the other hand, the Administrative Procedure Act also states in Government Code Section 11513(c): "The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions . . . ."

[2] Uniform Rule 2 provides that the Uniform Rules apply in judicial proceedings "except to the extent to which they may be *relaxed* by other procedural rule or statute applicable to the specific situation." (Emphasis added.)

[3] *E.g.*, CAL. CODE CIV. PROC. §§ 117g (judge of small claims court may make informal investigation either in or out of court), 956a (Judicial Council may prescribe rules for taking evidence by appellate court), 988i (like § 956a), 1768 (hearing of conciliation proceeding to be conducted informally), 2016(b) (it is not ground for objection to pretrial examination that the testimony sought from a deponent is inadmissible at the trial if such testimony is reasonably calculated to lead to discovery of admissible evidence) and CAL. PEN. CODE § 190.1 (on issue of penalty, evidence may be presented of circumstances surrounding crime and of defendant's background and history).

[4] See discussion in the text beginning on page 320, *supra*.

[5] Uniform Rule 25, declaring the privilege against self-incrimination, by its terms gives a privilege to refuse to disclose incriminating matter "in an action or to a public official of this state or any governmental agency or division thereof." The official Comment to the rule does not indicate why this one rule was made specifically applicable to nonjudicial proceedings. Perhaps the reason is found in the constitutional basis of the privilege. Yet, the Uniform Rule apparently is not broad enough to provide protection, for example, in arbitration proceedings.

[6] UNIFORM RULES OF EVIDENCE, RULE 2 (1953) [hereinafter cited as UNIFORM RULES].

[7] The Comment to Uniform Rule 2 reads:

> These rules are made applicable to court proceedings and are not specifically extended to administrative tribunals with fact-finding or semi-judicial power. This is true partly because the rules are designed for adoption by courts under their rule-making power as well as by legislation and there would exist the question of the extent to which the courts could impose the rules upon other tribunals. Also considerable modification and use of alternative language in the rules would be necessary to make them fit every fact-finding situation. However, there is no good reason why the same rules should not be employed in one type of tribunal as well as in another. In fact the hope of uniformity not merely among courts, but between courts

The fact that the Uniform Rules are limited to judicial proceedings does not mean that the Uniform Commissioners took the position that privileges should not be recognized in other proceedings. The Commissioners drafted a set of rules for judicial proceedings and did not intend to change the law applicable to the procedures followed in other types of proceedings.[8]

The Problem Created by the Difference in the Scope of Privileges Provided by the Uniform Rules and Under Existing California Law

In considering the Uniform Rules of Evidence for enactment in California, it is necessary, of course, to consider what disposition should be made of the existing privilege statutes. The Uniform Rules are limited to civil and criminal proceedings conducted by or under the supervision of a court;[9] but the existing California privileges, generally speaking, appear to be applicable in all types of proceedings—judicial, administrative and legislative.[10] This difference in the scope of the privileges presents a difficult problem.

It would be possible to limit the revised Uniform Rules on privilege to judicial proceedings and to retain the existing privilege statutes, amending them to provide that they do not apply to proceedings covered by the Uniform Rules. This course of action would result in a dual set of statutes that would prove burdensome and unworkable, for the existing statutes are defective and uncertain, and on their face do not reflect the judicially created rules that implement them. On the other hand, to enact new rules of privilege that would apply only in judicial proceedings and to repeal the existing privilege statutes would eliminate the privileges that probably are now available in many types of nonjudicial proceedings.

There appear to be but two reasonable methods of dealing with this problem. One possible solution would be to provide that the revised URE counterpart of an existing privilege statute applies to nonjudicial proceedings to the extent that the existing statute (to be repealed) formerly applied. This solution would merely create uncertainty and, in effect, would require the courts, without any reliable guide, to determine the scope of the new privileges. It would seem to be a better solution to provide in the statute the rules for determining the scope of the privileges. Otherwise, years would pass before the scope of each privilege can be determined by the courts. Cases must be tried and processed through the appellate courts. Litigants must expend their money to determine what the Legislature easily could have specified. And, in the meantime, while the scope of the various privileges remains unknown, whether a particular privilege is recognized in a particular nonjudicial proceeding would depend to a large extent on the weight given by the person conducting the hearing to the public policy that justifies that privilege.

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and administrative agencies is one of the major factors of justification for these rules. They can be very readily adapted to fit any situation and it is hoped that they may provide the pattern for all inquiries where evidence is introduced. It is not intended that these rules should modify any other procedural rules under which the rules of evidence are relaxed for specified purposes.

[8] See UNIFORM RULE 2 Comment, note 7 *supra*.

[9] UNIFORM RULE 2. See discussion of this rule in the text, *supra* at 324.

[10] See discussion in the text, *supra* at 320-324.

Thus, there appears to be only one reasonable method of dealing with the problems created by the differences in the scope of the privileges provided by the Uniform Rules and those provided by the existing California law: the statute should state specifically the types of proceedings in which each privilege is to apply. Possibly, this determination should be made only after a detailed consideration of the public policy underlying each particular privilege with a view to ascertaining whether effectuation of the policy requires recognition of the privilege in the various types of nonjudicial proceedings. However, given the broad range of nonjudicial proceedings in California where testimony presently can be compelled and the probability of recognition *sub silentio* of present California privileges in such proceedings, it is apparent that a general rule in regard to the scope of the privileges provided in the Uniform Rules is feasible without the detailed discussion suggested.

A desirable solution to the problem concerning the applicability of these privileges is illustrated by the experience of New Jersey, a state which has enacted a revised version of the Privileges Article of the Uniform Rules. New Jersey concluded that, as a general rule, the Privileges Article should apply in all types of proceedings and revised Uniform Rule 2 to read as follows:

> (1) The provisions of article II, Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.
>
> (2) All other rules contained in this act, or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.
>
> (3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.
>
> (4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication.[11]

A statute of this type is recommended for enactment in California. If it proves to be too broad in the scope of the protection accorded any particular privilege, appropriate sections may be added from time to time as justified. For example, some privileges—such as the right of a defendant in a criminal action not to testify at all—may at the outset be limited to criminal actions and not be made generally applicable to all types of proceedings. On the other hand, it seems desirable to determine at the outset that most privileges—such as the attorney-client privilege—should, as a working hypothesis, be made generally applicable to all types of proceedings, with desired exceptions specifically stated.

To avoid unnecessary collateral discussion, the following detailed consideration of Rules 23 through 40 proceeds on the assumption that

[11] N.J. REV. STAT. § 2A:84A-16.

the Privileges Article is limited to judicial proceedings as contemplated by Uniform Rule 2. This permits an orderly comparison and detailed study of the Uniform Rules as contrasted with the present California law applicable to judicial proceedings. Despite this self-imposed limitation, the foregoing material should be considered where appropriate in connection with the discussion of each privilege.

If the above recommendation in regard to making the Privileges Article applicable to all types of proceedings—legislative, executive, and administrative, as well as judicial—is approved, then several recommended revisions indicated in the following material should be revised to conform to this broader scope. Thus, making the privileges article applicable to all such proceedings may eliminate the need for some of the suggested revisions.

RULES 23, 24 AND 25—PRIVILEGE OF ACCUSED AND PRIVILEGE AGAINST SELF-INCRIMINATION

Introduction

The special privilege of an accused in a criminal action and the general privilege against self-incrimination—Rules 23 through 25—are considered together because they present mutual problems that are not easily separable for independent analysis. Other Uniform Rules, particularly Rule 7 and Rules 37, 38 and 39,[1] also are considered insofar as they relate to these privileges because Rules 23-25 present several unique problems in regard to these other rules.

Rule 23 deals with the privilege of an accused in a criminal action. It provides:

RULE 23. *Privilege of Accused.*

(1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify.

(2) An accused in a criminal action has 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, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.

[1] Rules 7, 37, 38 and 39 provide:

RULE 7. *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

RULE 37. *Waiver of Privilege by Contract or Previous Disclosure.* A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

RULE 38. *Admissibility of Disclosure Wrongfully Compelled.* Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

RULE 39. *Reference to Exercise of Privilege.* Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and 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 adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

(3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

(4) If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom.

Since paragraph (2) of this rule (the special marital privilege possessed by an accused in a criminal action) is closely related to Rule 28 (the general rule of marital privilege), discussion of paragraph (2) is deferred until consideration of Rule 28.[2] (Unless otherwise stated, therefore, future references to Rule 23 mean this rule *excluding* paragraph (2).)

Rule 24 defines "incrimination." The text of the rule is set out in the footnote.[3]

Rule 25 affirmatively states the privilege against self-incrimination and recites seven exceptions thereto. This rule provides:

RULE 25. *Self-Incrimination: Exceptions.* Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that under this rule,

(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and

(b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

(c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

(d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

(e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it; and

[2] See the discussion in the text, *infra* at 449-452.

[3] Rule 24 provides:

RULE 24. *Definition of Incrimination.* A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.

(f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and

(g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action.

General Considerations

As previously noted, Rule 7 makes admissible all relevant evidence except to the extent that some other rule or rules restrict its admission. Thus, Rule 7 provides in part:

> Except as otherwise provided *in these Rules,* . . . no person has a privilege to refuse to be a witness, and . . . no person has a privilege to refuse to disclose any matter or to produce any object or writing. [Emphasis added.]

The Commissioners on Uniform State Laws explain the purpose of Rule 7 and its place in the overall scheme of the Uniform Rules as follows:

> This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, *privileges* and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back onto the slate the limitations and exceptions desired. [Emphasis added.] [4]

In California, the privilege against self-incrimination is a constitutional privilege; it is guaranteed by the provisions of Article I, Section 13 of the California Constitution.[5] If Rule 7 were adopted as legislation (or as a rule of court under a court's rule-making power) in this State—or, for that matter, in any other state—the rule would not, of course, affect any constitutional rule of privilege. Nor would Rule 7 affect any other constitutional limitation on the admissibility of evidence. As the URE Commissioners remark: "Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule." [6] It would be possible, therefore, to accept and to enact Rule 7 of the Uniform Rules as legislation in this State and, at the same time, to reject and refuse to enact any part or all of Rules 23-25 or comparable provisions. The effect of this course of

[4] UNIFORM RULE 7 Comment.

[5] This section provides:

> In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

[6] UNIFORM RULE 7 Comment.

action would be to leave intact all the current rules and principles respecting these privileges insofar as such rules and principles are (as most of them are) deduced from the California Constitution.

This course would be *possible*. This is not to say, however, that it is the necessary or desirable course to follow. Alternatively, it would be possible to affirm the privileges provided by Rules 23-25 by legislation consistent with Article I, Section 13 of the California Constitution. This statutory affirmation would, of course, be in the form of an exception to the general statutory abrogation of all privileges as contemplated by Rule 7.

It is demonstrated later in this study that most of the provisions of Rules 23-25 would, if enacted in this State, constitute mere legislative declarations of what our courts have held to be the meaning and intent of Article I, Section 13 of the California Constitution. In a few instances, however, the URE provisions would contravene the Constitution as construed by our courts, and in a few areas our courts have not had occasion to rule.

Rule 23

Rule 23(1)—Accused's Privilege

Rule 23(1) provides:

> (1) Every person has in any criminal action in which he is an accused a privilege not to be called as a witness and not to testify.[7]

This provision should be contrasted with Section 13 of Article I of the California Constitution, which provides in part:

> No person shall be . . . compelled, in any criminal case, to be a witness against himself.

Note that Rule 23(1) explicitly embraces both a privilege "not to testify" and a privilege "not to be called as a witness." This latter privilege—the privilege not to be called as a witness—is not directly and explicitly stated either in the California Constitution or statutes of this State. However, certain statutes have been construed as forbidding the prosecution to call the defendant in a criminal case. These statutes and this construction are revealed in the following excerpt from *People* v. *Talle*:[8]

> It is . . . perfectly clear that, unless a defendant requests the privilege of testifying, he is incompetent as a witness, and that the prosecution has no legal right to ask him to testify. In this state there is an express statute that provides that those accused of crime are competent as witnesses only at their own request and not otherwise. This statute was first passed in 1865. . . . [S]ection [one] provides: "In the trial of or examination upon all indictments, complaints, and other proceedings before any Court, Magistrate, Grand Jury, or other tribunal, against persons accused or

[7] Uniform Rule 23(1) is a copy of MODEL CODE OF EVIDENCE [hereinafter cited as MODEL CODE] Rule 201(1) (1942). Evidently the sponsors of the Uniform Rules agree with the following commentary on Model Code Rule 201(1): "It is entirely impracticable at this time, if not unwise, to attempt to abolish this privilege."

In this study, this point of view is accepted and, therefore, no attempt is made to explore and evaluate arguments pro and con the privilege.

[8] 111 Cal. App.2d 650, 245 P.2d 633 (1952).

charged with the commission of crimes or offenses, the person so accused or charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the Magistrate, Grand Jury, or other tribunal before which such testimony may be given."

Section two as originally enacted, and as it now reads, provides: "Nothing herein contained shall be construed as compelling any such person to testify."

This statute [presently Penal Code Section 1323.5] . . . has never been repealed.

* * * * *

This type of statute is common to the federal government and to many states. The purpose of such statutes was to abrogate, in criminal cases, the original common law rule that made the accused incompetent as a witness even on his own behalf. [Citations omitted.]

Professor Wigmore interprets statutes such as the . . . one here involved as forbidding the calling of the accused by the prosecution. He states [citation omitted]: "By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness 'at his own request, but not otherwise' . . . Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution."[9]

It is concluded that the present California law is in accord with Rule 23(1).[10]

Rule 23(3)—Requiring Accused to Exhibit Body or Engage in Demonstration at the Hearing

Rule 23(3) provides:

> (3) An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

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[9] *Id.* at 664-66, 245 P.2d at 641-42. The rule that the prosecution should not call the accused is apparently here regarded as based wholly upon the statute. However, in People v. Tyler, 36 Cal. 522, 529 (1869), the statute is said to be "a re-enactment by . . . statute" of the constitutional incrimination privilege. If this be so, the right not to be called is a constitutional right. The question is presently only of theoretical interest unless it is desired to amend Rule 23(1) to eliminate the privilege not to be called. For the reasons stated in note 7 *supra*, such amendment is *not* advocated.

[10] Under Rule 23(1) questions would arise as to when one is "an accused" in a "criminal action." For example, in a disbarment proceeding is there "an accused" in a "criminal action"? Nothing in the Uniform Rules attempts to define the terms quoted. It would seem, therefore, that they would be construed in conformity with prevailing rules on the subject such as the current rule that a disbarment proceeding is "a special proceeding of a civil nature," which means the accused lawyer may properly be called to testify but may not be required to give incriminating testimony. Fish v. State Bar, 214 Cal. 215, 222, 4 P.2d 937, 940 (1931). In terms of the Uniform Rules this means the accused lawyer does *not* possess the Rule 23(1) privilege, but does possess the Rule 25 (self-incrimination) privilege.

For similar problems as to whether certain proceedings are civil or criminal, see Thurston v. Clark, 107 Cal. 285, 40 Pac. 435 (1895); Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965 (1895); West Coast etc. Co. v. Contractors' etc. Bd., 72 Cal. App.2d 287, 164 P.2d 811 (1945); *In re* Tahbel, 46 Cal. App. 755, 189 Pac. 804 (1920).

The California law seems to be in accord with the principle stated in this provision. Thus, it has long been settled that ordering the accused to stand for identification at the trial is not "compelling the defendant to become a witness against himself in any respect, within the meaning of the constitutional provision." [11]

By analogy, it would seem not to be a violation of an accused's privilege to order him to "submit his body to examination" in the sense of Rule 23(3) (*e.g.*, to roll up his sleeve so that judge and jury could see tattoo marks or scars), or "to do [an] act" in the sense of Rule 23(3) (*e.g.*, to walk across the courtroom so that judge and jury could see that he limps). Although no direct California holdings have been found other than the standing-for-identification cases, it is reasonable to assume—considering the view California has taken of the scope of the privilege in out-of-court proceedings [12]—that the courts of this State would agree with the limitations upon the in-court privilege stated in Rule 23(3). Some cases—though not directly involving the scope of the in-court privilege—quote the following from Professor Wigmore with apparent approval:

> Looking back at the history of the privilege . . . and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence.
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> * * * * *
>
> In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.* The one idea is as essential as the other.[13]
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> * * * * *
>
> If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.
>
> The limit of the privilege is a plain one. From the general principle . . . it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i.e.*, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial,—unless all bodily action were synonymous with testimonial utterance; for, as already observed . . . , not compulsion alone is the compo-

[11] People v. Goldenson, 76 Cal. 328, 347, 19 Pac. 161, 170 (1888). See also People v. Oliveria, 127 Cal. 376, 59 Pac. 772 (1899) and People v. Ferns, 27 Cal. App. 285, 149 Pac. 802 (1915).

[12] See discussion in the text, *infra* at 345-346 and 348-350.

[13] 8 WIGMORE, EVIDENCE § 2263, at 362-63 (3d ed. 1940) [hereinafter cited as WIGMORE], quoted with approval in People v. Haeussler, 41 Cal.2d 252, 257, 260 P.2d 8, 11 (1953); People v. Trujillo, 32 Cal.2d 105, 112, 194 P.2d 681, 685 (1948); People v. One 1941 Mercury Sedan, 74 Cal. App.2d 199, 204, 168 P.2d 443, 446 (1946).

> nent idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself . . . . Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. . . .
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> * * * * *
>
> Both principle and practical good sense forbid any larger interpretation of the privilege in this application.[14]

Rule 23(4)—Comment on Accused's Exercise of Privilege

A thorough discussion of Rule 23(4), which permits counsel to comment upon an accused's failure to testify, will be meaningful only by detailed consideration of a part of Rule 39, which generally forbids comment upon the exercise of a privilege. Rule 39 provides in part:

> Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . . , either in the action or with respect to particular matters, . . . the judge and 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 adverse inference therefrom.

Not only is there to be no comment upon the exercise of a privilege under the general scheme of Rule 39, but there also is to be no inference based upon the exercise of a privilege at the trial. But paragraph (4) of Rule 23 is recognized as an exception to the general rule declared in Rule 39. Rule 23(4) provides as follows:

> If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom.

Note that the quoted paragraph from Rule 23 permits *counsel* to comment upon the exercise of the privilege not to testify, but contains no exception to the Rule 39 prohibition against the *judge* commenting thereon.

This comment-inference scheme set up by Rules 39 and 23(4) of the Uniform Rules should be compared with the language in Article I, Section 13 of the California Constitution, which states in part that

> in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

There *may* be several important, substantive differences between the comment-inference scheme of the Uniform Rules and the principles enunciated in the quoted constitutional provision together with the pronouncements in judicial decisions thereunder. These possible differ-

[14] 8 WIGMORE § 2265, at 374-75, quoted with approval in People v. Trujillo, 32 Cal.2d 105, 113, 194 P.2d 681, 686 (1948); People v. One 1941 Mercury Sedan, 74 Cal. App.2d 199, 204-05, 168 P.2d 443, 446 (1946).

ences are explored by considering several hypothetical cases which follow.

Case One. Criminal action. Defendant does not testify. In charging the jury, the judge comments upon defendant's failure to testify and instructs the jury that they may consider that fact in their deliberations.

Article I, Section 13 clearly permits comment by the court. On the other hand, it may be that the Uniform Rules—either designedly or fortuitously—prohibit such comment. As noted above, Rule 39 provides in part: "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . . , the *judge* . . . may *not* comment thereon." (Emphasis added.) Rule 39 thus sets up a rule of no comment by the *judge* except as such comment may be permitted by Rule 23(4); turning to this exception, it is found that Rule 23(4) refers only to comment by *counsel*. It may be doubtful whether it was the intention of the draftsmen of the Uniform Rules to prohibit court comment. Their commentary on Rule 23(4), part of which is set out below, is somewhat equivocal in this regard:

> The right of comment upon the accused's failure to testify is here limited to comment in argument of counsel. . . . While these rules do not cover comment by the judge, the right of comment by counsel seems to be so closely related to the considerations of admissibility as to require notice here.[15]

This doubt—whether the URE provisions are intended to prohibit court comment—creates in turn some doubt as to the constitutionality of such provisions if adopted as legislation in this State, for, as indicated above, Article I, Section 13 clearly permits such comment. Note that this constitutional provision is not one simply and solely empowering the Legislature to provide for comment. (If it were, the Legislature could provide for lesser comment than the State Constitution authorizes but, of course, not for more.) The California Constitution itself sets forth the rule as a self-executing provision which does not require implementing legislation. Since the constitutional provision is of this character, legislation more restrictive of comment than that specifically stated to be valid in the State Constitution would be void to the extent that it is more restrictive.

Case Two. Bunco charge against defendant. Alleged victim, Evans, testifies in detail to transactions with defendant. Defendant testifies he did not know Evans and never saw Evans until after the present charge against defendant. Defendant does not otherwise deny the various transactions to which Evans testified. In summing up to the jury, the district attorney comments upon the defendant's failure to deny Evans' testimony point by point.

The case stated is *People* v. *Mayen*,[16] in which comment by the district attorney was approved on the following grounds:

> All [defendant] testified to was that he did not know Evans and that he never saw him until long after the time of the alleged

[15] UNIFORM RULE 23(4) Comment.
[16] 188 Cal. 237, 205 Pac. 435 (1922).

offense. This was equivalent to denying that he had any of the transactions with Evans testified to by witnesses for the prosecution. To test his denial of acquaintance with Evans it would be proper cross-examination to question him as to every alleged transaction claimed to have occurred between him and Evans. . . . We see no reason why on such testimony, within the scope that may be covered by cross-examination, comment should not be made as to the unsatisfactory nature of the defendant's testimony and the degree to which it fails to satisfactorily meet the testimony for the prosecution for which it was offered as a denial.

"If the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses." [Citation omitted.] [17]

How would this case be decided under the Uniform Rules? Note that the district attorney's comment could not be justified under Rule 23(4), for that rule is stated to be applicable only "if an accused in a criminal action does not testify." Nevertheless, the propriety of the comment could be deduced by holding that Rule 39 (the general no comment rule) is *in*applicable. Rule 39 in terms forbids comment only "if a privilege is exercised." Here it could be plausibly held that defendant's election to testify by way of general rather than specific denial was not the "exercise" of a "privilege" (self-incrimination or any other) in the sense of Rule 39, and hence the *general* rule of no comment is *in*applicable.

What, however, is the situation if defendant's refusal to testify to a matter is expressly put on incrimination grounds and the court sustains the claim and the district attorney comments? This is Case Three, which follows.

Case Three. Robbery. Defendant testifies that on a date following the alleged robbery officers visited defendant's San Francisco hotel; that defendant then left San Francisco and returned at a much later date. On cross-examination, defendant is asked as to places he visited while absent from San Francisco. Defendant claims the incrimination privilege. It appearing that the defendant was on parole at that time and that departure from the State would make him a parole violator, defendant's claim is sustained.

Query: Would comment upon this exercise of the incrimination privilege be proper today? On the authority of *People* v. *Richardson*,[18] it is believed that such comment would be proper. In the *Richardson* case, the precise question for decision was whether the trial court, though not requested to do so, erred in failing to instruct the jury not to draw any unfavorable inference against the defendant from his claim of privilege. In holding that the charge should *not* have been given, the court (by dictum) indicates that inference (and, presumably, *comment*) would have been proper under the circumstances, saying:

[17] *Id.* at 257-58, 205 Pac. at 443.
[18] 74 Cal. App.2d 528, 169 P.2d 44 (1946).

> [T]here was no error here in failing to give an instruction that no unfavorable inference to defendant could be drawn from his claim of the privilege against self-incrimination when testifying as a witness in his own behalf. In *People* v. *Adamson*, 27 Cal. 2d 478, an accused failed to take the stand and explain evidence introduced against him. . . . With respect to the weight which the jury could give to the fact that the defendant failed to take the stand, . . . the court said: "The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or to [*sic*] deny by his testimony' . . . , for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it." "[I]f it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." These inferences which the jury may draw with respect to evidence when the accused fails to take the stand are equally probative and no more subject to any constitutional prohibition when the question involves the defendant's claim of privilege as a witness.
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> * * * * *
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> It should be noted, however, that the court is not deciding whether or not the trial court properly allowed the claim of privilege in view of the defendant's testimony on direct examination which in some instances might be considered a waiver of his claim of privilege.[19]

How would the above query be answered under the URE system? Again, as in Case Two, comment could not be supported by Rule 23(4). Could it be supported, as in Case Two, on the ground that Rule 39 is inapplicable? Possibly so by construing Rule 39 as follows: (1) Rule 39 in terms applies only "if a privilege is exercised." (2) This means *validly* exercised. (3) Here there was no valid exercise since, under Rule 25(g), defendant had waived his privilege. Even under this interpretation of Rule 39, deducing the conclusion that comment in Case Three is permissible under the Uniform Rules is a roundabout and doubtful process.

It appears from the foregoing discussion that the difference, if any, between Rule 23(4) and Article I, Section 13, may be that the Uniform Rule is more restrictive than the constitutional provision in the sense that Rule 23(4), taken in connection with Rule 39, prohibits that which Article I, Section 13 permits. If Rule 23(4) is in fact more restrictive, it would be unconstitutional if adopted in this State in the form of legislation.

Article I, Section 13 appears to be a satisfactory solution of the problem in question. Rule 23(4) would thus seem to be of no utility in

[19] *Id.* at 533-35, 169 P.2d at 49-50.

this State, and of doubtful constitutionality. Therefore, it is recommended that Rule 23(4) be disapproved.[20]

Rule 24

Uniform Rule 25 refers to "any matter that will incriminate" a person. The quoted phrase is defined by Rule 24 as follows:

> A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.

This definition seems to be generally in accord with the concept of incriminating matter as developed in the California cases.[1]

Rule 24 is derived from Model Code Rule 203 as promulgated by the American Law Institute. The two following official illustrations of the

[20] The REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) [hereinafter referred to as the N.J. COMMITTEE REPORT] suggests that Rule 23(4) be combined with Rule 39 (the more general rule relating to comment). As so combined, the recommendation regarding Rule 39 follows Model Code Rules 201(3) and 233 in permitting comment by the court and by counsel, and in permitting unfavorable inferences to be drawn by the trier of fact.

It is instructive to note that the New Jersey Commission (see REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956) [hereinafter referred to as the N.J. COMMISSION REPORT]) recommended revising Rule 23(4) to specifically permit comment by the judge and the drawing of an unfavorable inference by the trier of fact, both in accord with existing New Jersey law. As so revised, the Commission suggested [N.J. COMMISSION REPORT at 28-29] that Rule 23(4) read as follows:

> (4) If an accused in a criminal action does not testify *after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony,* counsel *and the judge* may comment * * * *on his* failure to testify, and the trier of fact may draw *an inference that accused cannot truthfully deny those facts.* * * * [Note: * * * indicates omission from text of URE; italics indicates addition to text of URE.]

It is *possible,* of course, to similarly revise Rule 23(4) to remove the constitutional objections mentioned in the text. Unless it is desired to enlarge upon the permissible scope of comment and inference, however, (which in itself would raise other constitutional problems) it would be necessary to limit the revision to a mere legislative statement of the constitutional provision (Article I, Section 13).

As finally enacted, the entire text of Rule 23 as revised in New Jersey is as follows:

> (1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.
>
> (2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.
>
> (3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.
>
> (4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts. [N.J. REV. STAT. § 2A:84A-17.]

A Utah committee recommended adoption of Rule 23 in substantially the same form as the original URE rule, except for the deletion of Rule 23(4). FINAL DRAFT OF THE RULES OF EVIDENCE (1959) [hereinafter referred to as the UTAH FINAL DRAFT] at 17.

[1] Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900); People v. Bartges, 126 Cal. App.2d 763, 273 P.2d 49 (1954); *In re* Crow, 126 Cal. App. 617 & 621, 14 P.2d 918 & 920 (1932); *In re* Berman, 105 Cal. App. 37, 287 Pac. 125 (1930).

Model Code rule emphasize the point that the privilege does not embrace incrimination under the laws of another sovereignty:

> T claims exemption from taxation for a Grecian work of art under a statute exempting "antique foreign works of art." By Greek law it is criminal to remove antique works of art from Greece. T cannot by virtue of his privilege against self-incrimination refuse to answer the assessors' questions as to when, where, and how he acquired the work of art in question.
>
> The income-tax law of a state requires taxpayers to disclose the sources of their incomes. T, a taxpayer of the state, may not by virtue of privilege against self-incrimination refuse to make this disclosure, although part of his income is derived from sale of cigarettes in a neighboring state where such sale is criminal.[2]

Professor McCormick points out that both the English decisions and American holdings are conflicting on the question of incrimination under "foreign" law.[3] He concludes as follows:

> Certainly there is nothing in the language nor in the history of the Constitutional provisions which dictates an answer either way upon the question whether the protection should extend to prosecution under "foreign" law. Judges who consider that the policy behind the privilege is so salutary that the range of its application should be extended, will be inclined to accord protection when the danger of "foreign" prosecution is clear. The argument based on the difficulty in ascertaining the scope of the "foreign" law has lost much of its force with the widening of the reach of judicial notice.
>
> The paramount argument for confining the privilege to incrimination under the laws of the forum is based upon the undesirability of a wholesale extension of this already burdensome obstruction upon the judicial investigation of facts. Moreover, apart from collusion between the law enforcement agencies of state and Federal governments, there is little incentive for the enforcement officers of one government to seek to require a witness to inculpate himself under the laws of another jurisdiction. When such collusion does occur then the "foreign" government is participating in the compulsion, and its own constitutional provision forbidding it to compel testimony should be applied.[4]

The McCormick-URE view regarding the desirable scope of incrimination should be contrasted with the federal practice and recent developments in New Jersey and in Utah.

In New Jersey, the Court Committee expressly declined to "take a position on the question whether possible prosecutions in other jurisdictions should be embraced by the protection" afforded by the privilege. In recommending the adoption of Uniform Rule 24, the committee specifically noted the following language from a Michigan opinion[5] which aptly states the reasoning in support of the opposite position:

[2] MODEL CODE Rule 203 Comment.
[3] MCCORMICK, EVIDENCE [hereinafter cited as MCCORMICK] § 124 (1954).
[4] *Id.* at 261-62.
[5] People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947).

> It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution.[6]

The committee report on this part of Rule 24 concludes with the opinion expressed by Professor Morgan that the question really resolves itself upon determining basic policy as to whether the recognized privilege *ought* to be broadened.[7]

Contrariwise, the New Jersey Legislative Commission expressly recommended that the scope of the privilege should embrace incrimination under the law of that state, "or another state or the United States," thus excepting only a completely foreign power. As the Commission report frankly states, "This rule adopts a broad definition of self-incrimination." This view became the statutory law of New Jersey upon enactment of the Privileges Article in 1960.[8]

The Utah Committee recommended that Rule 24 be revised to include incrimination under the laws of that state "or of the United States."[9] Compared with the McCormick-URE view, on the one hand, and the approach of the New Jersey Commission, on the other, this represents a third (and compromise) view regarding the desirable scope of the incrimination definition. This compromise recognizes the concurrent exercise of jurisdiction by the United States over some crimes (*e.g.*, narcotics violations) committed within the territorial boundary of an individual state.

Turning now to the federal practice: To what extent does the Federal Constitution provide protection against self-incrimination? It seems clear that the Constitution does *not* operate to grant a privilege against self-incrimination where the action or proceeding is:

(1) In a federal court and the danger is of prosecution only under a state law.[10]

(2) In a state court and the danger is of prosecution only under the law of another state or under federal law.[11]

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[6] *Id.* at 651, 29 N.W.2d at 287, as quoted in N.J. COMMITTEE REPORT at 58.

[7] N.J. COMMITTEE REPORT at 59, citing 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 131 (1954).

[8] N.J. REV. STAT. 32A:84A-18. See also N.J. COMMISSION REPORT at 29-30. Three states have also adopted this view by judicial decision. Clark v. State, 68 Fla. 433, 436, 67 So. 135, 136 (1914); State v. Doran, 215 La. 151, 161, 39 So.2d 894, 897 (1949); *In re* Watson, 293 Mich. 263, 285, 291 N.W. 652, 661 (1940).

[9] UTAH FINAL DRAFT at 17.

[10] United States v. Murdock, 284 U.S. 141 (1931). In this case, the defendant was indicted for violation of a federal statute (refusing to furnish information concerning certain payments claimed as tax deductions). His claim of privilege, based on possible incrimination under a state law, was rejected. The court said:

> The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. [Citations omitted.] This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. [*Id.* at 149.]

[11] Knapp v. Schweitzer, 357 U.S. 371 (1958). Here, in a state grand jury proceeding (despite a grant of full immunity under the state statute), the petitioner refused to answer because of possible self-incrimination under the Federal Labor Management Relations Act. His contempt conviction was affirmed, the court pointing out that a state may require testimony in exchange for state immunity regardless of the fact that the witness may be exposed to federal prosecution. The

(3) In a federal or a state court and the danger is of prosecution only under the law of a foreign country.

It should be noted that under the Compulsory Testimony Act of 1954,[12] when testimony concerning national security is compelled in compliance with the Act, immunity is given from prosecution "in any court." That is, immunity is given not only from federal prosecution (which is all that the federal privilege protects against) but also from prosecution in a state court. This extension of immunity beyond the scope of the privilege has been held to be within the power of Congress.[13]

No California decision has been found which clearly indicates whether the present *California* constitutional provision and statutes relating to the privilege against self-incrimination extend protection to incrimination under the laws of any sovereignty other than California.[14] Note, however, Penal Code Section 1324:

> 1324. In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, *or could subject the witness to a criminal prosecution in another jurisdiction,* and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or

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court noted the danger of establishing a contrary rule—the thwarting of state law because of the extensive sweep of federal laws—saying:

> In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution. * * * If a person may, through immunized self-disclosure before a law-enforcement agency of the State, facilitate to some extent his amenability to federal process, or *vice versa,* this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere. [*Id.* at 378-81].

[12] 18 U.S.C.A. § 3486.

[13] Adams v. Maryland, 347 U.S. 179 (1954). Here, a witness before a Senate investigating committee admitted running a gambling business. The court held him to be immune from state prosecution under state anti-lottery laws.

[14] Two cases shed some light on this general problem in California. In Cohen v. Superior Court, 173 Cal. App.2d 61, 343 P.2d 286 (1959), the court annulled a judgment of contempt arising out of a claim of the privilege against self-incrimination made by a defendant in a civil action for assault and battery in which exemplary damages were sought. In holding that the claim was properly made, the court recited that Cohen

> was "on call" to testify as a witness before the United States Senate (McClellan) Labor-Management Rackets Committee; he was under in-

> subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. [Emphasis added.]

The policy reflected in Section 1324 appears to be that protection should be provided not only against criminal prosecution in this State but also against compelling disclosures that would subject the witness to criminal prosecution in "another jurisdiction." This may provide an immunity broader than the privilege itself, depending upon how the California courts view the scope of the privilege.

Whether the scope of protection that California is to provide should be limited to incrimination under the laws of this State or is to extend to incrimination under federal laws or laws of other states is a question of state policy. As the previous discussion indicates, there are several alternative solutions available:

(1) Approve Rule 24, which is limited to incrimination under the law of this State. This is the McCormick-URE view.

(2) Revise Rule 24 to extend protection against incrimination under federal law as well (but not incrimination under the law of another state).

(3) Extend Rule 24 to include incrimination under federal law or the law of another state (but not a foreign country).

The McCormick-URE view seems preferable. Furthermore, it is believed that the California courts could be persuaded to construe Article I, Section 13 of the State Constitution as embracing this view, and hence to uphold Rule 24 as legislation in this State. It is believed that the traditional scope of incrimination—namely, the limitation of incrimination to matters which will incriminate under the law of the sovereign which grants the privilege—does not so undermine the privilege that its scope must necessarily be broadened to meet all possible contingencies.

If Rule 24 were limited to incrimination under California law, a witness could not claim the privilege where he could be incriminated only under a federal law or the law of another state. Yet, if the witness were entitled to claim the privilege under Rule 24 because he could be incriminated under California law, still he could not be compelled to testify under Penal Code Section 1324 if such testimony "could subject the witness to criminal prosecution in another jurisdiction." Section

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vestigation by the internal revenue service; he stated that the State Senate Crime Committee had investigated him (undoubtedly he was in error as to the name of the committee and he probably meant the Assembly Judiciary Sub-Committee on Rackets which met in Los Angeles and called petitioner before it to testify); he was involved in a criminal proceeding in Division 28 or some other division of the municipal court arising out of his failure to testify before the committee of the state Legislature. To say the least, several governmental agencies and legislative committees have shown a particular interest in what he does and where he does it. It is indicated that he is under suspicion of having participated in at least one or more crimes. [*Id.* at 68-69.]

This does not clearly show that the *State* privilege was or was not available as against the pending federal matters.

In a later case, Regents of University of California v. Superior Court, 200 Cal. App.2d 787, 19 Cal. Rptr. 568 (1962), the court indicated that the claim of privilege against self-incrimination was not available in a State court where prosecution would be under only federal law. It is not clear, however, that the court's remarks were directed to the *State* privilege, or whether they were intended to mean only that the federal constitutional privilege was unavailable.

1324 would thus operate to provide a somewhat broader scope of protection than the Rule 24 privilege. It should be noted, however, that the federal act—The Compulsory Testimony Act of 1954—also provides greater protection than the federal privilege.[15]

Rule 25

Uniform Rule 25 consists of a general provision and seven exceptions to the rule stated therein. In the discussion that follows, the general rule is first separated into several of its parts, each of which is discussed. Thereafter, the seven exceptions to the general rule are considered.

General Rule

Witnesses in Judicial Proceedings. Rule 25 provides in part as follows: "[E]very natural person has a privilege, which he may claim, to refuse to disclose in an action . . . any matter that will incriminate him." (The reasons are set out in the appended footnote for the recommended striking of the phrase, "in an action," and substituting therefor "in any judicial action or proceeding."[1] This amendment is assumed to have been made in the discussion which follows.)

This part of Rule 25 differs from Rule 23(1) in two respects. First, Rule 23(1) deals only with the privilege of "an accused" in the "criminal action" in which he is the accused. That part of Rule 25 immediately under consideration deals with the privilege of "*every* natural person" "in *any* judicial action or proceeding." (Emphasis added.) Second, Rule 23(1) gives the accused the privilege (a) "not to be called as a witness" and (b) "not to testify." On the other hand, Rule 25 omits altogether the privilege not to be called as a witness and extends the privilege not to testify only to the privilege "to refuse to disclose matter that will incriminate." Thus, under Rule 23(1) the accused should not be called by the prosecution, and if (in violation of this privilege) he is so called, he still has the privilege to refuse to

[15] As previously noted (see discussion in the text accompanying note 8 *supra*), New Jersey adopted a broad definition of incrimination. Thus, Rule 24 was revised to read:

> Within the meaning of this article [2A:84A-17 to -22], a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration. [N.J. REV. STAT. § 2A:84A-18.]

Utah, of course (see discussion in the text accompanying note 9 *supra*), adopted the substance of the original URE rule, but extended its scope to include incrimination under the laws "of the United States." UTAH FINAL DRAFT at 17.

[1] The portion of Rule 25 quoted in the text is taken from Model Code Rule 203 which likewise uses the expression "in an action." However the Model Code under Rule 1(1) contains a comprehensive definition of action ("'Action' includes action, suit, special proceeding, criminal prosecution and every proceeding conducted by a court for the purpose of determining legal interests") which the Uniform Rules omit. In the absence of such comprehensive definition of "action" that term is not a happy choice of a word to describe judicial proceedings in general. Technically in this State "action" does not comprehend "special proceedings." Accordingly, it is suggested that Rule 25 be amended by striking "in an action" and substituting therefor "in any judicial action or proceeding."

testify in any respect whatsoever. On the other hand, the natural persons (*i.e.*, witnesses in general) referred to in Rule 25 may under this rule properly be called in any judicial action or proceeding, and under this rule they may be required to testify to all matters save only those matters that will incriminate them. These basic distinctions between the privilege of the accused in a criminal action and the privilege of other natural persons are, of course, recognized in California practice.[2]

Furthermore, in California both the privilege of the accused and that of the ordinary witness are derived from Article I, Section 13 of the State Constitution.[3] Literally and strictly construed, Section 13 would extend the privilege against self-incrimination only to the defendant in a criminal case. This construction, however, has not been accepted, as is revealed in the following excerpt from the leading case of *In re Tahbel:*[4]

> The constitution of this State has limited the extent to which the legislature may exercise its power, and has given the individual protection against its exercise by providing, in article I, section 13, that "no person shall be compelled in a criminal case to be a witness against himself."
>
> * * * * *
>
> The words "criminal case," as used in section 13 of article I of the constitution, are broader than "criminal prosecution." To bring a person within the immunity of this provision, it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured him against any use in a criminal prosecution of the evidence he may give.[5]

It is concluded that this portion of the general rule of Rule 25 is in accord with current California law.

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[2] See *In re* Lemon, 15 Cal. App.2d 82, 59 P.2d 213 (1936), recognizing the distinction between "the status of a witness in any proceeding, civil or criminal" and "the status of a party defendant in a criminal proceeding brought against such defendant" and expounding the differences in the privileges accompanying each status.

[3] For the full text of this constitutional provision, see note 5, *supra* at 330.

[4] 46 Cal. App. 755, 189 Pac. 804 (1920).

[5] *Id* at 758-59, 189 Pac. at 806. Barr, *Privileges Against Self-Incrimination in California,* 30 CALIF. L. REV. 547, 554-55 (1942), expresses the following opinion:

> It has been supposed that all the privileges against self-incrimination stem from the constitution. But the provision we find there does not broadly extend its privileges to all persons; it is explicit that the only persons entitled to the exemptions are those who are requested to testify in a *"criminal* case." The inference seems clear that where the proceeding is not criminal in nature, the privilege of the witness against self-incrimination is not based on article I, section 13. It is an interesting and open question whether the California legislature by repealing the privileges given to civil witnesses under Section 2065 of the Code of Civil Procedure could entirely deprive them of their historic privilege against self-incrimination.

It is believed the inference which is "clear" to the author is refuted by the decision of *In re* Tahbel, and upon the same authority the question which the author regards as "open" is truly a closed question.

Incrimination Before Governmental Agencies. Rule 25 provides in part that "every natural person has a privilege, which he may claim, to refuse to disclose . . . to . . . any governmental agency or division thereof any matter that will incriminate him."

This states the view prevailing generally [6] and in California. Thus, for example, a person possesses the privilege to refuse to incriminate himself in a hearing held by the Senate Interim Committee on Social Welfare [7] or in a hearing before the Contractors' State License Board [8] or in a disbarment proceeding.[9]

Incrimination Before Public Officials. Rule 25 provides in part as follows: [E]very natural person has a privilege, which he may claim, to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him." Rule 25 is based on Model Code Rule 203. One of the official illustrations of the Model Code rule is as follows:

> While investigating a homicide of A, who was found dead in a small room, the police ask W whether he was present in the room at the time of the killing. W is entitled to refuse to answer *on the ground of self-incrimination.* [Emphasis added.] [10]

It is apparent that California agrees with this view of the privilege. As the court stated in *People* v. *Clemmons:* [11] "In California it is recognized that the privilege against self-incrimination goes to and is with the citizen in the police station." [12]

Some of the consequences of this URE-California view of the incrimination privilege should be explored. For instance, what is the relation between the proposition of Rule 25 that "every natural person has a privilege . . . to refuse to disclose . . . to a public official of this state . . . any matter that will incriminate him" and the proposition of Rule 63(8)(b) [13] making admissible as "against a party, a statement . . . of which the party . . . has, by words or other conduct, manifested . . . his belief in its truth"? Suppose the police confront a suspect with an alleged confederate; the confederate makes a full statement acknowledging his guilt and implicating the suspect. Asked by the police what he has to say, the suspect replies "I stand on my privilege against self-incrimination." Logically, this is conduct indicative of belief in the truth of the accusation and, considering only Rule 63(8)(b), the evidence would be admissible. However, under Rule 25 the suspect possessed and claimed privilege, and under Rule 39 the

[6] McCormick § 123.
[7] McLain v. Superior Court, 99 Cal. App.2d 109, 221 P.2d 300 (1950) (dictum).
[8] West Coast etc. Co. v. Contractors' etc. Bd., 72 Cal. App.2d 287, 164 P.2d 811 (1945) (dictum).
[9] Fish v. State Bar, 214 Cal. 215, 4 P.2d 937 (1931) (dictum).
[10] Model Code Rule 203 Comment.
[11] 153 Cal. App.2d 64, 314 P.2d 142 (1957).
[12] *Id.* at 76, 314 P.2d at 150.
[13] Rule 63(8)(b) provides:

> Rule 63. *Hearsay Evidence Excluded — Exceptions.* Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * * * *
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> (8) As against a party, a statement . . . (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth.

For a full discussion of Rule 63(8) and a recommendation relating thereto, see *Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)* in 4 Cal. Law Revision Comm'n Rep., Rec. & Studies 301, 484 (1963).

claim may not be made the basis of an "adverse inference." It seems, therefore, that Rules 25 and 39 would here override Rule 63(8)(b) and the evidence would be inadmissible.

Today there is a comparable situation in California. The present counterpart of Rule 25 is the police station view of the privilege. The present counterpart of Rule 63(8)(b) is that portion of Code of Civil Procedure Section 1870(3) which makes admissible against a party an "act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." Upon the authority of *People* v. *Simmons*,[14] it seems clear that the case stated would be resolved in California in the same way as under the Uniform Rules. In the *Simmons* case, defendant's response to police accusations was: "I have told you all I am going to tell you. I have nothing more to say."[15] Held: In such cases the trial judge should consider, *inter alia*, "whether [defendant's] conduct . . . indicated a desire to avail himself of the rule against self-incrimination";[16] in the instant case "it is obvious that defendant was attempting to exercise his constitutional privilege against self-incrimination [so that] it was an abuse of discretion on the part of the trial court to admit the evidence."[17]

What, however, would be the result if our suspect had said nothing whatsoever? Should this be regarded as a claim of privilege within the rule of the *Simmons* case? *Possibly* this is an open question today.[18] If so, it would likewise be an open question under Rules 63(8)(b), 25 and 39. In other words, since these Uniform Rules do no more than state the *general* principles presently prevailing (police station privilege, no comment on exercise thereof, adoptive admissions), enactment of these rules would not solve questions now open under presently prevailing principles.

Returning to the main point of this section, it is concluded that the principle stated in that part of the general rule of Rule 25 presently examined is in accord with prevalent California principle.

Corporations. Rule 7(d) provides in part as follows:

> Except as otherwise provided in these Rules . . . (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing.

[14] 28 Cal.2d 699, 172 P.2d 18 (1946). See also People v. Abbott, 47 Cal.2d 362, 303 P.2d 730 (1956); People v. Davis, 43 Cal.2d 661, 276 P.2d 801 (1954); People v. McGee, 31 Cal.2d 229, 187 P.2d 706 (1947).

[15] People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18, 25 (1946).

[16] *Id.* at 716, 172 P.2d at 27.

[17] *Id.* at 721, 172 P.2d at 30.

[18] As suggestive of this possibility, consider the following from People v. Clemmons, 153 Cal. App.2d 64, 314 P.2d 142 (1957):

> If the privilege does extend to the police station, as it apparently does, it is difficult to see how Cook, under the circumstances, waived any right to be silent by the simple process of remaining silent. If he did not waive the right, he was certainly clothed with it, and was entitled to all of its protection. [*Id.* at 76, 314 P.2d at 150.]

Consider also the following statement from a law review note:

> *People* v. *Simmons* speaks of excluding accusatory statements where the defendant "has adopted the policy of silence." What does this mean? The court may have meant that the privilege is lost if not affirmatively claimed. It might be argued that in *Simmons* it was affirmatively claimed, since defendant continually said he would not talk. But is not the right to be silent claimed by merely refusing to answer? Silence itself would appear to be the most obvious way of claiming the privilege. Would this be a "policy of silence" under *Simmons*? Or is it necessary for one to say affirmatively that he will say nothing? [Note, *The Privilege Against Self-Incrimination, Does It Exist in the Police Station?*, 5 STAN. L. REV. 459, 474 (1953).]

The expression "person" is apparently used here in the broad sense, including both natural and artificial persons. Hence, the meaning of Rule 7(d) is that no natural person and no artificial person has any privilege of the character stated unless some other rule gives such person this privilege. The introductory part of Rule 25 prescribes a privilege as to incriminating matter but vests such privilege only in a "natural person." Rule 25 does not extend the privilege thus stated to corporations, and no other rule gives corporations any privilege against self-incrimination. It follows, therefore, that under Rule 7(d) corporations have no privilege to refuse to disclose "any matter" even though the matter will be incriminating, and they have no privilege to refuse to produce "any object or writing" even though the same will be incriminating.

This, however, merely carries forward the traditional (and California) view that corporations possess no privilege against self-incrimination.[19]

Exceptions to General Rule

The Exception in Rule 25(a). This exception is as follows:

> (a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness.

The general rule expressed in Rule 25 is that "every natural person" is possessed of the privilege there stated, "which he may claim." Unless Rule 25(a), quoted above, existed as an exception to this general rule, it might be thought that every such person could decide for himself in every instance whether or not the privilege applied. This exception is desirable, therefore, to make clear the perpetuation of the present practice of *judicial* determination of the applicability of the privilege. Where procedures are available for such determination[1] the judge decides the validity of the claim and is not bound by the claimant's protestations.[2]

Observe that Rule 25(a) in terms applies only when the privilege is claimed "in an action." This appears to be too narrow. Today, it is possible to have a witness claiming privilege and the judge denying such claim before any action is commenced—*e.g.*, in a grand jury investigation.[3] This practice should, of course, be continued. To do so, however, requires the selection of some expression of more comprehensive import than "in an action." Similar to the recommendation regarding the substitution of language in the general rule,[4] it is sug-

[19] McCormick § 125; McLain v. Superior Court, 99 Cal. App.2d 109, 221 P.2d 300 (1950); West Coast etc. Co. v. Contractors' etc. Bd., 72 Cal. App.2d 287, 164 P.2d 811 (1945) (dictum).

[1] It seems that under some circumstances the person is the sole judge of whether given matter will incriminate simply because no procedure for judicial determination is available. This seems to be so, for example, when a suspect is being interrogated by officers. The privilege applies here (see discussion in the text at 345-346) and there apparently is no procedure for procuring a judicial order at this point.

[2] See Barr, *Privileges Against Self-Incrimination in California*, 30 Calif. L. Rev. 547, 553-54 (1942). *Cf.* N.J. Commission Report at 31, where it is noted that "Paragraph (a) . . . is deleted as being unnecessary [because] the trial judge determines whether or not a matter is incriminating . . ."

[3] *In re* Lemon, 15 Cal. App.2d 82, 59 P.2d 213 (1936); *In re* Hoertkorn, 15 Cal. App.2d 93, 59 P.2d 218 (1936).

[4] See note 1, *supra* at 343.

gested that "in a judicial action or proceeding" be substituted here. Thus, Rule 25(a) should be revised accordingly.

The Exception in Rule 25(c). Because the exception contained in Rule 25(b) more naturally follows principles established in the discussion of Rule 25(c), these exceptions are considered in inverse order. Rule 25 provides in part as follows:

> [E]very natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him, except that *under this rule* . . . (c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [Emphasis added.]

The language above italicized conveys the thought that, whereas no person has any privilege *under Rule 25* to refuse to furnish or permit the taking of the samples, such person may have a privilege of refusal on some other basis. Thus the Commissioners on Uniform State Laws comment as follows on Rule 25(c):

> Resistance to the forceable extraction of body fluids is not justified on the ground of privilege against self-incrimination, but may be warranted on the ground of violation of the right of personal immunity, if proper safeguards, such as supervision by a physician, are not provided. The rule does not attempt to solve that constitutional question, but limits its application strictly to the privilege against self-incrimination. A sample of spittle or a sample of stomach contents may be equally incriminating and they are on the same ground under this rule. But the taking of the sample from the stomach by stomach pump may be viewed very differently from the other when it comes to the question of safeguards to be taken to assure non-violation of the right of security of one's person.[5]

Recent California cases approach the problem of forceable seizure of body substances in the same way, accepting the view that the privilege against self-incrimination is *in*applicable. For example, in *People* v. *Haeussler*,[6] (a case of blood extraction from defendant while defendant was unconscious) the court stated in part as follows:

> [T]he privilege is guaranteed by the Constitution of this state, which declares that "[n]o person shall . . . be compelled, in any criminal case, to be a witness against himself." (Cal. Const., art. I, § 13.). . . "Wigmore, in an exhaustive and scholarly discussion of the history and policy behind the provision of the federal Constitution, which is substantially the same as the California mandate, concludes that the object of the protection 'is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence. . . .'
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> * * * * *

[5] UNIFORM RULE 25 Comment.
[6] 41 Cal.2d 252, 260 P.2d 8 (1953).

" 'In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.*' "

* * * * *

Evidence is not obtained by testimonial compulsion where it consists of a test of blood taken from an accused. It is not a communication from the accused but real evidence of the ultimate fact in issue—the defendant's physical condition. [Citations omitted.]

Similarly, real evidence obtained from a defendant's stomach by use of an emetic is not violative of the privilege against self-incrimination. Despite contrary suggestions, the majority of the court in the Rochin case did not rest its reversal of the conviction upon that ground. (See the concurring opinions of Justices Black and Douglas, 342 U.S. 165, 174, 177.)[7]

Consider also the following from *People* v. *Duroncelay:*[8]

We are of the opinion that the only reasonable conclusion permitted by the testimony of Riggs and the nurse who assisted him in taking the blood sample is that, when asked for his permission, defendant made no verbal response to indicate whether he consented or refused. Because of defendant's condition, it would have been extremly difficult for him to give an answer, but, when the nurse approached him with the needle, he reacted by withdrawing his arm. Under the circumstances, a finding that defendant consented is unwarranted, and we must therefore determine whether the results of the blood test were admissible in the absence of defendant's consent to the taking of the sample.

It is settled by our decision in *People* v. *Haeussler,* 41 Cal. 2d 252, 257, that the admission of the evidence did not violate defendant's privilege against self-incrimination because the privilege relates only to testimonial compulsion and not to real evidence. We also held in the Haeussler case that the taking of the defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience and that, therefore, the defendant had not been denied due process of law under the rule applied in *Rochin* v. *California,* 342 U.S. 165. . . .

The question remains as to whether the taking of defendant's blood constituted an unreasonable search and seizure in violation of his constitutional rights. . . .

It is obvious from the evidence that, before the blood sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time. (Pen. Code, § 836.). . . . Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest. . . .

[7] *Id.* at 256-58, 260 P.2d at 11.
[8] 48 Cal.2d 766, 312 P.2d 690 (1957).

> Under the circumstances, a search, for example, of defendant's pockets or his automobile to obtain additional evidence of the offense would have been proper, regardless of whether he consented thereto. The question to be determined here is whether the taking of a sample of his blood for an alcohol test was a matter of such a different character that it must be regarded as an unreasonable search and seizure.
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> * * * * *
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> We conclude that there was no violation of defendant's rights and that the results of the alcohol test were properly admitted in evidence.[9]

Seemingly, this is precisely the approach intended by Rule 25(c)—namely, the privilege against self-incrimination is *in*applicable—and in and of itself is, therefore, not a basis for excluding the evidence. However, either the *Rochin* doctrine or the doctrine enunciated in *People* v. *Cahan*,[10] or both, may make the evidence inadmissible. Therefore, in screening the evidence the privilege is laid aside and the problem is decided on the basis of other doctrines.

It is concluded that Rule 25(c) is in accord with present California law.[11]

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[9] *Id.* at 770-72, 312 P.2d at 692-94.

[10] 44 Cal.2d 434, 282 P.2d 905 (1955) (evidence obtained in violation of State constitutional guarantee against unreasonable search and seizure is inadmissible). See also the recent decision in Mapp v. Ohio, 367 U.S. 643 (1961), making a similar rule applicable in every case—state and federal—on the basis of the Federal Constitution.

[11] Compare, however, People v. McGinnis, 123 Cal. App.2d Supp. 945, 267 P.2d 458 (1953), in which, after holding defendant's refusal to take an intoximeter test admissible as evidence against him, the court states the following dictum:

> A person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test, as the jury was instructed, but if he takes the tests, no physical or other coercion frowned upon by due process being employed, the result may be brought before a jury. (*People* v. *Haeussler* (1953), 41 Cal.2d 252.) [*Id.* at 948, 267 P.2d at 460.]

It is believed the following criticism of the dictum of the *McGinnis* case in a recent law review note is well taken:

> Nevertheless, the conclusion seems quite clear that the court in the *McGinnis* case was in error either in assuming (or at least suggesting) that McGinnis had a "right to refuse" to submit to the test *or* in permitting an inference of guilt based on the exercise of such "right." It is submitted that the result was probably correct; that the forcible administration of a breath test ought not to be deemed either an infraction of the *Rochin* rule or (assuming a lawful arrest) an "unreasonable search." And clearly, under the settled local doctrine, it does not violate the privilege against self-incrimination. On this basis, one lawfully arrested has no "right to refuse" to take a breath test; hence there appears no valid objection to the admissibility of evidence of his refusal as probative of a consciousness of guilt. [Note, 42 CALIF. L. REV. 697, 700-01 (1954).]

Under the Uniform Act on Blood Tests to Determine Paternity in civil or criminal actions in which paternity is a relevant fact, the court may order the mother, child and alleged father to submit to blood tests. If any party refuses, the court may enforce its order or may resolve the question of paternity against such party. CAL. CODE CIV. PROC. §§ 1980.1-1980.7.

Under the principle of Uniform Rule 25(c) the Uniform Act on Blood Tests is not violative of the URE privilege against self-incrimination. Since California agrees with Rule 25(c) it seems that the Uniform Act is not in violation of the California Constitution (Art. I, § 13). And compare the final rule adopted in New Jersey (where the exception stated in Rule 25(c) was entirely omitted) and the Legislative Commission's Comment thereon.

> The Court Committee provision of paragraph (c), compelling a person to submit to the taking of body fluids, is also deleted. This Commission feels that this is not only a matter of incrimination, but also of personal privacy. [N.J. COMMISSION REPORT at 31.]

As previously noted, it is clear that in California the privilege does not protect against the conduct here considered. Hence, a legislative statement of the rule of privilege ought to provide a similar exception, *i.e.*, the exception in Rule 25(c).

The Exception in Rule 25(b). This exception provides as follows:

> (b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition.

If (as provided in Rule 25(c) and as held in the *Haeussler* and *Duroncelay* cases) the privilege against self-incrimination does *not* embrace the privilege to refuse to permit the taking of samples of body fluids or substances for analysis, it would seem to follow a fortiori—as provided in Rule 25(b)—that the self-incrimination privilege does *not* embrace the privilege to refuse to submit to examination for the purpose of discovering or recording corporal features and other identifying characteristics or *physical* condition. (The portion of Rule 25(b) relating to *mental* condition is discussed below.) In other words, the approval of the principle of Rule 25(c) in the *Haeussler* and *Duroncelay* cases logically suggests California's approval of the principle of this portion of Rule 25(b). Thus, it may be anticipated that California would hold today that, insofar as the privilege against self-incrimination is concerned, a person has *no* privilege to refuse to give an exemplar of his handwriting,[1] or to give an impression of his fingerprint,[2] or to submit his arm to examination for hypodermic needle scars,[3] or to submit his hand for examination under an ultraviolet ray machine,[4] or to submit his private parts for examination for venereal disease,[5] or to submit his private parts for examination for the presence of fecal matter thereon.[6] It is conceded that in all of the cases just cited there was *consent* by the suspect. None of these cases, therefore, raises the problem of Rule 25(c), namely, whether there is a privilege against self-incrimination to *refuse* to consent. However, it may be concluded under the logic of the *Haeussler* and *Duroncelay* cases that there is no such privilege. This position is supported by the following from *People* v. *Robarge:*[7]

> Defendant further contends that the action of the police in placing dark glasses on him at the time he was identified . . . at the police station was in violation of his constitutional rights. . . . Defendant relies solely on *Rochin* v. *California* [citation omitted] in support of his contention that he was deprived of his constitutional rights. That case was extensively reviewed in *People* v. *Haeussler* [citation omitted] where this court stated . . . : "In brief, the Rochin case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence." In the present case there is no evidence whatsoever of brutality or shocking conduct. In fact, there is nothing to show that force was used when the glasses were

[1] People v. Smith, 113 Cal. App.2d 416, 248 P.2d 444 (1952). See also People v. Harper, 115 Cal. App.2d 776, 252 P.2d 950 (1953) and People v. Gormley, 64 Cal. App.2d 336, 148 P.2d 687 (1944).
[2] People v. Jones, 112 Cal. App. 68, 296 Pac. 317 (1931).
[3] People v. Salas, 17 Cal. App.2d 75, 61 P.2d 771 (1936).
[4] People v. Irvine, 113 Cal. App.2d 460, 248 P.2d 502 (1952).
[5] People v. Guiterez, 126 Cal. App. 526, 14 P.2d 838 (1932).
[6] People v. Morgan, 146 Cal. App.2d 722, 304 P.2d 138 (1956).
[7] 41 Cal.2d 628, 262 P.2d 14 (1953).

> placed upon defendant, and, for all that appears, he may have consented to what was done.[8]

Here, to be sure, the court does suggest as a possible rationale the theory of consent, but that is an alternate (and apparently secondary) theory to the principal theory which seems to be: (1) No privilege against self-incrimination is applicable, but (2) the *Rochin* principles are applicable.

The foregoing discussion of Rule 25(b) purposely omitted consideration of the following italicized portion:

> (b) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . *mental condition.* [Emphasis added.]

What is the meaning here of "mental condition" and what is the meaning of "examination"? The expression "mental condition" is, of course, a very broad term. In one sense of the term it includes consciousness of guilt. Manifestly, however, the Commissioners on Uniform State Laws do not use the term in this sense, for if "mental condition" includes consciousness of guilt Rule 25(b) wholly negates and nullifies the rule itself. Probably what the Commissioners intend by the term is mental condition in the sense of sanity or insanity. At any rate their proposal is considered here on the basis of that assumption. It is assumed, too, that they mean by "examination" something more than just observational examination; that something more is interrogation. Unless "examination" includes interrogation, the Commissioners' proposal is simply a declaration that the privilege does not insure privacy and freedom from observation—a proposition so obvious that the Commissioners would scarcely be suggesting it as a legislative enactment. It seems that the proposal is this: The privilege against self-incrimination does not embrace a privilege to refuse to answer questions relevant to the examinee's sanity or insanity, except that under Rule 23(1) the accused has the privilege not to be called as a witness and not to testify at his own trial.

California law seems to be in accord with the proposition just stated. Consider first the exception stated immediately above, namely, that the accused does possess a privilege at his trial not to be called and not to testify concerning his sanity.

Penal Code Section 1026 provides in part as follows:

> When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty . . . then the question whether the defendant was sane or insane at the time the offense was committed shall be

[8] *Id.* at 632-633, 262 P.2d at 17. See also People v. Chapman, 151 Cal. App.2d 59, 311 P.2d 190 (1957), to the effect that taking witnesses to defendant's apartment for identification purposes did not violate his incrimination privilege, and People v. Smith, 142 Cal. App.2d 287, 298 P.2d 540 (1956), admitting photographs of defendant's nude body taken without consent.

See also the recent decision in People v. Lopez, 60 Cal.2d —, 32 Cal. Rptr. 424, 384 P.2d 16 (1963). In rejecting defendant's contention that his self-incrimination privilege was violated at a police "line up," the court noted that "the privilege extends only to testimonial compulsion . . . ." *Id.* at —, 32 Cal. Rptr. at 435. 384 P.2d at 27.

promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law.

Clearly defendant possesses his normal privilege against self-incrimination upon the trial of the sanity issue. As is stated by the court in *People* v. *Lamey*.[9]

> It is declared in the Constitution of California, article I, section 13, that no person shall be compelled, in any criminal case, to be a witness against himself. In this case, under the plea of not guilty, the effect of the verdict in each instance was that the defendant had committed the acts which, if committed by a sane person, would make him guilty of the alleged crimes. For the purposes of that verdict he was presumed to be sane, but under his plea of not guilty by reason of insanity, the question of his status and responsibility as a criminal remained open and undetermined. That he was a criminal, and subject to punishment, was not yet established. Under the second plea, that issue was to be tried separately, but it was all in the same case. The second verdict, equally with the first, was necessary before a judgment of conviction could be rendered. Under the former practice, when the defendant relied upon his right to introduce evidence of insanity as part of his defense, it was well understood that the state had no right to compel the defendant to give testimony as a witness, even upon that issue. We do not perceive that his rights in this respect are in any way different under the new practice. The change is only a change of procedure; it does not affect a substantial right, and it does not take away any constitutional right or immunity. In *People* v. *Troche*, 206 Cal. 35, the defendant was tried on his plea of not guilty, and then under his plea of not guilty by reason of insanity, as provided by the present law. (Pen. Code, secs. 1016, 1020, 1026.) The jury found against him on both pleas. On appeal from the judgment, defendant contended that the provisions of the state Constitution guaranteeing a public and speedy trial to one accused of a crime "means *one* speedy and public trial and no more." To this the Supreme Court responded: "The trial had by the defendant, under the present law, amounted to one trial, and no more." The very reasoning which sustains the present procedure, at the same time preserves to the defendant all of his rights of defense. Among these rights, saved to the defendant under the Constitution, is the right of immunity from being compelled, in any criminal case, to be a witness against himself.[10]

The same result would logically follow under Rule 23(1) to which Rule 25(b) is, of course, subject.

[9] 103 Cal. App. 66, 283 Pac. 848 (1930).
[10] *Id.* at 67-68, 283 Pac. at 848-49.

What, then, is the situation respecting pretrial or out-of-court sanity examinations? One of the earliest cases is *People* v. *Bundy*.[11] The facts and holding are indicated by the following excerpt:

> The ground mainly urged for reversal is that the trial court improperly allowed two doctors called as witnesses by the district attorney to give their opinions on the question of defendant's sanity. . . . At the time of the second examination by Dr. Reynolds and the examination by Dr. Orbison defendant had counsel, and they were not notified that any examination was to be had and had no knowledge thereof. Defendant was in custody, confined in the county jail, where the examinations were had. He was informed by Dr. Orbison prior to his examination that he, Orbison, was employed by the district attorney to make an examination. . . . Defendant made no objection whatever to being examined at any time, and conversed very freely with each of the doctors. The claim of counsel is that by allowing the doctors to give their opinions based upon their examinations, defendant was compelled to be a witness against himself, in violation of section 13, article I of the constitution, which provides that "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." [Citation omitted.] It may freely be admitted that in view of this provision, one accused of crime may not be *compelled* to divulge to another, to be used by that other as basis for his testimony on the trial, facts which he has a right to hold secret. Whether one accused of crime can properly be compelled to submit to an examination by medical experts for the purpose of determining whether or not he is of sound mind, is a question that it is not necessary to discuss here. There is nothing in the constitutional provision relied on that prohibits such a person from furnishing evidence against himself if he chooses to do so. He *shall not be compelled* to do so, but whatever fact he may disclose without force or compulsion of any kind, or whatever testimony he may voluntarily give is not within the inhibition. . . . No decision brought to our attention holds to the contrary. And with special reference to examinations for the purpose of ascertaining whether an accused is of unsound mind, it is said in 4 Wigmore on Evidence, sec. 2265, that "the use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to." Perhaps utterances induced by fraud might likewise fall within the dubitable cases. In the case at bar an appellate court would certainly not be warranted by the record in holding that any force or compulsion was used, or that the accused did not voluntarily submit to the examinations. There was nothing in the nature of fraud on the part of the medical men, the authorities or anybody else. The fact that defendant's counsel were not notified of the proposed examinations and had no knowledge thereof in no way affects the question of the admissibility of the evidence complained of. There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person.[12]

[11] 168 Cal. 777, 145 Pac. 537 (1914).
[12] *Id.* at 780-82, 145 Pac. at 538-39.

Here, the question of compulsory examination is not reached for decision, but the court seemingly accepts Professor Wigmore's suggestion that the question is "dubitable."

In 1929, the Legislature added Section 1027 to the Penal Code which provides in part as follows:

> When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question.

The next case to be noted, *People* v. *Strong*,[13] was decided under this section. The following excerpt indicates the facts and holding in this case:

> Defendant was accused of robbery . . . and, standing mute, a plea of "not guilty" was ordered entered . . . . On December 9th he appeared with the public defender as counsel and entered an additional plea of "not guilty by reason of insanity" . . . . The trial of the issues raised by the pleas "not guilty" resulted in a verdict of guilty . . . whereupon the same jury was sworn to try the issues raised by the last pleas entered, which resulted in verdicts finding the defendant sane at the time of the commission of the offenses charged. . . .
>
> It appears that the court, under section 1027 of the Penal Code, appointed Dr. Benjamin Blank and Dr. Martin Carter to examine defendant and that Dr. Blank was called as a witness by the district attorney and testified that in his opinion the defendant was sane. . . . It is the contention of appellant . . . that said section 1027 . . . in effect compels a defendant to give evidence against himself . . . in violation of . . . section 13, article I, of the California Constitution . . . .
>
> * * * * *
>
> We fail to see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion.[14]

Here again, as in *People* v. *Bundy*, the question of compulsory examination is not reached because Penal Code Section 1027 is construed as not requiring such compulsory examination. Here, however, there is a suggestion in terms of a *constitutional* right of the defendant to stand mute and refuse to permit the examination.

[13] 114 Cal. App. 522, 300 Pac. 84 (1931).
[14] *Id.* at 523-24, 530, 300 Pac. at 84-85, 87.

The next case is *People* v. *French*.[15] The facts and holding in this case are indicated by the following excerpt:

> Another of appellant's contentions is that the court committed reversible error by the admission of the proceeding had before the judge which arose out of the refusal of defendant's counsel, participated in by the defendant himself, to permit the alienists appointed by the court to examine the defendant under the authority of section 1027, Penal Code . . . .
>
> The three alienists selected by the court attempted to comply with the provisions of said section before the case came to trial but were met with refusal on the part of the defendant on the advice of counsel to submit to any examination or answer any questions propounded by said alienists or to cooperate with said alienists in any respect whatsoever on the grounds that the statute compelled the defendant to be a witness against himself and was in violation of article I, section 13, of the state Constitution. . . . All efforts having failed, the matter was brought before the trial judge by the district attorney with the defendant's attorneys, the defendant and the district attorney being present. After discussing the matter at some length with the court, counsel for the defense, with the approval of the defendant, definitely stated that they would ignore any order made by the court requiring the defendant to submit himself to a physical or mental test bearing upon his plea of not guilty by reason of insanity.
>
> * * * * *
>
> The introduction in evidence of the transcript of the proceedings had upon the complaints of the alienists that they had been denied by defendant's counsel the privilege of examining into his mental condition was opposed by his counsel on all pertinent grounds and after its admission a motion to strike all reference to the proceedings was denied.
>
> Appellant cites *People* v. *Strong*, 114 Cal. App. 522, to the point that section 1027, Penal Code, does not compel the defendant to submit himself to an examination and if he does so his action is purely voluntary. . . .
>
> Whether a statute requiring that a person who enters a plea of confession and avoidance, such as insanity, shall submit to the examination provided by section 1027, Penal Code, under penalty that if he refuses to do so he places himself within the rule of the 1934 amendment of article I, section 13, of the state Constitution (which provides that if the defendant in a criminal case does not testify or fails to deny any evidence or facts in the case against him, that such facts may be commented upon by the court and counsel and considered by the court or jury), would, under the amendment of 1934, be held to be in conflict with another clause of the same section which provides that no person on trial in a criminal case shall be required to be a witness against himself, need not here be decided. This much is true. The defendant did not comply with section 1027, Penal Code, and the only question before us for decision is whether the introduction of said

[15] 12 Cal.2d 720, 87 P.2d 1014 (1939).

> proceedings constituted reversible error. It cannot be questioned that anything done or said in the proceedings if relevant to his mental state would be admissible. The proceedings disclose that he was conscious that his mental responsibility was under investigation and that he was acting in concert with his counsel who were directing his defense and therefore constituted evidence as to his mental condition.[16]
>
> The defendant's refusal to give any history or information as to his alleged mental ailment . . . and his refusal and conduct and all that he said was evidence in the case. . . .
>
> [T]hose things that disclosed the defendant's conduct, and indicated that he may have opposed the examination because of his fear of the result, were clearly admissible, as indicating defendant's state of mind.[17]

Here the end result is clear. Suppose a court appoints an alienist under Penal Code Section 1027. Defendant "clams up." Upon trial of the issue of sanity, the fact that defendant "clammed up" may be shown as prosecution evidence relative to his mental condition. The result is clear, but what is the rationale? The rationale apparently is that defendant's refusal was *not* justified as an exercise of his privilege against self-incrimination. It is clear that if a pretrial privilege does exist, defendant's claim of such privilege cannot be proved against defendant at the trial.[18] Hence, the holding in *People* v. *French* that defendant's pretrial claim of an alleged privilege may be proved against him is a holding which logically negates the existence of the alleged privilege. The only alternative rationale seems to be that the privilege exists but in this instance (for reasons unknown or unstated) the pretrial claim of privilege may be shown. The first is believed to be the more plausible rationale and, therefore, the court did decide (at least indirectly) that a statute of the kind posited in the opinion would be valid.

The question specifically left open but nevertheless indirectely decided in the *French* case has been considered recently. In *People* v. *Combes*,[19] the Supreme Court held:

> Section 1027 of the Penal Code is not unconstitutional. In response to a challenge that section 1027 compelled a defendant to incriminate himself, the court in *People* v. *Strong*, 114 Cal.App. 522, said at page 530: "We fail to see any merit in the contention that under section 1027 a defendant is compelled to be a witness against himself. Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary. To assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion."[20]

[16] The excerpt quoted is severely (but fairly) edited.
[17] People v. French, 12 Cal.2d 720, 766-70, 87 P.2d 1014, 1037-39 (1939).
[18] See People v. Simmons, 28 Cal.2d 699, 172 P.2d 18 (1946). *But see* the text, *infra* at 374-377, for a possible qualification respecting evidence of pretrial claim for impeachment purposes.
[19] 56 Cal.2d 135, 363 P.2d 4, 14 Cal. Rptr. 4 (1961).
[20] *Id.* at 149-50, 363 P.2d at 12, 14 Cal. Rptr. at 12.

And in *People* v. *Ditson*,[21] the Court quotes approvingly from the *Combes* opinion in rejecting defendant's contention that the admission of testimony by three court-appointed alienists violated the privilege against self-incrimination:

> [Defendant] argues that if the alienists may be required to reveal on the guilt phase of the trial incriminating statements of fact made by a defendant during such an examination, the defendant will find himself in an insoluble dilemma: if he talks, his statements may be used to establish his guilt; if he refuses to talk, (1) the alienists will probably be unable to form an opinion as to his true mental condition and (2) his silence may be commented upon as evidence of consciousness of guilt. . . .
>
> The argument is untenable. "Merely because the statute [Penal Code Section 1027] provides that it is the *affirmative* duty of an alienist to testify whenever summoned in a sanity proceeding does not mean or even imply that he is *prohibited* from testifying in other proceedings where information that he may have is relevant and material." (*People* v. *Combes* (1961) 56 Cal.2d 135, 149.) [Emphasis in original.] [22]

It follows that in allowing a person's refusal to submit to mental examination to be proved against that person, the court in *People* v. *French* has in effect affirmed the principle of Rule 25(b) that "no person has the privilege to refuse to submit to examination for the purpose of discovering or recording . . . his . . . mental condition." The language in the *Combes* and *Ditson* cases similarly supports this principle. On this basis, it is concluded that the portion of Rule 25(b) just quoted would in this State be valid legislation not in conflict with Article I, Section 13 of the State Constitution. Moreover, the trend of decisions throughout the country seems to lead in the direction of the view of Rule 25(b).

Summarizing the situation in general, the Commissioners on Uniform State Laws state that "in general practice and by the majority of jurisdictions the practice of taking . . . mental examinations is sanctioned."[23] Professor Inbau asserts: "By way of summary it may be stated that the decisions involving insanity pleas have been quite uniform in admitting in evidence the results of psychiatric examinations allegedly made under compulsion."[24]

It is not denied that what thus seems to be the majority and California view presents some aspects which may disquiet strong advocates of privilege. Some of the objections that may be advanced and some possible answers to these objections should be considered.

A man is in jail awaiting trial for murder. His defense is not guilty by reason of insanity. Actually, the man committed the murder and he is only feigning insanity. A court-appointed psychiatrist goes to jail to examine him. Since the man possesses the privilege to refuse to make

[21] 57 Cal.2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962).
[22] *Id.* at 447-48, 20 Cal. Rptr. at 183, 369 P.2d at 732. See also People v. Spencer, 60 Cal.2d —, 31 Cal. Rptr. 782, 383 P.2d 134 (1963).
[23] UNIFORM RULE 25(b) Comment. It may be noted that this exception was adopted without change in New Jersey, N.J. REV. STAT. § 2A:84A-19, recommended in Utah without change, UTAH FINAL DRAFT at 18, and adopted without change in the Virgin Islands, 5 V.I.C. § 853 (1957).
[24] INBAU, SELF-INCRIMINATION 60 (1950).

statements which would tend to show he committed the murder, how can it be that he possesses *no* privilege to refuse to make statements which would tend to expose his fraudulent claim of insanity?

A possible answer is that a sanity test, though verbal, should be analogized to nonverbal conduct not within the privilege. For example, the subject's participation in exercises to test his memory, reasoning power, and the like, may be equated with requiring him to grow a beard and wear dark glasses, put on overalls and, so outfitted, to display himself to an identification witness. This seems to be Professor McCormick's view. He argues that a sanity examination does not infringe the privilege because the "questions are not designed to elicit admissions of guilt as evidence of their truth, but rather to test the coherence and rationality of the subject. They are not used testimonially but as symptoms of abnormality or the reverse."[25] In the following passage, Professor Inbau seems to suggest the same rationale:

> It would . . . [be] desirable for the courts . . . to . . . [hold] that although the privilege protects the accused from supplying any testimonial link in the chain of evidence to establish the conclusion that he committed the crime in question, *it has no application to an inquiry as to his mental responsibility at the time the act was committed;* for even though an accused's ultimate guilt depends upon his mental condition at the time of the commission of the act, a psychiatric examination has no bearing upon the question of whether he actually committed it. The reasonableness of this analysis is obvious when we realize that a psychiatric examination does not necessitate an inquiry into the issue of the accused person's guilt or innocence of the offense itself. An expert in mental diseases can, if necessary, make a fairly satisfactory psychiatric examination by observing and interviewing an accused without at any time even so much as mentioning the crime in question.[26]

Another objection which may be leveled against the majority view is a practical one. Accepting the majority view that there is no privilege, where is the gain in discovering the mental condition of a *recalcitrant* examinee? The success of a question-and-answer examination must depend in large part upon answers. What if the examinee, even though he has no privilege to do so, simply refuses to answer any and all questions? Is it not true that if the examinee is willing to co-operate, he will do so irrespective of whether he has a theoretical privilege; and, on the other hand, if he is unwilling to co-operate, no denial of privilege will convert his unwillingness into willingness? In other words is not privilege *vel non* immaterial to the objective of achieving a successful mental examination? In answer to which, it may be said that in many cases (notably, cases of sophisticated, professional law breakers) this is probably so. However, if there is *no* privilege, the examinee may properly be told this and the result in some cases may be to break his silence. Furthermore, if there is no privilege, a court order to submit to exam-

[25] McCormick at 266.
[26] Inbau, Self-Incrimination 55-58 (1950).

ination (with appropriate sanctions for contumacy) would seem to be proper and in some cases might be effective.[27]

The overall conclusion on Rule 25(b) is that the subdivision in its entirety is in accord with current California law and approval of the entire subdivision is recommended.

The Exception in Rule 25(d). This exception is as follows:

> (d) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced.

Whether artificial persons, such as corporations and other collective groups, possess the privilege against self-incrimination is discussed at 346-347, *supra*. The prevailing view is that "the privilege against self-incrimination cannot be invoked by a collective group."[1] Thus, if an officer or employee of an organization is ordered to surrender his possession of the organization's books, he cannot refuse on the ground that the disclosure would incriminate the organization.[2] Moreover, he cannot refuse production, even though the incriminating entries were made by himself and would incriminate him personally. Two reasons are urged in support of this conclusion. First, it is said that the custodian has waived *his* privilege by voluntarily assuming custody of the books. Second, it is argued that the group has a superior right to the possession of the records and "it would be intolerable for the power to compel production, which could not be resisted by the organization whose property the records are, to be frustrated by the chance event that the records are, at the sufferance of the organization, in the possession of a person whom the records incriminate."[3]

Rule 25(d) provides in part as follows:

> [N]o person has the privilege to refuse to obey an order made by a court to produce . . . a document . . . incriminating him if the judge finds that . . . a corporation, or other association has a superior right to the possession of the [document].

This carries forward the proposition that the custodian must produce the books, basing the proposition on the superior-right rationale, the second of the two reasons above stated.

Just as the custodian of a private organization's books cannot resist production on the grounds of personal incrimination of himself, so, too, "a custodian of public books may not withhold the books on the ground that they might incriminate him," because "public official books are the

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[27] The fact is not overlooked that in many cases the penalty for the crime would exceed the penalty for disobedience to the order and, therefore, the strategy of the suspect might well be to disobey the order and incur the lighter penalty in the effort to win the higher stakes of a favorable verdict.

[1] 8 WIGMORE, EVIDENCE § 2259a (McNaughton rev. 1961).

[2] *Id.* at § 2259b.

[3] *Ibid.* It is here suggested, however, that "neither of these reasons will stand analysis" and that "the reason why the privilege is not available to the custodian is that in this class of cases the arguments supporting efficiency of law enforcement are more persuasive, and the sentiments behind the privilege are less appealing, than in the usual case."

property of the state and have always been understood to be accessible to representatives of the state." [4]

This result, too, is probably carried forward by the language of 25(d) above quoted. (This depends upon whether the language "some other person or a corporation, or other association" comprehends the state; a clarifying amendment may be desirable.)

It is apparent that, insofar as the purpose of 25(d) is to deny privilege to the individual who would be personally incriminated by surrendering his possession of public documents or books of a private organization, that purpose is merely to reaffirm existing principle. In other aspects, however, 25(d) enlarges existing doctrine. Suppose that D is on trial charged with larceny of a watch, the property of A. The prosecution moves for an order requiring D to produce the watch for use as evidence against him. In support of the motion the prosecution has A testify that A owns the watch and that D stole it from A. On the basis of A's testimony the judge finds: (1) A has a right to the possession of the watch superior to D's right, and (2) the watch is now under D's control. The judge therefore makes an order directing D to produce the watch. Under Rule 25(d) D has no privilege to refuse to obey the order even though the watch constitutes matter incriminating him.[5]

The idea underlying Rule 25(d) is that, whereas D possesses privilege to refuse to obey an order requiring him to produce *his* property, he possesses no such privilege respecting property of another in his custody. This idea is fortified by the following reasoning: A could replevy the watch from D and then turn it over to the prosecution. Since this procedure would not violate D's incrimination privilege,[6] short-cutting this procedure and in effect enabling the prosecution to act in A's behalf in asserting his property right is no violation of privilege.

The logic supporting Rule 25(d) is persuasive and, therefore, approval of this exception is recommended.

The Exception in Rule 25(e). This exception reads as follows:

> (e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations

[4] *Id.* at § 2259c.

[5] Uniform Rule 25(d) copies Model Code Rule 206. Consider the following colloquy between Mr. Rosenthal and Professor Morgan during the American Law Institute debate on Rule 206:

> MR. ROSENTHAL: Might I ask a question in that connection. Under Rule 206 a man is indicted for larceny and the question is whether he has stolen the watch. Of course, there can be a search warrant, but can that man be ordered in the court which is trying this case against him to produce the watch?
>
> MR. MORGAN: If the trial court finds that the watch belongs to the other party, yes. No question about it under this rule. [19 A.L.I. PROCEEDINGS 127 (1942)].

[6] Consider the following commentary on Model Code Rule 206 (which Uniform Rule 25(d) copies):

> There is no question that a person having in his possession a tangible which contains matter incriminating him cannot by claiming the privilege against self-incrimination avoid his duty to deliver it over to the person legally entitled to its possession. And it seems to be immaterial that the latter intends to turn it over to others for use in a criminal proceeding against the present possessor. See Johnson v. United States, 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919, 47 L. R. A., N. S., 263 (1913); *Ex parte* Fuller, 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881 (1923). [MODEL CODE Rule 206 Comment.]

See also 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2259b, n.16.

governing the office, activity, occupation, profession or calling require him to record or report or disclose concerning it.

Rule 25(e) deals with the doctrine of nonprivileged required records [7] and nonprivileged required oral reports.[8] This doctrine differs from that embodied in Rule 25(d) in several respects. Rule 25(d) concerns only incrimination of custodians, compelling surrender of documents and tangibles possessed by them but belonging to another person, natural or artificial. On the other hand, Rule 25(e) covers not only incrimination of a person by compelled surrender of documents and other tangibles, but also incrimination by compelled oral statements. Moreover, insofar as surrender of documents is involved, ownership of the same may be immaterial. Thus, such surrender may be required of a person, even though the thing surrendered is his own.

The exact boundaries of the required records and reports doctrine are, however, imprecise. On the one hand, it is conceded that, to some extent, the state may compel an individual to surrender an incriminating record of his which the state has required him to maintain.[9] Familiar illustrations are druggists' prescription records, pawnbrokers' records, and the like.[10] But, on the other hand, it is conceded that this state power is not unlimited.[11] For example, presumably the state could not validly require that every person who kills another with firearms should make a written report and deliver the same to the sheriff.[12]

A parallel situation exists with regard to oral reports required by law to be made. For example, laws which require a person whose vehicle has caused an injury to make oral disclosure of his name, address and the circumstances of the injury are concededly valid.[13] At the opposite extreme, it will, of course, be conceded that some such required oral reports would infringe the privilege.[14]

Thus, here is an area—however vague and ill-defined—[15] in which governmental power exists, and in which such power has been exer-

[7] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2259c; MCCORMICK § 134.
[8] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2259d; MCCORMICK § 134.
[9] See notes 7 and 8 *supra;* Shapiro v. United States, 335 U.S. 1 (1948).
[10] See People v. Diller, 24 Cal. App. 799, 142 Pac. 797 (1914), quoting with approval the following from a Missouri case:

> "We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods."

[11] See notes 7 and 8 *supra.*
[12] A requirement that "every person who kills another with firearms should report the fact to the sheriff" would presumably fall afoul of the privilege. MCCORMICK at 283.
[13] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2259d. See also People v. Diller, *supra* note 10, and People v. Fodera, 33 Cal. App. 8, 164 Pac. 22 (1917).
[14] See note 12 *supra.*
[15] McCormick's summary is as follows:

> It seems . . . that the power to require records and reports and to exempt them from privilege could only be exerted as a means of carrying out some other distinct governmental power, such as the power to tax, the power to regulate prices in an emergency, or the state's power to regulate activities dangerous to the health, safety, and morals of the community. To make easier the investigation and punishment of crime generally, or of a particular kind of crime, would not suffice as the only footing of the power. Where the independent regulatory power under the constitution and the privilege

cised,[16] to compel incrimination. It is, however, a most sensitive area and one in which there have been,[17] and may yet be, instances of usurpation exceeding the legitimate limits of the power.

What is the impact of this situation upon the URE formulations of the privilege against self-incrimination? One impact seems abundantly clear: given the format of a general rule of privilege plus exceptions, one of the exceptions should cover the *allowable* area of required records and oral reports above mentioned. Otherwise, the Legislature, in enacting the URE, would be repealing its former exercise of its conceded power in this area and would be stating the general proposition that such power is not to be exercised.

A further question, however, is whether any attempt should be made to state legislatively what is and what is not a valid exercise of governmental power in this area. It seems that the framers of the URE answer this question negatively—and wisely so. In other words, although the exception in Rule 25(e) speaks of certain "statutes or regulations," surely it means only those statutes and regulations which have been, or may properly be, determined to be constitutional; clearly, Rule 25(e) does not purport to state the criteria to be applied in making such determinations.

There is, then, nothing in Rule 25(e) which *ex proprio vigore* declares which of such statutes or regulations are valid and which are invalid. The sole purpose—and, properly construed, the sole effect—of Rule 25(e) is to provide that Rule 25 is subject to such of those statutes and regulations as may be valid under the constitutional privilege.

The Exception in Rule 25(f). This exception is as follows:

> (f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose.

The precise purpose of Rule 25(f) is somewhat obscure. Beginning with a negative approach, it may be noted that the purpose is probably not simply to provide that a corporation or association employee must surrender the employer's books. That is amply provided for by Rule

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against self-incrimination come in conflict each must yield to some extent, so that a viable accommodation may be found. Perhaps in the present state of the law, the limits can be no more definitely stated than to say with Vinson, C. J., that the bounds have not been overstepped "when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection . . . ." [MCCORMICK at 283.]

See also Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 708-19 (1951); Note, 68 HARV. L. REV. 340 (1954).

[16] See notes 7-10 *supra*.

[17] See People v. McCormick, 102 Cal. App.2d Supp. 954, 228 P.2d 349 (1951), invalidating a county ordinance which provided as follows:

> [E]very person who resides in, is employed in, has a regular place of business in, or who regularly enters or travels through any part of the unincorporated territory of Los Angeles County, and who is a member of any communist organization, shall register by acknowledging under oath and filing with the Sheriff's Department of the County a registration statement containing the following (1) Name and any alias or aliases of the registrant . . . (4) the name of all communist organizations of which he is a member.

25(d). Again, the purpose is probably not simply to make the principle of Rule 25(e) applicable to officers, agents or employees of a corporation or association. Rule 25(e) is so broadly phrased that such persons are included, and no special provision is needed to indicate that they are included.

What, then, is the function of Rule 25(f)? Consider this hypothetical case. A corporation engages in an illegal activity—for example, it distributes pornographic films to be shown at "stag" parties. It requires its employee, B, to handle the distribution and the bookkeeping covering this phase of its activities. An investigation is instituted. The books disappear. B is examined. He is asked to identify the distributees, if any, to whom he delivered pornographic films. He claims privilege.

Possibly, Rule 25(f) is intended to deny privilege in these circumstances. If so, the analysis is this: (a) the fact of distribution and the identity of the distributees constitute, in the language of Rule 25(f), "matter which . . . the conduct of [the corporation's] business" required B "to record"; (b) therefore, under Rule 25(f), B "does not have the privilege to refuse to disclose [such] matter." A possible rationale for this result is the argument that, because B would have to surrender the books if he had them—notwithstanding the personal incrimination thereby incurred [18]—it should follow that he must testify to what the books would show, if available.[19]

Some support for the foregoing theory of the purpose of Rule 25(f) is derived from this official illustration of Model Code Rule 207(2), which Rule 25(f) copies:

> A State statute requires all corporations owning stock in other corporations to keep records of such stock ownership, which records shall be open to inspection by specified officials of the State, and makes criminal the falsification of such records or concealment of such ownership. A, an accountant employed by corporation C to keep all its records, by reason of Paragraph (2) of this Rule has no privilege under Rule 203 [Uniform Rule 25, general rule] to refuse to testify about the falsity of his record of C's ownership of stock in other corporations.[20]

Note that the intent here is to deny to the corporate employee privilege to refuse to *testify* to matter incriminating him.

Consider also this exchange between Professor Morgan and Judge Wyzanski in the course of the American Law Institute debate on Model Code Rule 207(2):

> HON. CHARLES E. WYZANSKI, JR. . . .: Before you pass 207(2). . . . Supposing that the wage and hour law requires a corporation to keep records with respect to the employment of individuals and A is the employment manager in charge of these matters for the corporation. He, as a matter of fact, knows what the situation is, but no record was kept at all. The law under the statutes is that a corporation should keep these records. A may be called upon to testify and cannot raise the privilege of self-incrimination. I

[18] See discussion of Rule 25(d) *supra*.
[19] Query: Should it make any difference whether books and records *actually* were maintained?
[20] MODEL CODE Rule 207 Comment.

think it was that situation that it was intended to be covered by 207(2). . . .

MR. MORGAN: That is right.[21]

Professor McCormick tells us that

> it might well be determined that the agent of a corporation or association could be compelled to disclose by his oral testimony any acts performed for the principal, though incriminating the agent. The courts seem as yet not to have settled this question.[22]

It seems, however, that the question *is* settled in California and that the decision is adverse to the Model Code-URE-McCormick view. The case in point is *McLain* v. *Superior Court*.[23] The Senate Interim Committee on Social Welfare issued a subpoena addressed to the Citizens Committee for Old Age Pensions, a nonprofit corporation, and George H. McLain, Chairman of the citizens committee, commanding them to appear before the Senate committee on a given date "as witness in an investigation by the said committee" and commanding them to bring with them all cancelled checks, check stubs, check ledgers and bank statements of all the accounts in the name of Citizens Committee for Old Age Pensions. McLain appeared and was sworn. He testified that he was chairman of the corporation and that he had received the subpoena. He was then told that he had been subpoenaed only in his capacity as chairman and in none other and was asked if he had the documents which the subpoena had required him to produce. After some time was spent in arranging the records, McLain stated that for the convenience of the committee "we have separated to the best of our ability the checks that have been issued to Assemblyman John W. Evans during 1948 and 1949 as one of our public relations counsel, so we will be very happy to turn these over to you." He thereupon handed the specified checks to counsel for the committee, who said, "What are these?" and McLain replied, "Checks made payable to John W. Evans." The checks were signed "Citizens' Committee for Old Age Pensions, George H. McLain," and bore the apparent endorsement of Mr. Evans, and also the usual stamps and punch marks indicating a clearance through the bank on which they were drawn.

Later McLain was indicted by the Grand Jury of Sacramento County. The indictment contained four counts, in each of which McLain was charged with the crime of bribery in that he gave a bribe, consisting of the sum of $75, to John W. Evans, then a member of the State Legislature, with intent to influence him in giving or withholding his vote on bills introduced for passage. McLain then sought a writ of prohibition to restrain the Superior Court from taking any steps or proceedings based on the indictment. McLain based his petition upon Section 9410 of the Government Code, which, so far as here applicable, provides as follows:

> A person sworn and examined before the Senate or Assembly, or any committee, can not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify.

[21] 19 A.L.I. PROCEEDINGS 129-30 (1942).
[22] MCCORMICK at 262-63.
[23] 99 Cal. App.2d 109, 221 P.2d 300 (1950).

Respondent contended

> that immunity was not acquired by petitioner, not because the documents produced under the compulsion of the subpoena did not touch upon the alleged crimes for which he was later indicted, nor that the meager testimony he gave did not serve to identify and authenticate these documents, but that the production of the documents by petitioner and his testimony concerning them fell within permissible limits without the granting of immunity.[24]

The court held that such immunity attached and granted prohibition on the following grounds:

> [T]here is a clear distinction between the admitted power of such a body as the Senate Interim Committee on Social Welfare to compel the production before it of such documents, and the right to compel testimony from the custodian of such documents which would incriminate the witness.
>
> * * * * *
>
> Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the *ad testificandum* part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although, as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individually and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena *duces tecum,* by which production the demands of that process had been met, the petitioner, in response to appropriate questioning, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination.
>
> * * * * *
>
> Applying, then, the plain language of the act to the facts here, did the petitioner, having been sworn, testify as to any fact or act touching the bribery with which he stands charged? We think he did. . . .
>
> When the legislative committee swore petitioner as a witness it contracted that he would be immune from prosecution for any crime touching which he might testify. When that testimony touched upon the alleged bribery of Evans, immunity attached. Petitioner cannot be prosecuted therefor.[25]

[24] *Id.* at 114, 221 P.2d at 303.
[25] *Id.* at 115-19, 221 P.2d at 303-05.

The Supreme Court denied respondent's petition for a hearing.

This is a clear recognition that—to paraphrase Rule 25(f)—a person who is an officer, agent or employee of a corporation or other association *does* have the privilege to refuse to disclose *by his testimony* matter incriminating him (unless, of course, some exception other than Rule 25(f) is applicable or immunity is granted).

From the foregoing, it is concluded that insofar as Rule 25(f) would require testimony, it would be unconstitutional in this State. On that ground, disapproval of this rule is recommended.

The Exception in Rule 25(g). This exception is as follows:

> (g) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege to refuse to disclose any matter relevant to any issue in the action.

Suppose an accused in a criminal case voluntarily takes the witness stand and testifies in his defense to certain facts relevant to his defense. Under these circumstances, to what extent, if any, is he protected by Article I, Section 13 of the State Constitution? Could the Legislature provide that when an accused elects to testify the prosecution may cross-examine him with reference to *any* relevant fact whether or not such fact has been mentioned on direct examination? Could the Legislature provide that when an accused elects to testify in his defense the prosecution may call him in rebuttal as a prosecution witness? [1]

Rule 25(g) suggests these questions, for, if Rule 25(g) is sound as a statement of the scope of the constitutional privilege—*i.e.*, if Rule 25(g) itself would be a constitutional enactment in this State—it seems that the Legislature could validly enact the two statutes suggested. Rule 25(g) provides that by testifying on the merits the accused waives privilege as to any incriminating matter relevant to the merits. If accused does thus waive his privilege, could not the Legislature give the prosecution the advantage of such waiver by permitting full cross-examination of the accused or by permitting the prosecution to call the accused in rebuttal?

As a matter of fact, the Legislature has not attempted to provide either for full cross-examination of an accused or for calling him in rebuttal. Rather, the Legislature has chosen to provide only for restricted cross-examination, *i.e.*, for cross-examination restricted to the scope of the direct examination.[2] If this legislative decision was a free choice, Rule 25(g) would be valid legislation in this State. However, if the decision was dictated by Article I, Section 13, then Rule 25(g) would be an unconstitutional enactment. Regretfully, it is apparent that the latter is the case—the legislative decision was required by the State Constitution.

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[1] The thought here is *not* of the situation where the prosecution is calling defendant in rebuttal for further *cross-examination* as in People v. Searing, 20 Cal. App.2d 140, 66 P.2d 696 (1937); and People v. La Vers, 130 Cal. App. 708, 20 P.2d 967 (1933).

[2] CAL. PEN. CODE § 1323 provides:

> A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.

People v. *O'Brien* [3] seems very explicit on the point, as the following excerpt shows:

> The defendant was charged, in an information filed by the district attorney of San Francisco, with the embezzlement of a certain sum of money, to wit, $1000, the same being the property of the state, and on the trial he was called and examined as a witness on his own behalf. On the examination in chief his testimony was directed and confined to the alleged embezzlement of the particular sum of money mentioned in the information, but on the cross-examination he was examined generally as a witness in the case. This course of proceeding was objected to very frequently by his attorney, but the objections were as often overruled by the court, and the examination was allowed to be as general as could have been made of any other witness [4] in the case; the district attorney, in fact, making the defendant his own witness on behalf of the prosecution. The question is, Was this course of proceeding regular and proper under the law?
>
> Section 13, article 1, of the constitution declares that no person shall "be compelled in any criminal case to be a witness against himself." There is, therefore, no power in the court to compel a defendant in a criminal case to take the stand. . . .
>
> But by section 1323 of the Penal Code, it is provided that "a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. . . ." It is only under and by virtue of the foregoing provision of the Penal Code that a defendant in a criminal prosecution can be a witness at all; and when he is called on his own behalf and examined respecting a particular fact or matter in the case, the right of cross-examination is confined to the fact or matter testified to on the examination-in-chief. Such is the express language of the statute; and when the court, as it did in the case at bar, allowed the prosecution to make the defendant a general witness in its behalf, it invaded a right secured to the defendant not only by the statute but by the constitution.
>
> For this error the judgment and order are reversed, and the cause remanded for a new trial.[5]

Here violation of the statutory rule of restricted cross-examination is treated as ipso facto a violation of Article I, Section 13.[6] The conclusion

[3] 66 Cal. 602, 6 Pac. 695 (1885).

[4] Making the examination "as general as could have been made of any other witness" would not, it seems, in and of itself be objectionable.

[5] People v. O'Brien, 66 Cal. 602, 602-03, 6 Pac. 695, 695-96 (1885).

[6] See also the following from People v. McGungill, 41 Cal. 429 (1871).

> It appears from the bill of exceptions that "one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner." This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross-

seems inescapable that the statute states the outer limits of waiver which the Constitution permits. The same point of view seems to be taken in *People* v. *Arrighini*[7] as the following excerpt shows:

> The limitation contained in our code (Pen. Code, sec. 1323) was doubtless intended to preserve to defendants the right secured by section 13, article 1, of the constitution. . . . Other states from which cases are cited do not contain such a limitation. In Massachusetts the provision is that he "shall at his own request, and not otherwise, be deemed a competent witness." It has been held that when, under this statute, the accused offers himself as a witness, he waives all protection guaranteed by the constitution and becomes a competent witness in the whole case . . . .
>
> Under our statute there can be no doubt. Here, surely no evidence can be wrung from him. He can only be examined in regard to the matters concerning which he has voluntarily testified . . . .[8]

In view of the scope of Article I, Section 13 above expounded, it must be concluded that Rule 25(g) would be void legislation in this State because it contravenes Article I, Section 13 of the State Constitution. Therefore, it is reluctantly recommended that Rule 25(g) be disapproved.[9]

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examined to the whole case; that defendant's counsel protested against such comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, and against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. [Citation omitted.]

The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as a circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned. [*Id.* at 430-31.]

Query: Would comment be proper today under the comment provision of Article I, Section 13? If so, does this change the older rule that restricted cross-examination is a constitutional right? Probably it does not. Comment authorized by the Constitution does not negate the existence of privilege.

[7] 122 Cal. 121, 54 Pac. 591 (1898).

[8] *Id.* at 126, 54 Pac. at 593.

[9] Professor McCormick's analysis is as follows:

> As a means of implementing the prescribed *order* of producing evidence by the parties, the restrictive rules limiting cross-examination to the scope of the direct or to the proponent's case are burdensome, but understandable. The cross-examiner who has been halted has at least a theoretical remedy. He may call the witness to answer the same questions when he puts on his own next stage of evidence. But the Federal courts and the states following the restrictive practice have applied these confining rules to the cross-examination of the accused by the prosecution. Thus, the accused may limit his direct examination to some single aspect of the case, such as age, sanity or alibi, and then invoke the court's ruling that the cross-examination be limited to the matter thus opened. Surely the according of a privilege to the accused to select out a favorable fact and testify to that alone, and thus get credit for testifying but escape a searching inquiry on the whole charge, is a travesty on criminal administration. It is supposed to be necessitated by the principle that by taking the stand the accused subjects himself to cross-examination "as any other witness." Seemingly at least two escapes are available. First, the rule limiting the cross-examination has always been professedly subject to variation in the judge's discretion, and the fact that the cross-examiner cannot call the witness is a ground for exercising the discretion to permit cross-examination on any relevant fact. Second, the accused might reasonably be held to have waived altogether his right not to be compelled to be a witness against himself, by taking the stand in his own behalf. Consequently, the prosecution could later call the accused as state's witness, and the one-sided effect of limiting the cross-examination would be mitigated. In jurisdictions following the wide-open practice there is of course no ob-

Other Rules

Discussion thus far has centered around the provisions of the incrimination rules—Rules 23, 24 and 25. Special problems are presented by the incrimination rules in their relation to other Uniform Rules, notably Rules 37, 38 and 39. These other rules are later considered in the overall scheme of the Privileges Article of the Uniform Rules.[10] They are, however, specially considered here insofar as they relate particularly to the incrimination rules.

Rule 37. Waiver of Privilege by Contract or Previous Disclosure

This rule provides in part as follows:

> RULE 37. *Waiver of Privilege by Contract or Previous Disclosure.* A person who would otherwise have a privilege to refuse to disclose . . . a specified matter has no such privilege with respect to that matter if the judge finds that he . . . while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter.

Suppose a fire insurance policy contains a provision like the one considered in *Hickman* v. *London Assurance Corp.*,[11] which reads as follows:

> [T]he insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given, and shall produce to such person for examination, all

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stacle to cross-examining the accused upon any matters relevant to any issue in the entire case. [MCCORMICK at 49-50.]

For reasons stated in the text, it is believed that Professor McCormick's suggested first escape is not available in this State; nor is it believed that his suggested second escape—which is Uniform Rule 25(g)—is available.

In concluding this discussion of Rule 25, a word should be said about the action taken in New Jersey. The Court Committee recommended adoption of a new rule, similar in many respects to Rule 25. See N.J. COMMITTEE REPORT at 61-65. The Legislative Commission accepted many of these suggestions. See N.J. COMMISSION REPORT at 30-31. The rule as finally adopted reads as follows:

> Subject to Rule 37 [§ 2A:84A-29], every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:
>
> (a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;
>
> (b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;
>
> (c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;
>
> (d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein. [N.J. REV. STAT. § 2A:84A-19.]

The Utah Committee recommended adoption of Rule 25 substantially unchanged. UTAH FINAL REPORT at 18-19.

[10] See the text, *infra* at 509 *et seq.*

[11] 184 Cal. 524, 195 Pac. 45 (1920).

> books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made. . . . No suit or action on this policy for the recovery of any claim shall be sustained until full compliance by the insured with all of the foregoing requirements.[12]

The insured property is destroyed by fire. Arson is suspected. A grand jury investigates. The insured is called before the grand jury to testify. Asked whether he set the fire, he claims the privilege against self-incrimination. Rule 37(a) requires that the claim be denied.

Rule 37(a) is derived from Model Code Rule 231(a) as to which the official commentary reads in part as follows:

> This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise.[13]

It is probable that Rule 37(a) would be unconstitutional in this State as applied to the privilege against self-incrimination. In the *Hickman* case, the company (after the fire) made a written demand upon the insured to appear on a certain day before a designated notary and submit to examination as provided in the policy. The insured appeared as demanded but refused to answer pertinent questions, basing his refusal in part upon the circumstance that he had been accused of arson and was about to be tried. Such refusal was held, in the ensuing civil action, to require the denial of recovery on the policy by the insured. The court reasoned as follows:

> The compulsion secured against by the constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law. Constitutional immunity has no application to a private examination arising out of a contractual relationship. The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, not authorized by any constitutional or statutory provision, but purely by virtue of a contract between the parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent

[12] *Id.* at 527, 195 Pac. at 46-47.
[13] MODEL CODE Rule 231 Comment.

> "as often as required," and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform. In other words, when he commenced this suit he was without a cause of action.[14]

Here, the only question for decision was recovery in the civil action. The court did not reach the precise question presented by Rule 37(a)—namely, whether the prosecuting attorney (as a sort of third party beneficiary of the contract between insured and insurer) could have the benefit of the insured's promise to make disclosures. On the other hand, *In re Sales* [15] comes directly to the point and, as the following extract shows, seems to rule *against* the principle of Rule 37(a):

> The district attorney also cites authorities to the effect that a person may enter into a contract to waive said constitutional privilege in which event he may be thereafter estopped from claiming the same; and in this connection it is contended that petitioners' agreement to testify at the trial to the same state of facts revealed by them before the grand jury constituted such a contract. We are unable to sustain this view. The action is one instituted and prosecuted by and in the name of the People of the state for the alleged commission of a crime; and consequently there can be no contractual relationship with the witnesses. In other words, any person having knowledge of material facts connected with the commission of a crime may be compelled to testify thereto regardless of his personal inclinations, unless as here his testimony would tend to incriminate him; and any agreement attempted to be made by him as to whether or not he would testify would be wholly void and no rights whatever would be created thereunder.[16]

Apparently, the rationale here is that enforcement of the contract would infringe Article I, Section 13. Since this appears to be the rationale, it follows that disapproval of Rule 37(a), insofar as it applies to the privilege against self-incrimination, must be recommended.

Turning now to Rule 37(b): Suppose a witness without compulsion and with knowledge of his privilege testifies before a grand jury to facts incriminating him. The grand jury indicts X. At X's trial the witness is called and claims the privilege. Or suppose the testimony was at the preliminary hearing of "People v. X" and the claim of privilege is at the trial. Under Rule 37(b) the claim would be overruled. Today in California the claim would be sustained. As stated in *In re Berman:* [17]

[14] Hickman v. London Assurance Corp., 184 Cal. 524, 532-33, 195 Pac. 45, 49 (1920).
[15] 134 Cal. App. 54, 24 P.2d 916 (1933).
[16] *Id.* at 60-61, 24 P.2d at 919.
[17] 105 Cal. App. 37, 287 Pac. 125 (1930).

> We have . . . to examine first the contention that petitioner, by giving his deposition in the case of *Guenther* v. *Barneson et al.*, waived his privilege against testifying, assuming for the purpose of this as well as the succeeding question, that to answer the interrogatories would tend to incriminate the petitioner. The problem is not entirely new. In *Overend* v. *Superior Court,* 131 Cal. 280 [63 Pac. 372], the prosecuting witness who had testified at the preliminary hearing of one against whom a criminal complaint had been filed, refused to testify at the trial in the Superior Court on the ground that his evidence might tend to incriminate him. The trial judge thereupon found that the witness had waived his privilege by testifying at the preliminary hearing and sentenced him for contempt. The Supreme Court says, in reviewing the judgment of contempt: "It appears that the trial court based its judgment of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable. This question of waiving the privilege is discussed and decided in *Temple* v. *Commonwealth,* 75 Va. 896, and *Cullen* v. *Commonwealth,* 24 Gratt. (Va.) 624. It is said in those cases that the witness' statements elsewhere have nothing to do with the question." We find a like declaration in *People* v. *Cassidy,* 213 N.Y. 388 [Ann. Cas. 1916C, 1009, 107 N.E. 713], as follows: "The weight of authority is against the claim of the people that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case. [Citations omitted.]" These authorities amply establish the rule prevailing in this jurisdiction, and as we think, in accordance with sound reason.[18]

Is the "sound reason" last referred to derived from Article I, Section 13? Presumably so; and it seems, therefore, that the Legislature is precluded from adopting Rule 37(b) in this State unless it is amended to exclude from its operation the privilege against self-incrimination.

It is concluded that in this State Rule 37(a) and (b), as applied to the privilege against self-incrimination, would contravene Article I, Section 13 of the California Constitution.

Rule 38. Admissibility of Disclosure Wrongfully Compelled

Suppose that under the exception in Rule 25(a) the judge finds in respect to a certain matter "that the matter will not incriminate" a witness and the judge therefore orders the witness to answer. Suppose further that, obedient to the mandate of Rule 25(a) that under such circumstances "the matter shall be disclosed," the witness answers and his answer is in fact incriminating. Later the witness is prosecuted and his answer is offered in evidence against him. Such evidence is inadmissible under Rule 38, which provides as follows:

> RULE 38. *Admissibility of Disclosure Wrongfully Compelled.* Evidence of a statement or other disclosure is inadmissible against

[18] *Id.* at 40-41, 287 Pac. at 127.

the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

The Commissioners on Uniform State Laws say that Rule 38 "safeguards the privileges against destruction by their very violation." The rule, they say, "states the generally accepted view." [1]

There appears to be no California case directly raising the question, but it is believed that insofar as Rule 38 applies to the privilege against self-incrimination, the principle of Rule 38 is implicit in the *Cahan* decision.[2]

Rule 39. Reference to Exercise of Privileges

This rule provides in part as follows:

> RULE 39. *Reference to Exercise of Privileges.* Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify . . ., either in the action or with respect to particular matters, or to refuse to disclose . . . any matter, the judge and 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 adverse inference therefrom.

It is recommended above that Rule 23(4) be disapproved on the ground that it is probably in conflict with the constitutional comment-inference provisions contained in Article I, Section 13.[3] Accordingly, it is now recommended that Rule 39 be amended by striking the "Subject to" clause. The remainder of Rule 39 would, of course, be subject to the constitutional provision. Thus in this State Rule 39 would set up a general rule of no comment upon and no inference from an exercise of privilege except as provided in Article I, Section 13. As such, Rule 39 would affirm existing California self-incrimination law in some respects; in other respects, it would change such law. The extent to which Rule 39 would be in accord with prevailing principle is first noted.

Suppose D appears before a grand jury in response to subpoena and refuses to answer several questions on the ground of self-incrimination as permitted under Article I, Section 13. Later at D's trial the prosecution as part of its case in chief proposes to prove D's claim of privilege before the grand jury. The prosecution contends that the testimony is admissible because (1) it is an admission made by a party in response to an accusatory statement, and (2) defendant's reaction thereto showed a consciousness of guilt. In *People* v. *Calhoun*,[4] this testimony was held inadmissible for the following reasons:

> Neither of these grounds is tenable, for the reason that no implication of guilt can be drawn from a defendant's relying on the constitutional guarantee of the fifth amendment to the Constitution of the United States, article I, section 13, of the Constitution of the State of California, or Penal Code sections 688, 1323, and 1323.5. [Citations omitted.]

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[1] UNIFORM RULE 38 Comment.
[2] See discussion in the text accompanying note 10, *supra* at 350.
[3] See discussion in the text, *supra* at 334-338.
[4] 50 Cal.2d 137, 323 P.2d 427 (1958).

In view of the foregoing rule, the trial court prejudicially erred in holding that the grand jury testimony could be received in evidence as an admission and used to support a verdict. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above.

Such evidence does not fall within the scope of the 1934 amendment to article I, section 13, of the Constitution of the State of California, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Any inferences to the contrary in *People* v. *Byers*, 5 Cal.2d 676, are overruled.

Provisions of the federal and state Constitutions and the Penal Code sections referred to above establish that: (1) No person can be compelled in a criminal action to be a witness against himself; (2) if he offers himself, he can be cross-examined by the People's counsel only about matters to which he testified in chief; and (3) in grand jury proceedings, among others, he shall "at his own request, but not otherwise, be deemed a competent witness."[5]

The same result would follow if D's claim of privilege had been in the case of "People v. A" and the evidence of such claim was offered in "People v. D." This was so held in *People* v. *Snyder*,[6] in which the court stated:

> The trial court prejudicially erred in admitting the evidence of defendant's refusal to testify in *People* v. *Calhoun*. Likewise, the instruction quoted above which the trial judge read to the jury was prejudicially erroneous. The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions set forth above.[7]

The same results would ensue if these cases were to be decided under Rule 39. In each situation "a privilege [was] exercised . . . to refuse

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[5] *Id.* at 147-48, 323 P.2d at 434.

[6] 50 Cal.2d 190, 324 P.2d 1 (1958). The trial court's instruction was as follows:
"[T]hose accused of crime are competent as witnesses only at their own request and not otherwise. You are therefore not to draw an inference against the Defendant Nathan Harris Snyder because he refused to testify in the case of People versus Calhoun on this ground. However, you are further instructed that failure to testify on the ground that an answer might tend to incriminate may be considered by you in the light of all other proved facts in deciding the question of the defendant Nathan Harris Snyder's guilt or innocence. Whether or not his failure to testify in the case of People versus Calhoun on the ground of self-incrimination shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination." [*Id.* at 197, 324 P.2d at 5-6.]

[7] *Id.* at 197-98, 324 P.2d at 6. Suppose the evidence of privilege claim had been (1) offered after D testified, and (2) offered solely for the purpose of impeaching D's credibility as a witness.

In People v. Kynette, 15 Cal.2d 731, 750, 104 P.2d 794, 804 (1940), the court stated that the use at the trial "solely for impeachment purposes" of an incrimination privilege before a grand jury "no more destroys [the] constitutional privilege than does . . . comment" when privilege is exercised at the trial. Query: Is this changed by the *Calhoun* and *Snyder* cases?

If today the evidence would be admissible in this situation and upon this theory, this is an instance (in addition to those noted in the text) of difference between today's law and Rule 39.

to disclose [a] matter"; therefore, the trier of fact (in "People v. D") "may not draw any adverse inference therefrom."

Turning now to situations in which the principle of Rule 39 is in disagreement with current law: Suppose there is a civil action in which plaintiff calls defendant under Code of Civil Procedure Section 2055 and defendant refuses to answer pertinent inquiries on the ground of self-incrimination. Today an inference adverse to defendant may be drawn from his privilege claim because, as is said in *Fross* v. *Wotton*,[8] to hold otherwise "would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill."[9] On the other hand, the inference would be prohibited by Rule 39, which states that "if a privilege is exercised not to testify . . . with respect to particular matters, . . . the trier of fact may not draw any adverse inference therefrom."

Next, suppose there is a wrongful death action against a railroad. At the coroner's inquest the engineer of the death-dealing train claims privilege. In the wrongful death action the engineer testifies for the railroad in denial of his negligence. Today the engineer's privilege claim before the coroner may be shown to impeach his credibility, "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement of lack of negligence upon his part."[10] Again this would be otherwise under Rule 39 because "a privilege [was] exercised [at the coroner's inquest] . . . to refuse to disclose [a] matter" and therefore "the trier of fact may not draw any adverse inference therefrom."

While there may be some question as to the extent to which Rule 39 is in disagreement with current law, two matters seem to be reasonably clear. First, if the defendant in a *civil case,* for example, is called by the plaintiff as a witness and the defendant refuses to answer pertinent inquiries on the ground of self-incrimination, under the California cases an inference adverse to defendant may be drawn from his privilege claim.[11] Second, if a nonparty witness claims the privilege with respect to particular matters at issue in an action or proceeding, whether such

[8] 3 Cal.2d 384, 44 P.2d 350 (1935).

[9] *Id.* at 395, 44 P.2d at 355.

[10] Nelson v. Southern Pacific Co., 8 Cal.2d 648, 654-55, 67 P.2d 682, 685 (1937). See also Keller v. Key System Transit Lines, 129 Cal. App.2d 593, 277 P.2d 869 (1954).

Suppose, however, plaintiff calls the engineer. After a few preliminary questions plaintiff asks about the engineer's negligence. The engineer claims privilege. Claim sustained. Plaintiff tenders the engineer for cross-examination. To all questions on cross-examination touching the issue of his negligence the engineer claims privilege. Claim sustained.

Here it is believed an inference against defendant would *not* be allowed today. The engineer has not given any testimony with which his privilege claim is inconsistent; therefore, the inference could not be permitted as impeachment. Allowing the inference would in effect be permitting the conduct (privilege claim) of a witness to operate as substantive evidence against a party when that party has been unable to cross-examine the witness. The rationale of the objection to the inference in these circumstances is comparable to the traditional rationale supporting the exclusion of conduct hearsay. (Where the witness, as in Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935), is a *party* the situation is entirely different because then the principle of *admissions* becomes applicable.)

The theory above expounded explains such decisions as People v. Kynette, 15 Cal.2d 731, 104 P.2d 794 (1940); People v. Glass, 158 Cal. 650, 112 Pac. 281 (1910); People v. Irwin, 77 Cal. 494, 20 Pac. 56 (1888), and People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925), which seem to stand for the proposition that when a witness has been placed on the stand and has declined to testify this "should not be considered by the jury in determining the question of guilt or innocence" of the defendant. People v. Irwin, 77 Cal. 494, 507, 20 Pac. 56, 60 (1888).

[11] Fross v. Wotten, 3 Cal.2d 384, 44 P.2d 350 (1935).

claim was made *before* or *in* such action or proceeding, his claim may be shown to impeach the credibility of his testimony in such action or proceeding "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement." [12] While there are no California cases as to whether a *prior* claim of the privilege by a *party* to the civil action or proceeding is to be treated the same as a claim of privilege *in* the action or proceeding, there appears to be no rational basis for treating these situations differently.

The *Calhoun* and *Snyder* cases held that the use of evidence of the assertion of the privilege against self-incrimination by the defendant in a criminal case *as an indication of guilt and as support for a verdict* is directly contrary to the intent of the constitutional provisions. Although the court in the *Snyder* case went out of its way to overrule "any statements to the contrary" in *People* v. *Kynette* [13] and *People* v. *Wayne* [14]—two cases where evidence of a prior exercise of the privilege had been admitted for the limited purpose of impeaching the defendant in a criminal case—the court did not overrule or cast doubt on the holdings in the civil cases. The court also disapproved language in *Keller* v. *Key System Transit Lines*,[15] but an examination of that case discloses the following language which is in accord with *Kynette* and *Wayne:* "Even in criminal cases in this state this type of admission is allowed to impeach the credibility of a witness." [16] So far as the defendant in the criminal case is concerned, it is possible that the *Calhoun* and *Snyder* cases cast doubt upon the admissibility of a prior claim of the privilege by the defendant even for the purpose of impeaching his credibility.[17] This is not to say, however, that the Supreme Court will overrule *Fross* v. *Wotton* and *Nelson* v. *Southern Pacific Company*. In the *Fross* case the court distinguished between the party in a civil case and the defendant in a criminal case, saying that the privilege was not intended to protect the party from civil liability. *Nelson* relied on the *Fross* case to extend this to a nonparty witness, *i.e.*, a person who was neither the party in a civil case nor the defendant in a criminal case. Insofar as the court in the *Kynette* case saw no distinction between a party in a civil case or a nonparty witness and the defendant in a criminal case, the court was wrong and it has since been so demonstrated.

It is apparent from the foregoing discussion that Rule 39 is in some instances more restrictive than the current California law respecting permissible inference and comment on the exercise of the incrimination privilege. In these instances it is believed that the present law is preferable. Therefore appropriate revisions of Rule 39 will be suggested when that rule is again considered later in this study.[18]

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[12] Nelson v. Southern Pacific Co., 8 Cal.2d 648, 654-55, 67 P.2d 682, 685 (1937).
[13] 15 Cal.2d 731, 104 P.2d 794 (1940). See People v. Snyder, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958).
[14] 41 Cal.2d 814, 264 P.2d 547 (1953). See People v. Snyder, *supra* note 13.
[15] 129 Cal. App.2d 593, 277 P.2d 869 (1954).
[16] *Id.* at 598, 277 P.2d at 872.
[17] This is not entirely settled, however; the question remains open since the *Snyder* and *Calhoun* cases hold only that "[t]he use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions." People v. Snyder, 50 Cal.2d 190, 198, 324 P.2d 1, 6 (1958). See WITKIN, CALIFORNIA EVIDENCE § 475 (1958).
[18] See discussion in the text, *infra* at 520-523.

Recommendation

Today there exists a hodge-podge of statutes on the incrimination privilege. These are as follows:

> Penal Code Section 688. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.
>
> Penal Code Section 1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.
>
> Penal Code Section 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.
>
> This section shall not be construed as compelling any such person to testify.
>
> Code of Civil Procedure Section 2065 [in part]. "A witness . . . need not give an answer which will have a tendency to subject him to punishment for a felony."

These statutes plus Article I, Section 13 of the State Constitution and numerous decisions constitute the sources of the present incrimination law in California. Rule 23(1) and (3), Rule 24, and Rule 25(a), (b), (c) and (e)—except as Rule 25(e) may require testimony—would merely be declaratory of existing law. Possibly the same is true of Rule 25(d). All of these are recommended for approval. Rule 23(4) and Rule 25(f) and (g) would probably be unconstitutional and, therefore, are recommended for disapproval. Rule 37 would be unconstitutional unless construed to exclude the privilege against self-incrimination from its operation. This rule is in terms applicable to all privileges. Specific recommendations concerning Rules 37 and 38 are deferred until later in the study under the portions which deal generally with these rules.[19] Similarly, recommendations regarding Rule 39 (other than the preceding suggestion to delete the "Subject to" clause) are set out in that part of the study which deals with this rule.[20]

As stated at the outset of this study the merit, if any, of those rules and subdivisions above recommended for approval is that they codify and thus summarize and collect in one place a large body of existing

[19] See discussion in the text, *infra* at 509-519.
[20] See discussion in the text, *infra* at 520-523.

rules and principles which today must be extracted from a rather vast amount of case material. Amending the California statutes above mentioned to conform to the enactment of the Uniform Rules recommended would be relatively simple. The following changes would be desirable:

1. Eliminate the first clause of Penal Code Section 688 because it would be superfluous.
2. Eliminate the first clause of Penal Code Section 1323 because it would be superfluous (but leave the second clause intact as a substitute for Rule 25(g)).
3. Repeal Penal Code Section 1323.5 because it would be superfluous.
4. Repeal the portion of Code of Civil Procedure Section 2065 quoted above because it would be superfluous.

As revised and amended in accord with the foregoing suggestions, Rules 23, 24 and 25 are recommended for approval.

RULE 26—LAWYER-CLIENT PRIVILEGE

Introduction

This portion of the study deals with Rule 26, the lawyer-client privilege. The full text of Rule 26 is as follows:

RULE 26. *Lawyer-Client Privilege.*

(1) *General Rule.* Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative. The privilege available to a corporation or association terminates upon dissolution.

(2) *Exceptions.* Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (d) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(3) *Definitions.* As used in this rule (a) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional rela-

tionship, (c) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

It will be noted that Rule 26 is in three parts: (1) General Rule, (2) Exceptions to the General Rule, and (3) Definitions.[1] This portion of the study is similarly divided into three divisions. The general rule and definitions are considered in the first division. In this connection, the general rule formulated by Rule 26(1) is compared with the rule of privilege presently in force in this State, namely, the rule declared by Code of Civil Procedure Section 1881(2) and the judicial construction thereof. The exceptions to the general rule are examined in the second division, comparing the exceptions of Rule 26(2) with the recognized California exceptions. Recommendations regarding certain clarifying and corrective amendments to Rule 26 are set forth in the third division.

General Rule

For convenience of discussion, the following portion of Rule 26(1) is considered to be the general rule of the Uniform Rules relating to the lawyer-client privilege.

> [C]ommunications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it . . . . The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.

The California general rule is partially legislative and partially decisional. The legislation is Code of Civil Procedure Section 1881(2) which provides as follows:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . .

[1] In their Comment on Rule 26 the Commissioners on Uniform State Laws remark that the "rule embodies the subject matter of [American Law Institute] Model Code Rules 210, 211, 212, and 213." The official Comment on Rule 210 gives the following concise statement of the history and reason for the privilege:

> This privilege originally belonged to the lawyer. He was not required to disclose a confidential communication from a client, although the client by a bill of discovery might be compelled to reveal it. The notion back of the rule was that a lawyer ought not to be forced to violate his obligation as a gentleman to keep secret a matter told him in confidence. That notion has long since been outmoded. The privilege is no longer that of the lawyer but that of the client. And the continued existence of the privilege is justified on grounds of social policy. In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases. [MODEL CODE RULE 210 Comment.]

> (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.[2]

The URE and California rules are compared in several respects in the following discussion.

Client's Communication-Lawyer's Advice

Both rules cover "communications" by the client to the lawyer. Both also cover the lawyer's "advice" to the client. Section 1881(2) does so directly. Rule 26(3)(b) does so indirectly by defining the term "communication" as including "advice given by the lawyer in the course of representing the client."

Professional Relationship

Both rules require as a condition of privilege that the client's communication and the lawyer's advice be in the course of a professional lawyer-client relationship. (Rule 26: "in the course of that relationship"; Section 1881(2): "in the course of professional employment.")

Confidentiality

Rule 26(1) refers to "communications . . . *in professional confidence.*" (Emphasis added.) Section 1881(2) refers to "*any* communications made by the client to [his attorney]." (Emphasis added.) Despite the broader reference of Section 1881(2), the section is limited by construction to confidential communications.[3]

Whose Privilege?

Under Section 1881(2) the attorney does not possess the lawyer-client privilege.[4] Rather the privilege is the client's and his alone. Thus if the attorney is tried upon a criminal charge, he has no valid objection when his former client voluntarily reveals relevant matters

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[2] This statute was enacted in 1872 and derived from Civil Practice Act § 396 (Cal. Stats. 1851, Ch. 5, p. 114) which read as follows:

> An Attorney or Counsellor shall not, without the consent of his client, be examined as a witness as [to] any communication made by the client to him, or his advice given thereon, in the course of professional employment.

See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955).

In Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866 (1896), § 1881(2) is said to be "a declaration without any substantial modification of a principle that has always obtained." *Id.* at 472, 45 Pac. at 867.

The ethical duty of the attorney respecting the privilege is stated as follows in CAL. BUS. & PROF. CODE § 6068: "It is the duty of an attorney . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."

[3] "The argument here seems to assume that every communication between attorney and client is privileged. This is not the law. To be privileged 'the communication must be confidential, and so regarded, at least by the client, at the time.'" People v. Hall, 55 Cal. App.2d 343, 356, 130 P.2d 733, 740 (1942). See also City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951).

On the relationship of the lawyer-client privilege to discovery and use of an adverse party's expert information, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 STAN. L. REV. 455 (1962).

On the request for inspection of materials gathered by or for an attorney in his preparation for litigation, see Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961), noted in 14 STAN. L. REV. 606 (1962).

[4] Except possibly with respect to disclosures by his secretary, stenographer or clerk. (See discussion in the text accompanying notes 10 and 11, *infra* at 388.)

hitherto confidential between the client and himself. As is said in *People* v. *Riordan:* [5]

> It was no concern of [defendant] if his former client waived the right to treat their transactions and conversations as confidential [because] the secrecy [thrown] about communications of this character is a legal protection to the client [and] there is no bar to its revelation if the client chooses to waive the rule.[6]

A clear expression of the same view is the following taken from *Abbott* v. *Superior Court:* [7]

> The privilege . . . is the client's, not the attorney's, and if it results in the protection of the attorney it does so only accidentally as a result of the assertion of the client's right.[8]

In keeping with this modern view of the privilege,[9] the Model Code rules were premised on the basis that the privilege is the client's and his only (Model Code Rule 209(c)(i)). That the draftsmen of the Uniform Rules intend the same unilateral basis of the privilege is indicated in their Comment on Rule 26: "This rule embodies the subject matter of [the] Model Code Rules."

Guardian and Ward

Rule 26(1) provides in part: "The privilege may be claimed by the client . . . , or if incompetent, by his guardian." Rule 1(9) defines the terms "guardian" and "incompetent" as follows:

> (9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

Rule 26(3)(a) provides in part as follows: "As used in this rule (a) 'Client' . . . includes an incompetent whose guardian . . . consults the lawyer or the lawyer's representative in behalf of the incompetent."

All of these provisions are based upon parallel provisions of the Model Code. Thus Rule 26(1) parallels Model Code Rule 209(c)(i); Rule 1(9) parallels Model Code Rule 1(6); and Rule 26(3)(a) parallels Model Code Rule 209(a).

The history of Uniform Rule 26(3)(a) and Model Code Rule 209(a), both defining the concept "client" to include an incompetent, is instructive. During the debate on the Model Code, Senator Pepper posed this question:

> In the case in which there is infancy and the guardian of a minor and a lawyer is retained by the guardian and the minor makes a disclosure to the lawyer retained by the guardian, *Query* upon attaining age has the minor the privilege? [10]

[5] 79 Cal. App. 488, 250 Pac. 190 (1926).
[6] *Id.* at 498, 250 Pac. at 194. See to the same effect Stafford v. State Bar, 219 Cal. 415, 26 P.2d 833 (1933).
[7] 78 Cal. App.2d 19, 177 P.2d 317 (1947).
[8] *Id.* at 21, 177 P.2d at 318.
[9] See note 1 *supra* to the effect that the privilege originally belonged to the lawyer.
[10] 19 A.L.I. PROCEEDINGS 150 (1942).

The American Law Institute then voted to instruct the Reporter (Professor Morgan) to redraft Rule 209(a) to make it clear that "the privilege may be asserted by the person formerly under disability." [11] For this purpose Professor Morgan apparently chose the language quoted above from Uniform Rule 26(3)(a).

Suppose that the guardian of a 20-year-old infant consults a lawyer in behalf of the infant. The former infant has now reached majority and is party to an action. Under Rule 26(3)(a) he is a "client." As such, the former infant may claim the privilege under Rule 26(1) because "the privilege may be claimed by the client in person."

By way of contrast, however, suppose the 20-year-old infant himself consulted the lawyer. Upon reaching majority, should he not be regarded as the holder of privilege? The answer should be "Yes." It is doubted, however, whether Professor Morgan's language covers this situation. Thus, to clarify this situation, Rule 26(3)(a) should be amended as follows (new matter italicized):

> "Client" . . . includes an incompetent *who himself consults or* whose guardian so consults . . . .

No California authority on the matters discussed in this section has been found. However, it seems entirely reasonable to provide that during guardianship the guardian has control of the privilege which he may accordingly claim or waive,[12] and that after guardianship is terminated the former ward has control of the privilege.[13]

Ruling on Claim of Privilege

The privilege stated in Rule 26(1) is applicable only when the conditions requisite for its existence (lawyer-client relationship—professional confidence) are "found by the judge." Rule 8 provides that when "a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises." Thus, if there is a question whether the lawyer-client relationship existed when a given communication took place or whether a given communication was intended to be confidential, it seems that the judge is not bound by the mere statement of the privilege claimant regarding his conclusion on such questions. On the contrary, the judge must investigate and decide the question.

What is "implied" by Rule 26 as to who has the burdens referred to in Rule 8? It is probable that the proponent of evidence of the communication does not possess the burdens to negate privilege, but, instead, the privilege claimant possesses the burdens to establish privilege. This guess is prompted by the fact that such is the law today.

Code of Civil Procedure Section 1881(2) does not spell out any of the procedural principles adverted to in the two preceding paragraphs.

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[11] *Id.* at 151.

[12] As to waiver by the guardian, see Yancy v. Erman, 99 N.E.2d 524 (Ohio C.P., 1951) which the court states is a case of first impression in the United States.

[13] See 8 WIGMORE § 2330. See also MODEL CODE Rule 105(e).

However, the decisional law of this State seems to be in accord with these principles. Thus in *Hager* v. *Shindler*,[14] the court states:

> [W]hether a communication by a client to his attorney was made in confidence, is a question of fact, to be disposed of on principles applicable universally to questions of that character.
>
> We must assume that the court below passed upon the point as involving a matter of fact . . . . [W]e consider the finding [of the court below] to be well sustained by the evidence.[15]

The following excerpt from a later case clearly reveals the URE procedure as the proper procedure:

> The first assignment of error argued by plaintiff relates to the ruling of the court admitting evidence of certain statements made by him to an attorney at law over the objection that they were privileged. When this objection was made, and before passing upon it, the court took the testimony of witnesses to determine whether or not these statements were made in the course of professional employment. This was the proper procedure. The court found that the statements were not so made. It being within the province of the trial court to pass upon this, like any other question of fact, and the evidence being conflicting, the conclusion of the trial court will stand as final.[16]

[14] 29 Cal. 47 (1865).

[15] *Id.* at 64. By way of contrast two earlier cases—Gallagher v. Williamson, 23 Cal. 331 (1863), and Landsberger v. Gorham, 5 Cal. 450 (1855)—seem to suggest that the attorney must decide what is and what is not privileged.

[16] Stewart v. Douglass, 9 Cal. App. 712, 714, 100 Pac. 711, 712 (1909); see Reese v. Bell, 138 Cal. xix, 71 Pac. 87 (1902).

Query: Suppose in the action of "P v. D," D calls P's former attorney to testify to P's communication to the attorney. P objects. Objection sustained. May D now make an offer of proof, thus revealing the communication? In Collette v. Sarrasin, 184 Cal. 283, 193 Pac. 571 (1920), the trial judge sustained plaintiff's claim of privilege and refused to permit defendant to make an offer of proof. The court held that the claim was improperly sustained and spoke as follows with reference to the refusal to allow the offer of proof:

> Respondent [plaintiff] claims that the offer of proof was particularly objectionable because the effect of the offer would be to reveal the very matter that was privileged. If this contention be upheld it is obvious that counsel are thereby precluded from showing or offering to show that the particular conversation or communication was within any of the well-recognized exceptions to the rule excluding privileged communications, and would be also prevented from offering any proof as to whether or not the witness was in fact acting as an attorney. It is true that an offer of testimony which incorporated privileged communications of such a character that it would reflect upon the client, if proved in evidence, might be nearly as objectionable as the proof itself, but something should be left to the judgment of the attorney making the offer and to the witness, who, of course, is aware of his obligations as an attorney. It is proper to ask the attorney whether or not with relation to the transaction under inquiry he was acting as the attorney for the person making the statements. If either of the parties are not satisfied with the answer of the witness, the dissatisfied party can ask such questions as are essential to enable the court to determine whether or not the relationship existed. If the relationship is established to the satisfaction of the court, it remains to be determined whether or not the communication was of such a character as comes within any of the exceptions to the rule concerning communications between attorney and client. The burden of showing that the confidential relation existed was upon the [plaintiff] respondent. The showing made being insufficient for that purpose, the rulings excluding the testimony were for that reason erroneous and the judgment must be reversed. [*Id.* at 288-289, 193 Pac. at 573.]

As to who possesses the burden with reference to privilege, note the following explicit statement in *Sharon* v. *Sharon:*[17]

> The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute [Section 1881(2)].[18]

Coerced Disclosure by Client

Rule 26(1)(b) provides that "a client has a privilege . . . to prevent his lawyer from disclosing" the communications there described. Section 1881(2) provides that "an attorney cannot, without the consent of his client, be examined as to" the communication or advice there described. Thus under both provisions the client may prevent the attorney from testifying to the client's statements or to the attorney's advice.

What, however, is the situation if disclosure of the client's statement or the attorney's advice is sought from the client as a witness? Rule 26(1)(a) explicitly extends privilege in this situation in these terms: "[A] client has a privilege (a) if he is the witness to refuse to disclose." Section 1881(2) is silent on this aspect of the privilege. However, judicial decisions expand the privilege to this extent.[19]

Common Problems Under Both URE and California Rule

Insofar as the general matters above considered are concerned, there is substantial identity of principle between the Uniform Rules and California law. Therefore, if this State were to adopt Rule 26, much of the case law would in no way be affected.

The following example is a good illustration of this identity of principle. It involves the question frequently arising as to whether an attorney was consulted in a professional or a nonprofessional capacity. As stated in *Ferguson* v. *Ash,*[1] the governing principle is as follows:

> There are many cases in which an attorney is employed in business not properly professional and where the same might have been transacted by another agent. In such cases the fact that the agent sustains the character of an attorney does not render the communication attending it privileged and that may be testified to by him as by any other agent.[2]

The application of this standard has produced a considerable body of precedent.[3] If Rule 26 were adopted, these cases would be germane to the question of what constitutes communication "in the course of [lawyer-client] relationship" in the sense of Rule 26.

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[17] 79 Cal. 633, 22 Pac. 26 (1889).

[18] *Id.* at 677, 22 Pac. at 39. See to the same effect Collette v. Sarrasin, 184 Cal. 283, 193 Pac. 571 (1920).

[19] Verdelli v. Gray's Harbor etc. Co., 115 Cal. 517, 47 Pac. 364 (1897) (client's communication); I.E.S. Corporation v. Superior Court, 44 Cal.2d 559, 283 P.2d 700 (1955) (attorney's advice). See Note, 10 STAN. L. REV. 297, 300 (1958).

[1] 27 Cal. App. 375, 150 Pac. 657 (1915).

[2] *Id.* at 379, 150 Pac. at 659.

[3] Estate of Perkins, 195 Cal. 699, 235 Pac. 45 (1925) (attorney's advice "in the nature of business rather than legal advice"); Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258 (1912) (attorney acted "rather as a scrivener than attorney"); McKnew v. Superior Court, 23 Cal.2d 58, 62, 142 P.2d 1, 3 (1943) (attorney's service was to witness client's deposit in a bank—"This service did not require any particular legal knowledge. . . . It could have been performed as well and as effectively by a layman as by a lawyer"). See also cases collected in Note, 10 STAN. L. REV. 297, 301-02 nn. 22-29 (1958).

Some of the above cases also involve the question whether confidence was intended. See note 4 *infra.*

Likewise many cases have arisen which turn on the point of whether or not the communication was intended to be confidential.[4] If Rule 26 were adopted, these cases would be germane to the question of what constitutes "professional confidence" in the sense of Rule 26.

Furthermore, problems have arisen as to the extent to which the client can avoid disclosure of documents in discovery proceedings by turning such documents over to his lawyer.[5] Similarly, problems arise regarding the extent to which the client, by choosing an agent to investigate and report to the attorney, can disable such agent from disclosing either what he has discovered or reported to the lawyer or both.[6] Without pausing here to analyze and discuss these decisions,[7]

[4] Brunner v. Superior Court, 51 Cal.2d 616, 335 P.2d 484 (1959) (identity of client); Mission Film Corp. v. Chadwick Pictures Corp., 207 Cal. 386, 278 Pac. 855 (1929) (defendant gives his attorney statement to be submitted to plaintiff's attorney); *Ex parte* McDonough, 170 Cal. 230, 149 Pac. 566 (1915) (identity of client); Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889) (The "communication that took place was on a public street, and in the presence of and mostly with a third party, and was not, for that reason, in any sense confidential"); People v. Gilbert, 26 Cal. App.2d 1, 78 P.2d 770 (1938) (client's mental condition).

For an extensive collection of cases on the question of presence of a third party as negating confidentiality, see Note, 10 STAN. L. REV. 297, 308 (1958).

Some of the above cases also involve the question whether the attorney-client relationship existed. See note 3 *supra*.

[5] If the document is brought into being solely as a communication to the attorney, such as a confidential letter from client to attorney, it is privileged. Hardy v. Martin, 150 Cal. 341, 89 Pac. 111 (1907); Federated Income Properties v. Hart, 84 Cal. App.2d 663, 191 P.2d 59 (1948); New York Etc. Co. v. Superior Court, 30 Cal. App.2d 130, 85 P.2d 965 (1938). If, on the other hand, the document was not created either wholly or partially as a communication to the attorney, it is not within the attorney-client privilege and so far as this privilege is concerned the document is subject to discovery. As is said in Myers v. Kenyon, 7 Cal. App. 112, 93 Pac. 888 (1907):

> It would be a strange doctrine that a client could deliver a map, deed, contract, or other document into the hands of his attorney, and then prevent such map or other document from ever being brought to light or produced, for the reason that such delivery was a privileged communication. [*Id.* at 115, 93 Pac. at 890.]

See also People v. Rittenhouse, 56 Cal. App. 541, 206 Pac. 86 (1922).

In between these two extremes are situations in which the document is created, in part as a communication to the lawyer and in part for some other purpose. Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) (action against defendant company for personal injuries arising out of a collision with defendant's bus. Plaintiffs sought inspection of witnesses' statements which defendant's investigators had obtained at the scene of the accident and subsequently transmitted to defendant's attorney. The superior court ordered that the documents be produced. On writ of prohibition to the Supreme Court, the writ was denied). Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025 (1954) (action against city and city employee for injuries received on a bus operated by the city. Plaintiff sought an order allowing inspection of the employee's accident report rendered to the city and now in the hands of the city's attorneys and of photographs taken by the city and now in the lawyer's hands. Held: The order should be refused because the "dominant purpose" of creating such documents was to communicate to the city's attorney). Commenting on the *Greyhound* case, Note, 14 STAN. L. REV. 606 (1962), it is stated:

> By holding that witnesses' statements obtained by client's agents for transmission to the attorney are not privileged, the *Greyhound* court gave the *Holm* rule a narrow interpretation, ignoring the apparent legislative intent of 2016(b). *Greyhound* makes clear that the bus driver's statement in *Holm* was privileged as a communication made by client's employee; the witnesses' statements in *Greyhound* were not protected because they were communications by independent third parties. In each case the fact that transmission to the attorney was made by client's agents is immaterial. Although contrary to legislative intent, the holding conforms to the traditional justification of the attorney-client privilege. The privilege is intended to encourage full disclosure from client to lawyer to permit counsel to give the best possible representation. There seems no reason to extend protection to nonconfidential material simply because client's agents collected it. [*Id.* at 610 (footnote omitted).]

See also Jessup v. Superior Court, 151 Cal. App.2d 102, 311 P.2d 177 (1957).

[6] City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951); Webb v. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931); Wilson v. Superior Court, 148 Cal. App.2d 433, 307 P.2d 37 (1957). *Cf.* People v. Heart, 1 Cal. App. 166, 81 Pac. 1018 (1905).

[7] The leading case is Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). For an excellent discussion, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962), and Note, 10 STAN. L. REV. 297 (1958).

it should be emphasized that, since these decisions were reached by construing and applying principles substantially the same as those stated in Rule 26, adoption of this rule would not *ex proprio vigore* affect such decisions.

Who Is a Lawyer?

Rule 26(3)(c) defines a lawyer, for purposes of the lawyer-client privilege, as follows:

> "[L]awyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

There is little California law on this aspect of the lawyer-client privilege.[8] However, there is convincing fairness in this URE concept of "lawyer" in the context of lawyer-client privilege. To require a client to run the risk that one he reasonably believed qualified to practice law is in fact disqualified would seem incompatible with the purpose of the privilege.[9]

The Lawyer's Clerk

Section 1881(2) of the Code of Civil Procedure provides in part:

> [A]n attorney's secretary, stenographer or clerk [cannot] be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

This was added to the section by amendment in 1893.[10] The evident purpose of the amendment was to extend the lawyer-client privilege to the attorney's secretary, stenographer or clerk. Here, however, the privilege is expressly given to the attorney rather than to the client. Possibly this vesting of the privilege in the attorney was a legislative inadvertence which will be corrected by construction.[11] At any rate, it seems fairly clear that it is the intent of Rule 26 both to extend privilege to the attorney's secretary, stenographer or clerk, and to vest such privilege in the client. (However, as hereinafter suggested, a clarifying amendment of the rule is desirable in this regard.)[12]

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[8] In Carroll v. Sprague, 59 Cal. 655 (1881), the court speaks as follows:

> The communication which Eckert made to Burt in regard to the ownership of the property in dispute was privileged, if made for the purpose of obtaining the professional advice or aid of the latter in some matter relating to said property, and that would be so if Eckert supposed at the time that Burt was his attorney, although in fact he was not. [*Id.* at 659-660.]

[9] "Since full disclosure is encouraged by an assurance to the client that his communications will not be disclosed, the client's reasonable belief that the person he is consulting is an attorney should be sufficient." Note, 10 STAN. L. REV. 297, 301 (1958).

[10] Historical Note, CAL. CODE CIV. PROC. § 1881 (West 1955). Cal. Stats. 1893, Ch. 217, § 1, p. 301.

[11] See the following comment in Note, 10 STAN. L. REV. 297 (1958):

> Despite the literal wording of § 1881(2), the client would probably also control the disclosure of any confidential communication by the attorney's secretary or clerk. To leave control with the attorney would detract from rather than effectuate the purpose of full disclosure by the client. The court has never had to decide this problem, and cases involving an attorney's employees have allowed the testimony on various other grounds. McIntosh v. State Bar, 211 Cal. 261, 294 Pac. 1067 (1930) (knowledge not acquired in capacity as secretary of attorney); Mitchell v. Towne, 31 Cal. App.2d 259, 87 P.2d 908 (1st Dist. 1939) (clerk acted as witness); People v. Eiseman, 78 Cal. App. 223, 248 Pac. 716 (1st Dist. 1926), *appeal dismissed per curiam*, 273 U.S. 663 (1927) (knowledge not acquired in capacity as secretary of attorney). [*Id.* at 300 n.17.]

[12] See the discussion in the text, *infra* at 400.

Exclusion by Judge on His Own Motion

Suppose in the criminal action of "People v. D," D offers attorney L to testify to a confidential communication made to L by one C. The prosecution does not object. L (who no longer represents C) does not object. The court, however, on its own motion refuses to permit L to testify to the communication.

Under the following provision of Model Code Rule 105(e) the judge's conduct was proper:

> The judge . . . in his discretion determines . . . (e) whether to exclude, of his own motion, evidence which would violate a privilege of a person who is neither a party nor the witness from whom the evidence is sought . . . .

Under a dictum in *People* v. *Atkinson*,[1] the judge's conduct would likewise be proper California practice.

The Uniform Rules omit any provision similar to Rule 105(e). This omission, however, need not be regarded as indicative of an intent to negate the judge's power to act on his own motion. It is believed that the Commissioners would regard the power in question as an inherent power of the court and, as such, not necessary to be stated in the Uniform Rules. If this be so, there is, of course, no difference between the Uniform Rules and California as to the judge's power to act *ex mero motu*.[2]

Death of Client—Effect on Privilege

There was much difference of opinion among the draftsmen of the Model Code and the members of the American Law Institute as to the effect upon the lawyer-client privilege of the death of the client. Some, such as Professor Morgan and Judge Learned Hand, advocated the view that the privilege should not survive the death of the client.[3] Others thought that the privilege should survive death and that the client's personal representative, devisee, or heir should be entitled to claim the privilege.[4] Still others thought that the privilege should survive but should be vested only in the client's personal representative.[5] This last is the view which prevailed and which was incorporated in the Model Code and later in the Uniform Rules. (Note that the second sentence of Rule 26 provides in part: "The privilege may be claimed by the client . . . , or if deceased, by his personal representative.")

It *may* be that the current California view is not any of the three views stated above but is, rather, a fourth view to this effect: The privilege survives the death of the client and nobody can waive the privilege in behalf of the deceased client. Or, to put it another way, any party is entitled to claim the privilege in behalf of the deceased client.

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[1] 40 Cal. 284, 285 (1870).

[2] Professor McCormick regards the power of the court to act in behalf of the absentee privilege holder as well established and points out that the power may be invoked upon request of a party. MCCORMICK §§ 73, 96. See also the following Comment by the N.J. Court Committee:

> Model Code Rule 105(e), which is not adopted in the Uniform Rules, provides that if the client is neither party nor witness, the judge in his discretion may of his own motion exclude a privileged communication. This appears to be the New Jersey law. [N.J. COMMITTEE REPORT at 69.]

[3] 19 A.L.I. PROCEEDINGS 138, 143-44 (1942).

[4] *Id.* at 156-57.

[5] *Id.* at 158.

This is the view California has adopted concerning the physician-patient privilege [6] and the marital privilege for confidential communication.[7] It may, therefore, be the view in force by analogy respecting the lawyer-client privilege. If so, there could today be no waiver in a case such as the following: Action by an administrator for wrongful death of his intestate; plaintiff administrator calls intestate's lawyer to testify to intestate's relevant confidential communication to the lawyer. Defendant's objection on the basis of Code of Civil Procedure Section 1881(2) is sustained.

If this is the California view, it would clearly be changed—and meritoriously so—by adopting the URE view. Under that view the executor or administrator is the sole holder of the posthumous privilege of the deceased client. As such holder he could, of course, elect (under Rule 37) to waive the privilege.

Exceptions to General Rule

Uniform Rule 26(1) sets up a general rule of privilege. Rule 26(2) sets forth five lettered exceptions to the general rule. These exceptions are in large part presently operative in California. None of these exceptions is expressly stated in Code of Civil Procedure Section 1881 (2). Each is, however, more or less firmly recognized to some extent by judicial decision. The terms of these exceptions and the extent of their present existence in this State are discussed below.

The Exception in Rule 26(2)(a)—Client's Contemplated Crime or Tort

This exception declares that the lawyer-client privilege is inapplicable "to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort."

California clearly recognizes this exception insofar as future criminal or fraudulent activity is concerned.[8] Note, however, that this exception would bar privilege in case of consultation with a view to commission of *any* tort. This seemingly extends the traditional scope of this exception. Professor Wigmore refers to the "inclination to mark the line at crime and civil fraud." Then he attacks this limitation in the following terms:

> Yet it is difficult to see how any moral line can properly be drawn at that crude boundary [*i.e.*, crime and civil fraud], or how the law can protect a deliberate plan to defy the law and oust an-

[6] See the discussion in the text, *infra* at 408-410.

[7] Emmons v. Barton, 109 Cal. 662, 669-670, 42 Pac. 303 (1895). See also the discussion in the text, *infra* at 444-445.

[8] "The continuous and unbroken stream of judicial reasoning and decision is to the effect that communications between attorney and client having to do with the client's contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of this privilege. [Citations omitted.]

"Some of the cases hold that as a foundation for such evidence there must be a prima facie showing of the criminal activities of the client." Abbott v. Superior Court, 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947).

"[W]hen the client seeks advice that will serve him in the contemplated perpetration of a fraud there is no privilege," Wilson v. Superior Court, 148 Cal. App.2d 433, 443, 307 P.2d 37, 44 (1957) (dictum). See to the same effect *Ex parte* McDonough, 170 Cal. 230, 149 Pac. 566 (1915); Agnew v. Superior Court, 156 Cal. App.2d 838, 320 P.2d 158 (1958).

> other person of his rights, whatever the precise nature of those rights may be.[9]

Professor McCormick is of like opinion.[10] It may be noted, however, that in New Jersey the exception was revised so that privilege obtains unless the consultation is "in aid of the commission of a crime or a fraud." [11]

Note that the exception in Rule 26(2)(a) applies only "if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding." Rule 26(2)(a) is in substance the same as Model Code Rule 212. The Comment on the Model Code rule states: "Only a few cases discuss the showing which must be made as a preliminary to compelling the disclosure. The Rule is in accord with the statement of Mr. Justice Cardozo in Clark v. United States." [12]

Mr. Justice Cardozo's statement referred to in the Comment is the following dictum in the *Clark* case:

> There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. . . . But this conception of the privilege is without support in later rulings. "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." O'Rourke v. Darbishire, (1920) A.C. 581, 604. To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie* evidence that it has some foundation in fact." O'Rourke v. Darbishire . . . . When that evidence is supplied, the seal of secrecy is broken.[13]

Apparently Professor Wigmore does not discuss the foundation problem. Professor McCormick does so only briefly, citing Rule 26(2)(a) and the *Clark* and *O'Rourke* cases.[14]

Only one reference to the foundation problem has been found in California. In *Abbott* v. *Superior Court*,[15] the court refers to the many decisions holding that consultation to perpetrate crime or fraud is

[9] 8 WIGMORE § 2298, at 579.

[10] MCCORMICK § 99. Compare, however, the following criticism in Note, 45 CALIF. L. REV. 75 (1957):

> This rule [*i.e.*, Uniform Rule 26(2)(a)] has extended the exception to the attorney-client privilege to include communications in furtherance of any tort (the cases have generally drawn the line at fraud), as well as of a crime. In spite of impressive authority which seems to advocate this extension of the exception (8 WIGMORE, EVIDENCE § 2298 (3d ed. 1940)), it is submitted that perhaps this language is too broad considering the technical nature of some torts. This rule would go far towards eradicating a valuable right of the citizen who is seeking legal advice and would tend to make it even more difficult for the attorney to secure the information he needs to defend his client's legitimate interests. [*Id.* at 77 n.15.]

This criticism is repeated in Note, 10 STAN. L. REV. 297, 312 n.91 (1958).

[11] N.J. REV. STAT. § 2A:84A-20 (as enacted by N.J. Laws 1960, Ch. 52, § 20, p. 456). The full text of the New Jersey rule, as revised, is set out in note 17, *infra* at 401.

[12] MODEL CODE Rule 212 Comment.

[13] Clark v. United States, 289 U.S. 1, 15 (1933).

[14] MCCORMICK § 99, pp. 200-202.

[15] 78 Cal. App.2d 19, 177 P.2d 317 (1947).

without the privilege. Then the court adds the following concerning foundation:

> Some of the cases hold that as a foundation for such evidence there must be a prima facie showing of the criminal activities of the client.[16]

The court added that in the case before it there was "detailed and voluminous" evidence of this character.[17]

The court in the *Abbott* case cited an American Law Reports Annotation, which states as follows:

> The mere assertion, by one seeking to apply the exception under consideration, of an intended crime or fraud on the part of the client will not destroy the privilege ordinarily accorded communications between attorney and client, for to destroy the privilege there must be something to give color to the charge; there must be prima facie evidence that it has some foundation in fact.[18]

The Annotation cites the following in support of this proposition: the *Clark* and *O'Rourke* cases and a few cases from states other than California.

It is concluded that there is little case or text authority on the foundation requirement of Rule 26(2)(a), and such authority as there is does not make a convincing case in support of the requirement. It is of interest to note that in New Jersey the foundation requirement was specifically excluded from the rule,[19] even though it may formerly have been required under New Jersey law.[20]

The Exception in Rule 26(2)(b)—Parties Claiming Through Client

This exception makes the lawyer-client privilege inapplicable "to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction."

Suppose T dies. A writing purporting to be his will leaves all of his property to P. P propounds the writing for probate. D, T's heir, contests the writing. Prior to his death T made a statement to his attorney indicative of the validity (or invalidity) of the writing as a will.

Here there is a "communication relevant to an issue between parties all of whom claim through the client . . . by testate or intestate succession." Under the Rule 26(2)(b) exception, such communication is not privileged. Under the rule generally prevailing today such communication is not privileged. Likewise under California law such communication is not privileged. As was said in the recent leading case of *Paley* v. *Superior Court*:[1]

> The rule is well established in this state, as elsewhere, that the privilege does not survive the testator's death when the matter of his conversations or instructions arises in will contests, petitions to determine heirship, petitions to construe an ambiguous will, or

[16] *Id.* at 21, 177 P.2d at 318.
[17] *Ibid.*
[18] 125 A.L.R. 519 (1940).
[19] N.J. REV. STAT. § 2A:84A-20. See N.J. COMMISSION REPORT at 32.
[20] See N.J. COMMITTEE REPORT at 69.
[1] 137 Cal. App.2d 450, 290 P.2d 617 (1955).

> any other type of controversy involving only the heirs or next of kin and the legatees or devisees of the testator. [Citations omitted.] Though varying explanations of the reason for this rule have been given,[2] it is a court made principle based upon considerations of public policy [citations omitted] and is limited to controversies between persons in privity with the testator's estate. Between persons claiming under testator and others who are not in privity with his estate the privilege survives. This is a generally accepted proposition. [Citations omitted.] The rule is usually stated in terms of application to "strangers" or persons claiming adversely to the estate.[3]

Now suppose there is an action by P against D, executor of T. The action is for damages for injury to P allegedly inflicted by T's negligence. At the trial P calls T's attorney to testify to T's confidential communications respecting P's injuries. Objection is sustained. This is a clear case of survivorship of the privilege. As is pointed out in the preceding quotation, the rule of nonsurvivorship "is limited to controversies between persons in privity with the testator's estate." As is also there pointed out, the privilege survives in a controversy between a person claiming under decedent and one not "in privity" with decedent's estate—a so-called "stranger." In the hypothetical case, P is clearly a "stranger" in this sense.

By way of contrast, suppose that P, as sole heir of T, sues D to have a grant deed from T to D declared a mortgage. Is D "in privity" with the estate so that the privilege does not survive or is D a "stranger" so that the privilege does survive? Outside of California the authorities are conflicting. Within California the question is involved in obscurity. Such out-of-state conflict and in-state confusion may best be revealed by a long quotation from the opinion in the *Paley* case:

> But the question of who fall within this category ["stranger"] is involved in some obscurity, especially in California. Whether one who claims under contract with or conveyance from the testator is a "stranger" within the rule has met with diverse answers in the courts. [Citations omitted.] . . . .
>
> In California the first case on the subject appears to be *In re Bauer,* 79 Cal. 304, 312 [21 P. 759]. That was a contest over final

[2] Professor McCormick summarizes the various rationales as follows:

> The accepted theory is that the protection afforded by the privilege will in general survive the death of the client. But under various qualifying theories the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death, namely, cases involving the validity or interpretation of a will, or other dispute between parties claiming by succession from the testator at his death. This result has been reached by different routes. Wigmore argues, as to the will-contests, that communications of the client with his lawyer as to the making of a will are intended to be confidential in his life-time but that this is a "temporary confidentiality" not intended to require secrecy after his death and this view finds approval in some decisions. Other courts say simply that where all the parties claim under the client the privilege does not apply. The distinction is taken that when the contest is between a "stranger" and the heirs or personal representatives of the deceased client, the heirs or representatives can claim privilege, and they can waive it. Even if the privilege were assumed to be applicable in will-contests, it could perhaps be argued that since those claiming under the will and those claiming by intestate succession both equally claim under the client, each should have the power to waive. [McCormick § 98, at 199-200.]

[3] Paley v. Superior Court, 137 Cal. App.2d 450, 457, 290 P.2d 617, 621 (1955).

distribution, decedent's son claiming as sole devisee and the widow under a homestead declaration upon alleged community property. It was held error to exclude testimony of the attorney who prepared the declaration of homestead. At page 312 the court said: "One other point remains to be considered. The attorney at law who drew the declaration of homestead, and was at the time apparently acting for the deceased and his wife in the matter, was interrogated on behalf of contestant as to whether the recital in the declaration of homestead was explained to Mrs. Bauer, if she understood it, what explanation was given, and what she knew about the matter. This was objected to on the ground that it called for a privileged communication between attorney and client, and was sustained and excepted to. The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." In effect the holding was that the son stood in the position of the deceased father with respect to the matter of privilege. Concerning this case the court said in *Smith* v. *Smith*, 173 Cal. 725, 733 [161 P. 495]: "It will be remembered that in the Bauer case the contest was between a son asserting title to property as an heir and his mother claiming under a hom[e]stead, and it was held that the statements of his father and mother, made to the attorney who prepared the declaration of homestead were not privileged."

Smith v. *Smith, supra,* was an action to quiet title, etc., brought by the sons of Uriah Smith, deceased, against their stepmother Ella R. Dooley Smith. Plaintiffs claimed under two deeds which their father had placed in escrow to be delivered to them upon his death. Later he conveyed the same properties and others to Ella R. Dooley who thereupon married him. One of the issues was that of knowledge on her part of the escrowed deeds at the time she received her conveyance. Attorney Russell, who drew her deed, testified to a conversation with her and Uriah in which the fact of the existence of those escrowed deeds was mentioned. It was claimed that this was error as the conversation was privileged. The court said at page 732: "It is asserted also that Mr. Russell was attorney and common agent for both grantor and grantee named in the deed which he prepared, and that therefore the communications made to him when they were present were privileged so far as plaintiffs were concerned. There was no proof that Mr. Russell was acting for Mrs. Dooley. He was employed by Mr. Smith and acted under his orders. Nevertheless appellant contends that the statements of Mr. Russell come within the rule of privilege applying where, for example, an attorney acts for a husband and wife in preparing a declaration of homestead. (*In re Bauer,* 79 Cal. 304-312 [21 P. 759].) But that rule only operates against strangers. The sons claiming title under the deeds which have been placed in escrow were not within that category. 'It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under

the client.' (40 Cyc., p. 2380.) Among the citations supporting this text are *Kern* v. *Kern,* 154 Ind. 29 [55 N.E. 1004], *Phillips* v. *Chase,* 201 Mass. 444-448 [87 N.E. 755, 131 Am.St.Rep. 406], and *Glover* v. *Patten,* 165 U.S. 394-406 [17 S.Ct. 411, 41 L.Ed. 760]." Then follows the observation about the Bauer case which we have quoted. This ruling seems to rest upon the theory that the sons, claiming under the deeds, were not strangers but were in privity with decedent and his estate.

Collette v. *Sarrasin,* 184 Cal. 283 [193 P. 571], throws considerable doubt upon this conclusion however. It was an action brought by the sole heir of a decedent to have his grant deed to defendant declared to be a mortgage. The attorney who drew the deed was precluded by court rulings from giving any testimony as to the transaction, and defendant's attorney was prevented from making any offer of proof or any statement of what he expected to prove by the witness. The court, in reversing, held that the record as made did not disclose whether the relationship of attorney and client existed in fact or whether there was any confidential communication; that the rulings were reversible error. The court then added: "The mere fact that both parties claim under the deceased does not, in our opinion, make the communication admissible, for under our code (Code Civ. Proc., § 1881) the privileged communication cannot be received unless that privilege is directly or inferentially waived by the client." (P. 289.) Though *Smith* v. *Smith* is not mentioned this seems to be directed toward the argument presented by respondent in his petition for hearing in Supreme Court, which sought to explain away the Smith decision. The quoted language clearly was not necessary to the ruling, but, as it was responsive to an argument presented by counsel and probably intended for guidance of court and attorneys upon a new trial, it probably cannot be put aside as mere dictum. (Cf. *People's Lbr. Co.* v. *Gillard,* 5 Cal. App. 435, 439 [90 P. 556]; *Chamberlain Co.* v. *Allis-Chalmers Mfg. Co.,* 74 Cal. App.2d 941, 943 [170 P.2d 85]; 13 Cal. Jur.2d § 135, p. 666; *People* v. *Bateman,* 57 Cal. App.2d 585, 587 [135 P.2d 192].) Counsel have cited no later cases on this point and we have found none. Neither the Smith case nor Collette dealt with the administration of a decedent's estate; the Bauer decision did pass upon that very problem. But in all three instances the effect of death upon the privilege was expressly or impliedly presented. And we must assume that the Collette decision represents presently prevailing law of this state. It merely abolishes the concept that the privity of estate created by an *inter vivos* transaction is enough to do away with the privilege of attorney and client and leaves unimpaired the principle that in probate matters privity with the decedent's estate under administration is enough to render the privilege inoperative.[4]

Now it will be remembered that the exception stated in Rule 26(2)(b) makes the lawyer-client privilege inapplicable "to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or *by inter vivos transaction.*" (Emphasis added.)

[4] *Id.* at 457-60, 290 P.2d at 621-23.

One effect of adopting this in California would be, it seems, to reestablish in this State "the concept that the privity of estate created by an *inter vivos* transaction is enough to do away with the privilege of attorney and client."[5] The long excerpt quoted above from the *Paley* case indicates that the court there regards the *Bauer* and *Smith* cases as establishing this concept and the *Collette* case as abrogating it. In this light, the exception in Rule 26(2)(b) should be viewed as a proposal to "reestablish the concept."

It seems desirable to reestablish the concept. Accepting the rule of nonsurvivorship when all parties claim through a deceased client by testate or intestate succession, no basis can be perceived in logic or policy for refusing to have a like rule when one or both parties claim through such deceased client by inter vivos transaction.

The remarks just made, however, illustrate only situations in which the client is deceased—apparently the same situation considered by the court in the *Paley* case. Now compare the following: Suppose there is an action by P against D to quiet title to Blackacre. P claims under a deed from C. D likewise claims under a deed from C. D contends his deed is prior to P's. P contends D's deed was never delivered. C has made a confidential communication to his lawyer relating to the issue between P and D. Under the exception stated in Rule 26(2)(b) the communication is not privileged, even though C is alive and stoutly resists disclosure by the lawyer.

Probably in most such cases waiver would be found. However, in the case—probably rare—of C being alive and resisting disclosure, it is believed the interests of P and D in obtaining a settlement of their controversy in the light of all the relevant facts should override C's interest in preserving secrecy and nondisclosure. Therefore the exception in Rule 26(2)(b) is approved unqualifiedly.[6] If, however, it is desired to limit this exception along more traditional lines, this could be done simply by changing the expression "the client" to "a deceased client."

The Exception in Rule 26(2)(c)—Breach of Duty

This exception states that the lawyer-client privilege is inapplicable "to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."

Suppose an attorney enters into a certain stipulation. Later the client discharges the attorney and attempts to repudiate the stipulation on the basis of want of the attorney's authority. In order to defend his integrity, the attorney must, of course, be free to reveal the client's communications to him.

Suppose further that a client refuses to pay his lawyer's fee and the lawyer brings an action. It may be that to establish his right to the fee claimed, the lawyer must reveal the client's communications.

These are probably the types of situations envisioned by this exception. There is little authority in this State on this exception; but

[5] *Id.* at 460, 290 P.2d at 623.

[6] It may be observed in passing that New Jersey retained the exception regarding inter vivos transactions, using the same language set out in Rule 26(2)(b). N.J. REV. STAT. § 2A:84A-20. (The full text of the New Jersey rule, as revised, is set out in note 17, *infra* at 401.)

at least the existence of this exception is suggested by such authority.[7] It is well recognized elsewhere.[8]

The Exception in Rule 26(2)(d)—Lawyer as Attesting Witness

This exception states that the lawyer-client privilege is inapplicable "to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness." This exception has been recognized in cases in which the lawyer is an attesting witness to a will.[9] Presumably it would be extended by analogy to cases in which the lawyer is an attesting witness to other documents.

The Exception in Rule 26(2)(e)—Communications to Joint or Mutual Lawyer

This exception declares that the lawyer-client privilege is inapplicable "to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients."

This exception is apparently established in this State.[10]

Rule 26(1)(c)(i) and (ii)—Eavesdroppers

Under Rule 26(1)(c)(i) and (ii) "a client has a privilege . . . to prevent any . . . witness from disclosing [communications described in Rule 26] if [such communication] came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client."

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[7] "In the case now engaging our attention the professional conduct of appellants' former attorney was attacked by them. It would be a sad commentary upon our boasted concept of fairness and the right to defend one's reputation and integrity, were it possible for the accuser to silence the accused by invoking the doctrine of privileged communication." Pacific Tel. & Tel. Co. v. Fink, 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956).

In many cases the communication could be revealed simply because it was not confidential. In such cases there is, of course, no need for the exception in Rule 26(2)(c). See Note, 10 STAN. L. REV. 297, 310 n.80 (1958).

[8] MCCORMICK § 95.

[9] The rationale is stated as follows in *In re* Mullin, 110 Cal. 252, 42 Pac. 645 (1895):

> When a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege. It is so held by the court of appeals of New York, under the provisions of section 835 of their Code of Civil Procedure, which, in substance, is identical with section 1881, subdivision 2, of our own. As is said in *Alberti* v. *New York etc. R.R. Co.*, 118 N.Y. 77: "But, although dead, he may leave behind him evidence which indicates an express intention to waive the privilege; as, for instance, where he requests his attorney to sign the attestation clause of his will, he, by so doing, expressly waives the provisions of the statutes and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. (*In the Matter of Coleman,* 111 N.Y. 220.)"
>
> It is true that the New York code, in section 836, now expressly authorizes an attorney who has become a subscribing witness to a will to testify to its preparation and execution, but this provision was inserted by amendment adopted in 1892, and merely followed the judicial declaration to that effect.
>
> In the *Estate of Flint,* 100 Cal. 395, our code provisions and the policy of the law are fully considered, and *In re Wax,* 106 Cal. 343, adopts the interpretation above quoted. [*Id.* at 254-55, 42 Pac. at 645.]

This rationale is, however, questioned in Note, 10 STAN. L. REV. 297, 313 (1958). It should be noted that the exception in Rule 26(2)(d) was entirely omitted from the New Jersey statute. N.J. REV. STAT. § 2A:84A-20. *Cf.* the N.J. Court Committee's Comment in N.J. COMMITTEE REPORT at 68-69.

[10] Harris v. Harris, 136 Cal. 379, 69 Pac. 23 (1902); De Olazabal v. Mix, 24 Cal. App.2d 258, 74 P.2d 787 (1937).

Where codefendants A and B in a criminal action have a common attorney and B then decides to turn against A, A may prevent the attorney from repeating A's conversation with the attorney in the joint conference. People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954). Undoubtedly, this would also be so

Suppose a client makes a confidential statement to his lawyer in the course of a telephone conversation and the switchboard operator listens in. Or, suppose the client mails a confidential letter and an interceptor steams the letter open and reads it. These, it seems, are cases of the communication coming to the knowledge of the witness (switchboard operator, letter-interceptor) "in the course of its transmittal between the client and the lawyer." These are Rule 26(1)(c)(i) cases.

Suppose the client mails a confidential letter to his lawyer. The lawyer places the letter in a locked file in his office. A wrongdoer breaks into the lawyer's office, rifles the files and steals the letter. This is not a case of knowledge of the wrongdoer gained in the course of transmittal of the letter. Rather, it is a case of knowledge gained "in a manner not reasonably to be anticipated by the client"—a Rule 26(1)(c)(ii) case.

Under the widely prevailing and so-called "eavesdropper exception," the switchboard operator, the interceptor and the wrongdoer could testify, notwithstanding lawyer-client privilege.[11] There is some doubt whether this exception exists in California.[12] There is no doubt, however, that the Commissioners on Uniform State Laws intend by Rule 26(1)(c)(i) and (ii) to abrogate the eavesdropper doctrine.[13]

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under exception (e). That is, such a situation would not be regarded as "an action between . . . such clients" in the sense of exception (e).

Furthermore, it seems that A could also prevent B from testifying to A's communication to the attorney. This is the precise situation recounted in People v. Ditson, 57 Cal.2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962), where the court states:

> Ditson [defendant] next contends that the trial court erred in allowing Cisneros [codefendant] to testify, over an objection on the ground of privileged communications, to statements which Ditson made to him after their arrest in the presence of . . . Brooks, their then joint attorney. As hereinabove mentioned, Brooks represented both defendants in the early stages of the proceedings (and had represented Cisneros and the Bridgeford brothers in a previous robbery prosecution), but was relieved as counsel for Cisneros . . . at the latter's request. Prior to that time several interviews were held between Brooks, Ditson, and Cisneros in the attorney room of the county jail. Cisneros testified that during these interviews Ditson asked him to implicate Leonard York and exonerate him (Ditson) by falsely testifying that York killed Ward, and then told him to sign a statement to this effect . . . produced by Brooks, and that he did so because he was afraid of Ditson.
>
> Ditson contends that any statements allegedly made by him in Brooks' presence were privileged as against strangers (including the People), and that Cisneros could not waive Ditson's privilege in this regard. The contention is unsound. Brooks was not called as a witness; and Cisneros, who waived the privilege as to himself, was not allowed to testify to any conversation between Brooks and Ditson. The testimony was offered and admitted for the limited purpose of establishing Cisneros' defense that he acted under the domination and control of another, and the jury were specifically instructed at that time that it was not to be considered against any of the other defendants. There was no violation of the attorney-client privilege [citations omitted]. [*Id.* at 446-447, 369 P.2d at 732, 20 Cal. Rptr. at 183.]

See also Note, 10 STAN. L. REV. 297, 309 (1958). It is there suggested that the same result would obtain under Uniform Rule 26(1)(c).

[11] MCCORMICK § 79.

[12] Dicta in the following cases suggest California adopts the eavesdropper's rule: City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 236, 231 P.2d 26, 30 (1951); People v. Durrant, 116 Cal. 179, 219-220, 48 Pac. 75, 86 (1897); People v. Rittenhouse, 56 Cal. App. 541, 546, 206 Pac. 86, 88 (1922).

However, dicta in these two cases create some doubt: Kelsey v. Miller, 203 Cal. 61, 92, 263 Pac. 200, 213 (1928); People v. Castiel, 153 Cal. App.2d 653, 659, 315 P.2d 79, 83 (1957).

PENAL CODE § 653i makes it a felony to eavesdrop on an attorney-client conversation when the client is held in custody. Query: Will the policy underlying this provision be enforced by excluding the evidence? See Note, 10 STAN. L. REV. 297, 312 (1958).

[13] "This rule [prevents] disclosure of communications overheard by eavesdroppers." UNIFORM RULE 26 Comment.

It is believed that the eavesdropper doctrine is incompatible with the purpose of the privilege. Because the client who consults a lawyer is frequently involved in a litigious situation, eavesdropping is a real menace to him—he is in great danger of the types of interception suggested. The policy of the privilege—encouraging communication in confidence—is thwarted by such interceptions. Accordingly, there is no hesitation to approve and endorse the abrogation of the eavesdropper doctrine proposed by Rule 26(1)(c)(i) and (ii).[14]

Suggested Amendments to Rule 26

Amendment of Rule 26(1)

The second sentence of this rule now reads as follows:

> The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.

This sentence might be thought to vest the lawyer with privilege in his own right. As pointed out above,[15] this is not the intent of the Commissioners on Uniform State Laws. However, to remove the misleading implication, the following redraft of the sentence is recommended:

> The privilege may be claimed by the following persons:
>
> (a) the client, when he is competent; (b) the guardian of a client who is incompetent as defined in Rule 1(9); (c) the personal representative of a deceased client; (d) any person when authorized by such competent client, such guardian or such personal representative to claim the privilege.

Amendment of Rule 26(1)(a)

Suppose a collision occurs between P's car and D's car. P consults an attorney. P makes oral confidential statements to the attorney. At the attorney's direction, P also writes out a statement in duplicate.

[14] Wigmore defends the eavesdropper exception in the following terms:

> All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (*post*, § 2326) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent the overhearing of third persons; and the risk of insufficient precautions is upon the client. This principle applies equally to documents.
>
> § 2326. *Third Persons Overhearing.*
>
> The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy (*ante*, § 2325). [8 Wigmore §§ 2325(3) and 2326.]

Although the N.J. Court Committee recommended revising Rule 26(1) to retain the New Jersey rule recognizing the eavesdropper exception in accord with Model Code Rule 210(c)(ii) and (iii) (see N.J. COMMITTEE REPORT at 67) the N.J. Legislative Commission recommended its abrogation (see N.J. COMMISSION REPORT at 31-32), the latter recommendation being adopted in N.J. REV. STAT. § 2A:84A-20.

[15] See the text, *supra* at 382-383.

P retains the carbon. Upon the trial of the action of "P v. D," P testifies upon direct examination as to the circumstances of the collision. Upon cross-examination D then asks P what statements P made to P's attorney. Under these circumstances, P's objection would be sustained either under present law or Uniform Rule 26(1)(a). Although Code of Civil Procedure Section 1881(2) expressly provides only that the attorney cannot reveal the client's statements, it is settled that the privilege extends to revelation by the client as well as revelation by the attorney. Under Rule 26(1)(a) "a client has a privilege (a) *if he is the witness* to refuse to disclose . . . ." (Emphasis added.)

It is believed, however, that the restriction in Rule 26(1)(a) which limits privilege to the client as *witness* is unwise and probably is inadvertent. To clarify this point, suppose that prior to the trial of the above action of "P v. D," D sought a discovery order requiring P to produce for D's inspection carbons of written statements prepared by P for P's lawyer. In the discovery proceeding P is not technically a witness and thus is not strictly within the protection of Rule 26(1)(a). However, it should be indisputable that the production sought should not be required. In order to clarify Rule 26(1)(a) on this point, therefore, it is recommended that the language above italicized be stricken from Rule 26(1)(a). It is of interest to note that in New Jersey the same language was deleted for precisely the same reasons suggested here.[16]

Amendment of Rule 26(1)(b)

Suppose a client sends his lawyer a confidential letter. The lawyer turns the letter over to his stenographer with instructions to file it. This is a privileged "communication" in the sense of Rule 26(1) because Rule 26(3)(b) defines "communication" as including "disclosures of the client to a representative associate or employee of the lawyer incidental to the professional relationship." Under Rule 26(1)(a) the client may refuse disclosure. Under Rule 26(1)(b) the client may "prevent his lawyer from disclosing." The rule, however, omits to provide that the client may prevent the stenographer from making disclosure. This apparent oversight should be corrected by amending Rule 26(1)(b) to read as follows (new matter in italics):

> (b) to prevent his lawyer *or the lawyer's representative, associate or employee* from disclosing it.

Recommendation

In recommending enactment in this State of Rule 26 as revised in accord with the suggestions made in the preceding pages, it seems desirable to review the probable effect that this action would have on existing law. This is summarized in the paragraphs which follow.

1. The privilege respecting the attorney's secretary, stenographer, or clerk would be vested in the client. Under present law the privilege may be vested in the lawyer.

2. The lawyer-client privilege would exist when the person consulted was reasonably believed by the client to be a lawyer, though in fact he was not. Today it is uncertain whether the privilege exists in these circumstances.

[16] See N.J. COMMISSION REPORT at 31.

3. In cases of guardianship, the guardian would possess the privilege during guardianship. Thereafter the former ward would possess the privilege. It is not certain whether this is the law today in California.

4. After death of the client only his personal representative would possess the privilege. Query as to present law.

5. The present exception to the lawyer-client privilege concerning consultation in aid of future fraud or crime would be expanded to cover consultation in aid of any future tort.

6. The present exception respecting parties all of whom claim through the client by testate or intestate succession would be expanded to cover not only these persons but also parties who claim through the client by inter vivos transaction.

7. The eavesdropper exception would be abrogated. Probably this exception exists in California today.

As previously indicated in this portion of the study, these appear to be desirable changes and clarifications. Accordingly, approval of a revised form of Rule 26 is recommended.[17]

[17] In concluding this discussion on the lawyer-client privilege, it is interesting to note the action taken in New Jersey and Utah with respect to this rule. As previously noted (see note 14 *supra*), New Jersey disregarded the Court Committee's suggestion concerning the eavesdropper doctrine and adopted the URE view (which eliminates this exception). There was complete accord between the Committee and Commission, however, in placing an affirmative duty upon the lawyer as witness to claim the privilege unless otherwise instructed by the privilege holder. Unlike the Court Committee, however, the Commission departed from the URE view as to the survival of a corporation's privilege—the privilege survives the dissolution of the corporation client. In other respects (except as previously noted—see, *e.g.*, note 9 *supra*, regarding the omission of the exception in Rule 26(2)(d)), the rule as adopted in New Jersey is in substantial accord with the URE rule. Note, however, the important presumption regarding the confidential nature of a communication in place of the definition in Uniform Rule 26(3)(b). As revised, the New Jersey rule reads as follows:

Rule 26. *Lawyer-Client Privilege*

(1) General Rule. Subject to Rule 37 and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege. [§ 2A:84A-20.]

The Utah Committee recommended adoption of Uniform Rule 26 in the identical form approved by the Commissioners on Uniform State Laws. UTAH FINAL DRAFT at 19-20.

RULE 27—PHYSICIAN-PATIENT PRIVILEGE

Introduction

This portion of the study concerns Rule 27, the physician-patient privilege.[1] Rule 27 provides as follows:

RULE 27. *Physician-Patient Privilege*

(1) As used in this rule, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(2) Except as provided by paragraphs (3), (4), (5) and (6) of this rule, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the

[1] The official Comment on the rule is, in part, as follows:

> The common law recognized no privilege for communications between physician and patient. . . . At the 1950 meeting of the National Conference of Commissioners on Uniform State Laws it was voted that the physician-patient privilege should not be recognized. . . . Nevertheless, at the 1953 meeting the Conference reversed its previous action and by a close vote decided to include the privilege and adopted the rules of the Model Code of Evidence on that subject. Rule 27 incorporates the provisions of Model Code Rules 220 to 223. [UNIFORM RULE 27 Comment.]

Similarly, there was much difference of opinion in the debates on the Model Code as to whether the privilege should be included therein. See 19 A.L.I. PROCEEDINGS 183-217 (1942).

communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(4) There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(5) There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(6) No person has a privilege under this rule if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

Like Rule 26, just discussed, Rule 27 consists of three parts: (1) Definitions, (2) General Rule, and (3) Exceptions to the General Rule. In this portion of the study the general rule as set forth in Rule 27(1) and (2) is first considered, comparing this general rule with the California rule, namely, the rule declared in Code of Civil Procedure Section 1881(4) and the judicial construction thereof. In the second portion of this part of the study the exceptions stated in Rule 27(3), (4), (5), (6), and (7) are considered, comparing these exceptions with the California exceptions.

General Rule

For convenience of discussion, the following portions of Rule 27(1) and (2) are regarded as the general rule of the Uniform Rules relating to the physician-patient privilege:

> [A] person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.[2] "[H]older of the privilege" means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient.[3]

The California rule is partially legislative and partially decisional. The legislation is Code of Civil Procedure Section 1881(4), providing in part as follows:

> A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.[4]

In the following discussion, the URE and California general rules are compared in several respects.

Communication and Information

Section 1881(4) of the Code of Civil Procedure refers to "information." Rule 27(2) refers to "communication." However, Rule 27(1)(d)

[2] UNIFORM RULE 27(2).
[3] UNIFORM RULE 27 (1)(c).
[4] This statute was enacted in 1872 and derived from the Civil Practice Act (Cal. Stats. 1851, Ch. 5, p. 114) § 398, which read as follows:

> A licensed Physician, or Surgeon, shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe, or act, for the patient; provided, however, in any suit, or prosecution, against a Physician, or Surgeon, for malpractice, if the patient, or party, suing, or prosecuting, shall give such consent, and any such witness shall give testimony, then such Physician, or Surgeon, defendant, may call any other Physicians, or Surgeons, as witnesses, on behalf of defendant, without the consent of such patient, or party, suing, or prosecuting.

See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955).
Good general law review notes regarding this privilege are: 9 SO. CAL. L. REV. 149 (1936); 20 CALIF. L. REV. 302 (1932).

defines "communication" as including "information." Both the California statute and Rule 27 thus extend the privilege to "information."

Confidentiality

Under Rule 27(2)(a) the privilege attaches only if the judge finds that the communication was "a confidential communication." On the other hand, Section 1881(4) refers to "*any* information." (Emphasis added.) However, this expression has been construed to mean confidential information.[5]

Purpose of Communication: Diagnosis-Prescription-Treatment

Under Rule 27(2)(b) the privilege attaches only if the judge finds that "the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor." Under Section 1881(4) a comparable condition is stated in the following terms: "information acquired in attending the patient, which was necessary to enable [the physician or surgeon] to prescribe or act for the patient."

Note that Rule 27(2) explicitly mentions diagnosis, prescription and treatment. The comparable expression in Section 1881(4) is "to prescribe or act." In this context "prescribe" is the correlative of "physician"; "act" is the correlative of "surgeon." Hence the meaning of Section 1881(4) is that privilege attaches to information necessary to enable the physician to prescribe or to enable the surgeon to act.[6] The process of the physician's "prescribing" in the sense of Section 1881(4) doubtless includes diagnosis and treatment. Similarly, the process of the surgeon's "acting" must include diagnosis, prescription and treatment. Hence, it appears that the California and Rule 27 privileges are alike in respect to the diagnosis-prescription-treatment feature of each.[7]

Is there a difference, however, with respect to the necessity factor? In other words, must the information have been in fact necessary to the medical service or is reasonable belief in its necessity sufficient? Rule 27(2)(b) explicitly adopts the latter alternative, *i.e.*, reasonable belief is sufficient. Literally, Section 1881(4) adopts the former alternative; but in practice the meaning is probably the same as is stated in Rule 27(2)(b).[8]

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[5] Horowitz v. Sacks, 89 Cal. App. 336, 344, 265 Pac. 281, 285 (1928) ("communications of the patient were not confidential and therefore were not privileged.") See also People v. Dutton, 62 Cal. App.2d 862, 864, 145 P.2d 676, 677 (1944).

[6] City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 233, 231 P.2d 26, 28 (1951).

[7] The decisions seem to assume that the statute covers diagnosis, prescription, and treatment. See, for example, Kramer v. Policy Holders Life Ins. Assn., 5 Cal. App.2d 380, 390, 42 P.2d 665, 670 (1935); ("the examination . . . was indispensible to the *treatment* received." [Emphasis added.]); McRae v. Erickson, 1 Cal. App. 326, 332-33, 82 Pac. 209, 212 (1905) ("the intention of the statute is to exclude all statements made by a patient to his physician while attending him in that capacity *for the purpose of determining his condition.*" [Emphasis added.]).

Examination for the purpose of reporting to the patient's attorney in aid of the patient's lawsuit is not "prescribing or acting" for the patient in the sense of Code of Civil Procedure Section 1881(4). City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951). Presumably, such examination would not be regarded as meeting the condition stated in Rule 27(2)(b).

[8] In McRae v. Erickson, 1 Cal. App. 326, 332, 82 Pac. 209, 212 (1905), the reasonable belief standard of necessity—Rule 27(2)(b)—seems to be approved by the California court in quoting the following passage from a Wisconsin case:

> "[I]t has been held that the word 'necessary' should not be so restricted as to permit testimony of statements or information in good faith asked for or given to enable intelligent treatment, although it may

Whose Privilege?

Under Rule 27(1)(c) the "holder" of the privilege is the patient.[9] The same is true under Code of Civil Procedure 1881(4).[10]

Guardian and Ward

Under Rule 27(1)(c) "the guardian of the person of an incompetent patient" is "holder of the privilege."[11] In this respect, Rule 21(1)(c) may be declaratory of existing California practice. No authority on this point has been found.

Ruling on Claim of Privilege

The Rule 27(2) privilege is applicable only "if the judge finds" the several matters there specified as requisites of the privilege. Rule 8 provides in part as follows:

> When . . . the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises.

The California practice seems to be similar.[12] Probably the privilege claimant possesses the burden to establish the privilege.[13]

Coerced Disclosure by Patient

Suppose a patient consults a physician professionally and relates in confidence to the physician symptoms of his illness. Under both Rule 27(2) and Section 1881(4) the patient may prevent the *physician* as witness from making disclosure.

Suppose, however, the *patient* is the witness and is asked what he told the physician. Rule 27(2)(c)(i) is explicit to the point that the patient may resist such disclosure when he is the witness. Section

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appear that the physician might have diagnosed the disease and prescribed for it without certain information, so that it was not strictly necessary."

In the *McRae* case the patient was injured by a falling rock in a tunnel and the doctor asked the patient how the rock fell and whence it came. The patient's answer was held to be privileged. The court (after quoting the above extract) states: "Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge." (*Id.* at 333, 82 Pac. at 212.) Here the court is obviously thinking of questions asked by the doctor. The passage should not therefore be read as negating privilege for statements *volunteered* by the patient who reasonably thinks them necessary. The *McRae* case is cited and quoted with approval in Kramer v. Policy Holders Life Ins. Assn., 5 Cal. App.2d 380, 385-91, 42 P.2d 665, 667-69 (1935).

[9] Except in cases of guardianship and death.

[10] City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951). Thus if the patient waives the privilege the physician must testify. Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397 (1887).

[11] The terms "guardian" and "incompetent" are defined as follows by Uniform Rule 1(9):

> (9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a *sui juris* person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

[12] Estate of Casarotti, 184 Cal. 73, 192 Pac. 1085 (1920); *In re* Redfield, 116 Cal. 637, 48 Pac. 794 (1897).

[13] As in the case of lawyer-client privilege. See discussion in the text accompanying notes 17 and 18, *supra* at 386.

1881(4) is silent on this aspect of privilege, but presumably this aspect would be imported into it by construction.[14]

Actions in Which Applicable

The Section 1881(4) privilege is applicable only in civil actions.[15] On the other hand, the Rule 27 privilege is applicable both in civil actions and in misdemeanor prosecutions.

This, of course, is an important substantive difference. On balance, judgment here should be in favor of the limitation in the present California law. In view of the already questionable basis of the privilege,[16] any broadening of the present scope of the privilege ought to be opposed.[17] Therefore, it is recommended that the following language be stricken from Rule 27(2): "or in a prosecution for a misdemeanor."

Who Is a Physician?

Rule 27(1)(b) defines "physician," for purposes of the physician-patient privilege, as follows:

> (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place.

In comparison, the reference in Section 1881(4) is to a "licensed physician or surgeon." Assuming this means what it literally states,[1] the URE concept seems preferable. If the physician-patient privilege is to be recognized at all, it would seem better to protect patients from reasonable mistakes as to unlicensed practitioners.

Physician's Nurse, Stenographer or Clerk

Suppose a patient consults a doctor. During the consultation the doctor calls in his stenographer to take down a shorthand report of the consultation. This situation raises two questions. First, may the patient prevent the doctor from testifying? Second, may the patient prevent the stenographer from testifying?

Under Rule 27, the answer to the first question is "Yes."[2] This is because, under Rule 27(1)(d), the communication was confidential despite the presence of the stenographer. Thus, under Rule 27(2)(c)(ii) the patient may prevent the physician from disclosing the communication.

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[14] As has been done in the case of lawyer-client privilege. See discussion in the text accompanying note 19, *supra* at 386.
Of course, the patient must testify to relevant facts even though he has made such facts the subject matter of his communications to the physician. It is only the communication that he is privileged not to reveal.

[15] People v. Griffith, 146 Cal. 339, 80 Pac. 68 (1905); People v. West, 106 Cal. 89, 39 Pac. 207 (1895); People v. Lane, 101 Cal. 513, 36 Pac. 16 (1894); People v. Dutton, 62 Cal. App.2d 862, 145 P.2d 676 (1944).

[16] See McCORMICK § 108, at 221 n.1.

[17] The Utah Committee similarly recommended restricting this privilege to civil cases. UTAH FINAL DRAFT at 20-21. New Jersey does not recognize the privilege. See note 13, *infra* at 416.

[1] It cannot be determined whether this assumption is sound. In Estate of Mossman, 119 Cal. App. 404, 6 P.2d 576 (1931), a Christian Science practitioner was held not to be a licensed physician or surgeon in the Section 1884(4) sense. Presumably the patient knew the status of the practitioner. In Frederick v. Federal Life Ins. Co., 13 Cal. App.2d 585, 57 P.2d 235 (1936), the statement was made by a hospital patient to an intern who was a senior medical student. Privilege was denied on the basis that the intern was not prescribing or acting for the patient but was only taking the patient's history for the hospital records.

[2] This assumes, of course, that only the general rule is applicable to this case, *i.e.*, that no exception is applicable.

Under Rule 27, the answer to the second question is likewise "Yes."[3] Again the communication is confidential under Rule 27(1)(d), and under Rule 27(2)(c)(ii) the patient may prevent disclosure by "a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted." The stenographer in the hypothetical case seems to be such a person.

What is the California law in this regard? Code of Civil Procedure Section 1881(4) contains no explicit provision respecting the physician's assistants.[4] Nevertheless, the problems posed above have been considered in California. The present state of the law seems to be this: Under California law the answer to question one above is "Yes"; that is, the patient can prevent the doctor from testifying. Question two above has been discussed in California, but has been left open.[5]

Manifestly, the adoption of Rule 27 would provide the answer for the second question. That answer is sound, since it would be useless to put the doctor under a ban of silence without also extending the ban to the stenographer.

Exclusion by Judge on His Own Motion

On the basis of what was said on this same subject in connection with the lawyer-client privilege,[6] and in view of the parallels between that privilege and the physician-patient privilege, it is believed that under both California practice and the Uniform Rules the judge either on his own motion or on motion of a party may protect the physician-patient privilege of an absentee holder of the privilege who has not waived it.

Patient's Posthumous Privilege

It is axiomatic that a person possessed of a privilege has the option to claim or to waive the privilege. It has never been doubted, therefore, that under Section 1881(4) the patient could himself waive the privilege. However, there has been in this State, and to some extent there still may be, an odd situation in cases arising after the death of the patient. This situation stems from a nineteenth century doctrine which California borrowed from New York decisions of that era. That doctrine is that the patient's privilege survives his death and nobody can waive the privilege in behalf of the decedent.

Thus, suppose a California civil action in 1897. The action is by an administrator for the wrongful death of his intestate. The administrator calls the intestate's attending physician. Defendant's objection is sustained upon the following grounds:

> Under the principles announced in the *Estate of Flint,* 100 Cal. 391, the evidence should have been excluded. While the precise question here presented—whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone—was not there directly decided, it was, nevertheless, fully considered and discussed, and the meaning of the statute in that regard very clearly indi-

[3] See note 2 *supra.*
[4] Compare the provision of Section 1881(2) with reference to the attorney's secretary, stenographer, or clerk. See the text accompanying notes 10-12, *supra* at 388.
[5] Kramer v. Policy Holders Life Ins. Assn., 5 Cal. App.2d 380, 42 P.2d 665 (1935).
[6] See discussion in the text, *supra* at 389.

cated in the following language: "The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York, section 836, provides that the privilege is present unless 'expressly waived by the patient.' The California provision contains the words 'without the consent of his patient.' It will thus be seen that the provisions are in effect the same.

"The Courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed." [Citations omitted.]

This construction is not unreasonable in view of the peculiar terms of our statute, and is undoubtedly fully supported by the New York authorities referred to in the case just cited; and, since our statute seems to be framed closely after that of New York, the construction given the latter by the courts of that state should have great weight with us in interpreting the meaning of our own.[7]

In 1911, and again in 1917, the Legislature partially abrogated this doctrine by adding a proviso to Code of Civil Procedure Section 1881(4). That proviso, as it reads today, is as follows:

[P]rovided . . . , that after the death of the patient, the executor of his will, or the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give . . . consent [to the doctor's testimony], in any action or proceeding brought to recover damages on account of the death of the patient.[8]

Possibly the no-waiver doctrine is still in effect in actions other than those "to recover damages on account of the death of the patient" unless, of course, the action is covered by other provisos in Section 1881(4). To illustrate: The widow-administratrix of a deceased policeman sues a pension board for the award of a pension. The widow calls her deceased husband's doctor. Defendant objects. Arguably, the objection should be sustained. Prior to the 1911 and 1917 amendments, it was so held on the basis of the no-waiver doctrine.[9] Possibly it might be so held today on the ground that the widow's action is not to "recover damages" in the sense of the 1911 and 1917 amendments and the rule of no waiver therefore applies in such action.

Rule 27(1)(c) defines "holder of the privilege" in part as follows: "'[H]older of the privilege' means . . . the personal representative of a deceased patient." If this were adopted (together with Rule 37 whereby the privilege-holder may waive his privilege), it would sweep away all vestiges of the doctrine that the personal representative may not waive the privilege. The widow-administratrix in the illustrative

[7] Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 167-68, 47 Pac. 1019, 1022 (1897).

[8] The 1911 amendment referred to an action "on account of the death of the patient, caused by the negligent or wrongful act of another." This was changed by the 1917 amendment to read: "on account of the death of the patient." See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955).

[9] Murphy v. Board of Police etc. Comm'rs, 2 Cal. App. 468, 83 Pac. 577 (1905).

pension case, being the holder of the privilege, could elect to waive the privilege and could thus succeed in having the doctor testify.

At the same time, Rule 27(1)(c) would narrow somewhat the scope of the 1911 and 1917 amendments. This may be illustrated as follows: Suppose there is a wrongful death action by the spouse of the decedent. Plaintiff calls decedent's doctor. The administrator is present in court and objects. Under the present proviso in Section 1881(4) the administrator's objection should be overruled, since the amendments provide that the spouse may consent to the doctor's testimony. Under Rule 27(1)(c), however, the personal representative is the privilege holder and as such he may claim the privilege though not a party.[10] There would be, therefore, a valid claim of privilege by the privilege holder and the waiver attempt by the spouse would be ineffective.

However, it is doubtful whether such a conflict between a spouse and the representative or between heirs and the representative would often arise. Therefore, it is believed that Rule 27(1)(c) is a satisfactory substitute for the proviso of Section 1881(4) introduced by the 1911 and 1917 amendments. Moreover, Rule 27(1)(c) is an improvement over that proviso in that by it (together with Rule 37) the possibility of waiver is clearly guaranteed in all posthumous actions.

Exceptions to General Rule

Rule 27(3), (4), (5), (6), and (7) set up several exceptions to the general rule of privilege stated in Rule 27(2) and (3). The terms of each of these exceptions and the extent to which it prevails in California today are considered below.

The Exception in Rule 27(3)(a), First Part—Patient's Competence or Incompetence

Under this exception the privilege is inapplicable "upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence."

No authority recognizing this exception in California has been found. The reasonableness of the exception, however, is impressive. Here the need for the physician's testimony is acute. In this situation, it is believed this need should override the patient's interest in preserving secrecy.

The Exception in Rule 27(3)(a), Second Part—Patient's Criminal Conduct

Under this exception, the privilege is inapplicable "in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor." Evidently, the thought here is that if the action were criminal there would be no privilege under Rule 27(2) (because the privilege does not apply in felony prosecutions) and, by analogy, there should be no privilege where the action is civil.

This exception is not found in California. If, however, the rationale for such exception is accepted (which is hereby recommended), the

[10] UNIFORM RULE 27(2).

restriction respecting conduct amounting to misdemeanor should be eliminated. Since the present law does not recognize the privilege in misdemeanor prosecutions,[11] if there is fashioned an exception in civil actions for criminal conduct analogous to the rule of no privilege in criminal actions, then the civil exception should be broad enough to cover actions for damages for *any* criminal conduct.

Therefore, it is recommended that "other than a misdemeanor" be deleted from the exception in the second part of Rule 27(3)(a).

The Exception in Rule 27(3)(b)—Validity of Patient's Will

Under this exception the privilege is inapplicable "upon an issue as to the validity of a document as a will of the patient."

The first proviso of Code of Civil Procedure Section 1881(4) recognizes the principle of this exception. This proviso is in part as follows:

> [P]rovided . . . that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, . . . such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased.[12]

The Exception in Rule 27(3)(c)—Parties Claiming Through Patient

Under this exception the privilege is inapplicable "upon an issue between parties claiming by testate or intestate succession from a deceased patient."

The exception in Rule 27(3)(b) provides that the privilege is inapplicable upon an issue of the validity of a document as the will of the patient. The exception in Rule 27(3)(c) provides for such inapplicability in "probate issues" other than will validity (such as petitions to construe a concededly valid, but ambiguous, will), petitions to determine heirships and any other proceeding where all the parties claim by testate or intestate succession.

What is the situation when some or all of the parties claim by inter vivos transaction, for example, in an action by plaintiff heir to have a grant deed from decedent to defendant declared a mortgage?

The exception in Rule 27(3)(c) is comparable to an exception to the lawyer-client privilege.[13] It will be recalled, however, that the latter exception specifically embraces the inter vivos feature.[14] Possibly the thought in including this feature in the lawyer-client exception and in excluding it in Rule 27(3)(c) is that a decedent's lawyer will frequently be possessed of information relevant to inter vivos transactions whereas decedent's physician will seldom be so possessed. If this is the underlying thought, it may be answered that in the occasional case where a physician is possessed of the vital information (for example, a psychiatrist to whom the patient now deceased has revealed all of his affairs—business and otherwise) there is the same reason for disclosure by the physician as there is for disclosure by the attorney. Accordingly,

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[11] See note 15, *supra* at 407.

[12] Added by a 1927 amendment (Cal. Stats. 1927, Ch. 683, p. 1154). See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955).

[13] UNIFORM RULE 26(2)(b). For discussion of this provision, see the text, *supra* at 392-396.

[14] See note 13 *supra*.

it is recommended that Rule 27(3)(c) be amended to read as follows (new matter in italics):

> (c) upon an issue between parties claiming by testate or intestate succession *or by inter vivos transaction* from a deceased patient.

The first proviso in Section 1881(4) of the Code of Civil Procedure is somewhat comparable to the exception in Rule 27(3)(b) but is more limited in scope. The proviso is as follows:

> [P]rovided . . . that . . . after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased.[15]

It would seem that at least the following proceedings would be included under the exception in Rule 27(3)(b) (amended as suggested above) but would not be embraced by the proviso: petition to determine heirship, petition to construe ambiguous will and actions involving the meaning (but not the validity) of instruments of conveyance by the patient. There are possibly other proceedings that would be included under the Uniform Rules which would not be embraced by the proviso in Section 1881(4).

As stated above, the scope of the testate-intestate-inter vivos exception to the physician-patient privilege should be as broad as the comparable exception to the attorney-client privilege. It follows that Rule 27(3)(c) (amended as suggested above) is regarded as a desirable substitute for the portion of the Section 1881(4) proviso quoted above.

The Exception in Rule 27(4)—Patient's Condition

This exception provides as follows:

> There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

This is the type of exception which in California parlance is called the "patient-litigant exception."[1] Section 1881(4) of the Code of Civil Procedure contains two such exceptions, namely, provisos three and four as follows:

> [P]rovided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the adminis-

[15] Added by a 1927 amendment (Cal. Stats. 1927, Ch. 683, p. 1154). See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955).

[1] City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951).

trator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased.[2]

The philosophy underlying these exceptions is stated as follows by Mr. Justice Traynor of the California Supreme Court:

> The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.[3]

Rule 27(4) would carry this rationale through to its logical conclusion thereby extending the rule of no privilege well beyond the present limited area of injury and death actions. For example, as we construe Rule 27(4) and Section 1881(4), the privilege would be *in*applicable under Rule 27(4) in the following actions in which today in California it is applicable:

1. Action by patient to recover disability benefits under an insurance policy.

2. Action by patient by guardian to set aside a deed by patient or to cancel a contract for want of capacity of the patient to execute the instrument.

3. Action by beneficiary of a policy insuring the patient's life where the defense is the alleged fraud of the patient in answering health questions on the appliaction for the policy. (Here it is believed that the patient's condition is "an element or factor of the claim" of the plaintiff beneficiary in the sense of Rule 27(4), even though the plaintiff need not plead such element. That is, it is not believed that "claim" means only such claim as is required to be pleaded by the patient or the one now standing in the shoes of the patient.)

This does not suggest that the enumeration is in any sense exhaustive. Furthermore, the fact is not overlooked that under today's view—that the privilege is applicable in such actions—it may well be that the patient (or a plaintiff in the patient's shoes) in the course of making a prima facie case will have to waive the privilege.[4] It should be emphasized, however, that such actions are within Justice Traynor's rationale and that Rule 27(4) would remove them from the ban of privilege without the necessity of discovering any waiver of privilege by plaintiff.

The situation is radically different, however, when the patient's position in the action is *not* that of plaintiff. For example, suppose

[2] Added by a 1917 amendment (Cal. Stats. 1917, Ch. 611, p. 954). See Historical Note in CAL. CODE CIV. PROC. § 1881 (West 1955). For applications, see City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951); Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465 (1946); Phillips v. Powell, 210 Cal. 39, 290 Pac. 441 (1930).

[3] City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 232, 231 P.2d 26 (1951).

[4] See discussion in the text relating to Rule 27(7) and Rule 37, *infra* at 415 and 510-512.

divorced husband P brings a proceeding against ex-wife D to gain custody of a child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls a psychiatrist who is treating D. Rule 27(4) apparently requires that D's objection be overruled because this is "an action in which the condition of the patient [D] is an element or factor of the . . . defense of the patient."

Should a plaintiff be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action? Here Justice Traynor's rationale is not apropos, for here the patient does not take the initiative in instituting the proceeding. In fact, the very argument in behalf of Rule 27(4) urged in the official Comment to Model Code Rule 223(3) (which is copied in URE Rule 27(4)) seems inapplicable to this aspect of Rule 27(4). The argument is that the object of the rule is "the prevention of the use of the privilege to suppress persuasive evidence after the legitimate purpose of the privilege has been frustrated by the conduct of the patient or his representative." [5] This argument, while most compelling when the patient is plaintiff, seems to be wholly without force when the patient is defendant.

This leads to the conclusion that there is no logical basis in support of the defense-of-the-patient portion of Rule 27(4). If this portion of the exception is accepted, the privilege as thus interpreted would, as a practical matter, protect only nonparties (as, for example, if P's claim in the above hypothetical case were that D's new husband is a homosexual and P offered the new husband's doctor and the privilege was claimed in behalf of the new husband).[6] Protecting such nonparty cannot be logically advocated when at the same time protection is withheld from the person who is the *un*willing party to the action.[7] Therefore, it is recommended that "or defense of the patient" be stricken from Rule 27(4).

Rule 27(4) as so amended is recommended for adoption because of the convincing merit of giving full scope to the patient-litigant idea when the patient (or his representative) is plaintiff (and assuming, of course, that "claim" as used in Rule 27(4) would be construed to mean claim as plaintiff).

The Exception in Rule 27(5)—Required Reports

Rule 27(5) provides as follows:

> There is no privilege under this rule as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

The theory here seems to be that it is idle to protect the patient from in-court disclosure when out-of-court disclosure is required. This ex-

[5] MODEL CODE Rule 223 Comment. Uniform Rule 27(4) copies Model Code Rule 223(3).
[6] Newell v. Newell, 146 Cal. App.2d 166, 303 P.2d 839 (1956).
[7] Uniform Rule 27(3)(a) does, it is true, withhold the privilege from parties defendant under the circumstances there stated. It is also true that a position in favor of that exception has been taken. However, it is believed that it is defensible to advocate the limited exception stated in Uniform Rule 27(3)(a) and yet oppose (so far as defendant patients are concerned) the much broader principle of Uniform Rule 27(4).

ception seems sensible. No California authority respecting it has been found.[8]

The Exception in Rule 27(6)—Patient's Contemplated Crime or Tort

This exception provides as follows:

> No person has a privilege under this rule if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

No recognition of this exception in California has been found. In support of recommending its adoption, however, the following commentary on the comparable Model Code rule (Rule 222) may be cited:

> The policy supporting the privilege cannot prevail where the consultation was for the purpose of enabling anyone to commit a crime or a civil wrong, or to avoid the consequences of such conduct. It may be important to provide medical aid to wrongdoers, but not at the price of encouraging illegal conduct.

It is recommended, however, that "sufficient evidence, aside from the communication has been introduced to warrant a finding that" be deleted from this exception for the same reason it was recommended that this language be deleted from the analogous exception to the lawyer-client privilege.[9]

The Exception in Rule 27(7)—Previous Disclosure

Rule 27(7) is directed to the situation in which the patient calls the physician to testify in his behalf. This exception provides as follows:

> (7) A privilege under this rule as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

There is no need for Rule 27(7). The termination of privilege provided in this exception seems adequately covered by Rule 37(b).[10] Therefore, upon the assumption that Rule 37(b) will be approved,[11] it is recommended that Rule 27(7) be deleted as superfluous.

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[8] Compare the following section of CAL. HEALTH & SAF. CODE § 3197 respecting venereal disease:

> In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, or any person by whom such habeas corpus or other proceeding was instituted, and the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be applicable to or in any such prosecution or proceeding.

[9] See discussion in the text, *supra* at 390-392.

[10] See discussion in the text, *infra* at 509-516.

[11] *Ibid.*

The Eavesdropper Exception

It will be recalled that Rule 26, the lawyer-client privilege, abrogates the eavesdropper doctrine with reference to that privilege.[12] It may be fairly asked whether lawyers can justly claim more in this respect for their privilege than the law is willing to give their professional medical brethren? Arguably they may. The client who consults a lawyer is most likely in much greater danger of eavesdropping, "bugging," and other forms of interception than is the patient who consults a physician. The client usually is or may be embattled in a litigious situation; the patient is usually in peaceful pursuit of health. Eavesdropping, therefore, is a real and proximate menace to clients. To patients it is a remote menace, if any at all. For these reasons, it is believed that the difference in the scope of the two privileges with respect to eavesdroppers is defensible and should be defended.

Recommendation

If Rule 27 were revised in accord with the suggestions made above, and so adopted, the revised rule would have the following effects on present California law:

1. The question of who is a physician for purposes of the privilege would be clarified.

2. The privilege as respects the physician's assistants would be clarified.

3. The posthumous privilege would in all cases be vested in the deceased patient's personal representative, who in all cases could waive such privilege.

4. The privilege would be inapplicable in proceedings to place the patient under guardianship or to remove him therefrom.

5. The privilege would be inapplicable in civil actions against the patient for damages for his criminal conduct.

6. The privilege would be inapplicable in controversies between parties all of whom claim through a deceased patient.

7. The patient-litigant exception would be expanded in scope.

8. The privilege would be inapplicable as to information of which the physician is required to make an official report.

9. Communications in aid of the future commission of a crime or a tort, or in avoidance of detection of a past crime or tort, would not be privileged.

It is believed that these changes and clarifications are desirable substitutes for the present California law and, therefore, Rule 27 (as revised) is recommended for adoption.[13]

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[12] See discussion in the text, *supra* at 397-399.

[13] It should be noted that in New Jersey the entire privilege was rejected. Note the following Comment by the N.J. Legislative Commission: "New Jersey at present has no physician-patient privilege and this Commission does not consider it desirable to adopt such a privilege at this time." N.J. COMMISSION REPORT at 35.
The Utah Committee recommended adoption of Uniform Rule 27 in substantially the same form approved by the Commissioners on Uniform State Laws. The single difference is that the Utah Committee recommended against limiting the exception in Rule 27(3)(a) to conduct which "constitutes a criminal offence other than a misdemeanor," dropping the limiting language "other than a misdemeanor," thus making the privilege available only in civil actions. UTAH FINAL DRAFT at 21.

A PRIVILEGE NOT COVERED BY THE UNIFORM RULES—PSYCHOTHERAPIST-PATIENT PRIVILEGE

Introduction

The preceding discussion of the physician-patient privilege did not consider one important aspect of the total problem respecting medical privileges: Should a patient who consults a psychotherapist (*i.e.*, a psychiatrist or clinical psychologist)[1] have a *special* privilege to prevent disclosure of confidential communications made in the course of diagnosis or treatment? Even though this question is not specifically covered by the Uniform Rules, a discussion of the rules of evidence relating to privileges would not be complete without some consideration of this important and difficult problem.

The California law on this matter is unsatisfactory. The patient who consults a *psychiatrist* has the same privilege as a patient who consults a physician; one who consults a *psychologist* has the same privilege as a client who consults a lawyer. The California lawyer-client privilege provides broad protection against disclosure of confidential communications whereas the California physician-patient privilege is subject to many limitations and exceptions. The result is that under existing California law the client who consults a psychologist is given substantially more protection against disclosure of confidential communications than the patient who consults a psychiatrist. For example, California gives the psychologist's client a privilege applicable in both civil and criminal cases but gives the psychiatrist's patient no privilege in a criminal case. No justification can be perceived for this statutory incongruity.

The Uniform Rules do not provide any *special* privilege to prevent disclosure of confidential communications made to a psychiatrist or psychologist. Communications between patient and psychiatrist would,

[1] Professor Louisell in *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, n. ** (1957) [hereinafter cited as LOUISELL] points out the distinction between the psychologist and psychiatrist as follows:

> A psychiatrist is a specialist in psychiatry, "the medical specialty that deals with mental disorders, esp[ecially] with the psychoses, but also with the neuroses." Webster, New International Dictionary (2d ed. 1947). A psychologist is one versed in psychology, "the science which treats of the mind . . . in any of its aspects; systematic knowledge and investigation of the phenomena of consciousness and behavior; the study of the organism and its activities, considering it as an individual whole, esp[ecially] in relation to its physical and social environment; . . ." *Id.* Thus a psychiatrist is a doctor of medicine who after completing a regular medical course has specialized in psychiatry. The psychologist is a non-medically trained specialist in psychology, often with a Ph.D., whose particular specialty within psychology involves performance of one or more of numerous functions, ranging from industrial psychology (which may pertain to the conduct of labor relations), to psychodiagnosis and psychotherapy, sometimes carried on by a clinical practitioner of psychology. It is activities of the clinical psychologist as a practitioner of psychodiagnosis and psychotherapy which most closely coincide with the activities of the psychiatrist. There would seem to be general consensus among the psychiatric and psychological professions that (1) people in need of professional psychological services whose needs involve organic pathology require the competence of the psychiatrist, and (2) some psychological functions, such as diagnosis by projective tests, vocational guidance, and corrective-educational procedures are normally within the competence primarily of the psychologist. [Omissions and additions in original.]

of course, be covered by Rule 27 (the general physician-patient privilege). The several exceptions to Rule 27, however, greatly restrict the applicability of the privilege. The logic underlying the need for the exceptions in the ordinary physician-patient situation does not apply with equal force to the psychotherapy situation. This leaves the psychiatrist's patient without sufficient protection against disclosure of confidential matters. Furthermore, none of the privileges provided by the Uniform Rules applies to communications between client and psychologist.

Law review writers, judges and psychotherapists have recently urged the enactment of legislation to provide substantial protection against disclosure of confidential communications between a patient and psychotherapist.

The Law in California and Under the Uniform Rules

The Psychologist-Client Privilege

Under the Uniform Rules the client who consults a psychologist has no privilege to prevent disclosure of confidential communications between himself and his psychologist.

California, by statute, has adopted a different view. Business and Professions Code Section 2904, enacted in 1957 as a part of the Psychology Certification Act,[2] provides:

> For the purposes of this chapter the confidential relations and communications between psychologist and client shall be placed on the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed.[3]

To better appreciate the scope of this psychologist-client privilege, the pertinent[4] exceptions to the lawyer-client privilege in California and under the Uniform Rules (Rule 26) are summarized[5] as follows:

Communications to Joint or Mutual Lawyer. If two persons jointly engage a lawyer, the California privilege cannot be asserted in a subsequent action between them. This exception is also found in Rule 26(2)(e).

Communications Pertinent to Lawyer's Good Faith or Integrity. The California privilege cannot be asserted when the communication is relevant to an issue of the lawyer's good faith, integrity or authority. This exception is also found in Rule 26(2)(c).

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[2] Cal. Stats. 1957, Ch. 2320, p. 4037.

[3] This section may be unconstitutional because the title of the 1957 Act is so specific that it may not embrace the subject matter of the section. CAL. CONST., Art. IV, § 24 provides in part:

> Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.

The title of the Psychology Certification Act is:

> An act to add Chapter 6.6 (commencing with Section 2900) to Division 2 of the Business and Professions Code, relating to the creation of the Committee of Psychological Examiners and to prescribe its organization, powers and duties . . . . [Cal. Stats. 1957, Ch. 2320, p. 4037.]

[4] Some of the lawyer-client privilege exceptions obviously are not pertinent to the psychologist-client privilege. For example, an exception is recognized relevant to an issue concerning a will of which the lawyer is an attesting witness.

[5] See that portion of the study on Rule 26 for a detailed discussion of the lawyer-client privilege—pp. 380-401.

Parties Claiming Under Deceased Client. The California privilege does not survive the client's death when the communication is relevant to a will contest, petition to construe an ambiguous will, or any other type of controversy between persons claiming "under" the client relating to the devolution of the estate of the client. Rule 26(2)(b) provides a similar, but broader, exception which applies "to a communication relevant to an issue between parties all of whom claim through the client." The URE exception applies even while the client is alive.

Client's Contemplated Crime or Fraud. The California privilege cannot be asserted where the legal service was sought or obtained to enable or aid the client to commit or plan to commit a crime or fraud. Rule 26(2)(a) provides an exception not only in cases where the legal service is sought or obtained in order to enable or aid the client to commit or plan to commit a crime or fraud but also where the legal service is sought or obtained in order to enable or aid the client to commit or plan to commit a *tort.*

Eavesdroppers. Although the matter is far from clear, the California privilege may not provide protection against testimony by an eavesdropper, intermeddler or interceptor. Rule 26(1)(c) clearly abolishes this exception, for it gives the client a privilege "to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client."

The Psychiatrist-Patient Privilege

Since the psychiatrist is also a physician, he is generally considered to be within the scope of the physician-patient privilege.[6] The privilege created by Section 2904 of the Business and Professions Code does not apply to a psychiatrist, for that privilege is limited to psychologists certified under the Psychology Certification Act. Although Section 2904 has never been so interpreted by the courts,[7] an examination of the title[8] of the Psychology Certification Act and its provisions[9] justifies this conclusion.

The physician-patient privilege under existing California law and under Rule 27 is subject to numerous exceptions that operate to restrict

[6] See City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (1951). CAL. BUS. & PROF. CODE § 2379 provides that the wilful betrayal of a professional secret constitutes nonprofessional conduct for which the physician's medical certificate may be suspended or revoked.

[7] Section 2904 has apparently never been before the courts. *But see* People v. Spigno, 156 Cal. App.2d 279, 319 P.2d 458 (1957) (holding that a "psychologist" is not a "psychiatrist" within the meaning of CAL. WELF. & INST. CODE §§ 5504-06).

[8] See note 3, *supra* at 418. The Committee of Psychological Examiners is given no powers or duties with respect to psychiatrists.

[9] Psychologist is defined by Section 2903, which states:

> A person represents himself to be a "psychologist" within the meaning of this chapter when he holds himself out to the public by any title or description incorporating the words "psychological," "psychologist" or "psychology" and under such title or description offers to render or renders psychological services for remuneration.

Section 2936 provides:

> Nothing in this chapter shall be construed as permitting . . . any infringement upon the practice of medicine as defined in the laws of this State or the use of therapeutic measures in the diagnosis or treatment of mentally ill except in collaboration with a physician and surgeon as specified in Section 2013 of this code.

Section 2013, a section in the chapter on the licensing of medical practitioners, provides in part:

> The performance of psychological services on referral from a person licensed under this chapter is not a violation of this chapter.

narrowly its application.[10] These exceptions can be summarized[11] as follows:

Criminal Cases. The California privilege is expressly limited to a "civil action" and does not apply in criminal cases. Rule 27(2) recognizes the privilege not only in civil actions but also in criminal prosecutions for a misdemeanor.

Deceased Patient. The California privilege does not apply where the patient is dead and (1) the patient's will is contested or (2) an action is brought involving the validity of any instrument claimed to have been executed by him transferring real or personal property. Similarly, Rule 27 provides that there is no privilege when (1) the issue is the validity of a document as a will of the patient or (2) the issue is between parties claiming by testate or intestate succession from a deceased patient.

Patient-Litigant Exception. If the patient brings an action for damages for personal injuries, or in a wrongful death action for the death of the patient, the doctor who "prescribed for or treated" the patient may testify. Rule 27 provides that there is no privilege in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient.

Mental Competency of Patient. Rule 27, but not California, recognizes an exception in proceedings to commit the patient for mental incompetence and in proceedings by the patient to establish his competence.

Persons Claiming by or Through the Patient or Claiming Under Contract. California restricts the privilege narrowly and therefore its principal application appears in litigation over insurance policies. Rule 27 creates an exception that will abolish the privilege in all cases where the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

Official Information. Rule 27, but not California,[12] creates an exception where the information must be reported to a public official or recorded in a public office unless the statute requiring the report or recording provides that the information is confidential.

Aid in Commission of Crime or Tort. Rule 27, but not California, creates an exception where the services of the physician were sought or obtained to aid in the commission of a crime or tort or to escape detection or apprehension after its commission.

Action for Damages for Conduct Constituting a Felony. Rule 27, but not California, creates an exception for "an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor."

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[10] As more than one writer has correctly pointed out, URE Rule 27 contains so many exceptions that it is difficult to imagine a case in which it may be applied. See Quick, *Privilege Under the Uniform Rules of Evidence,* 26 U. CINC. L. REV. 537, 548 (1957); Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175, 180 (1960) [hereinafter cited as SLOVENKO].

[11] See that portion of the study on Rule 27 for a detailed discussion of the physician-patient privilege—pp. 402-416.

[12] Note, for example, however, CAL. PEN. CODE § 11161, requiring physicians who treat gun and knife wounds to report the facts to the police.

Eavesdroppers. Although the matter is far from clear, the present California privilege apparently does not provide any protection against testimony by an eavesdropper, intermeddler or interceptor. Rule 27 similarly provides no protection against such testimony.

The Law in Other States

The Psychologist-Client Privilege

There is no privilege at common law to prevent disclosure of confidential communications between a psychologist and his client. But during the years 1948 to 1958, California and seven other states passed legislation creating a special psychologist-client privilege.[13] All of these statutes take the same general form as the California statute; they grant the client who consults a psychologist substantially the same privilege as the client who consults a lawyer. In 1963, Illinois joined with these states in providing statutory protection to the psychologist-client relationship, but departed from the earlier statutory schemes by legislating several specific exceptions to the new privilege.[14]

[13] The text of these state statutes is as follows:

1. Arkansas. ARK. STAT. ANN. § 72-1516:
   For the purpose of this Act, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this Act shall be construed to require any such privileged communication to be disclosed. [Acts 1955, No. 129, § 16, p. 302.]
2. California. CAL. BUS. & PROF. CODE § 2904:
   For the purpose of this chapter the confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client, and nothing contained in this chapter shall be construed to require any privileged communication to be disclosed. [Cal. Stats. 1957, Ch. 2320, § 1, p. 4038.]
3. Georgia. GA. CODE ANN. § 84-3118:
   For the purpose of this Chapter, the confidential relations and communications between licensed applied psychologist and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this Chapter shall be construed to require any such privileged communication to be disclosed. [Acts 1951, pp. 408, 416.]
4. Kentucky. KY. REV. STAT. § 319.110:
   For the purpose of this chapter, the confidential relations and communications between certified clinical psychologist and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. [L. 1958, Ch. 169, § 11.]
5. New Hampshire. N.H. REV. STAT. ANN. § 330-A:19:
   The confidential relations and communications between a psychologist certified under provisions of this Chapter and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this Chapter shall be construed to require any such privileged communications to be disclosed. [L. 1957, Ch. 121, § 1.]
6. New York. N.Y. EDUC. CODE § 7611:
   The confidential relations and communications between a psychologist registered under provisions of this act and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this article shall be construed to require any such privileged communication to be disclosed. [L. 1956, Ch. 737, § 1.]
7. Tennessee. TENN. CODE ANN. § 63-1117:
   For the purpose of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. [Acts 1953, Ch. 169, § 17.]
8. Washington. REV. CODE WASH. ANN. 18-83.110:
   Confidential communications between a client and a certified psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client. [L. 1955, Ch. 305, § 11, p. 1371.]

[14] The full text of the Illinois Statute, part of the Psychologist Registration Act of 1963, is as follows:

No psychologist shall disclose any information he may have acquired from persons consulting him in his professional capacity, necessary to enable him to render services in his professional capacity, [*sic*?] to such persons [, *sic*?] except only: (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the

The Psychiatrist-Patient Privilege

In 1959 Georgia became the first state to provide a special privilege for communications between a psychiatrist and patient.[15] The Georgia statute[16] grants the patient an unqualified privilege. The enactment of such a statute may be explained by the fact that Georgia has provided a psychologist-client privilege but does not recognize the physician-patient privilege. Although no other state recognizes a special privilege for the psychiatrist and his patient, two-thirds of them recognize the physician-patient privilege.[17] In these states, the patient who consults a psychiatrist has the same privilege as the patient who consults any other physician. In the remaining states, the patient who consults a psychiatrist—like the patient who consults a physician—has no privilege to prevent disclosure of communications made in the course of treatment.[18]

The Case for a Psychotherapist-Patient Privilege

The writers on the law of evidence almost unanimously agree that the physician-patient privilege should be abolished, for it serves no useful legal purpose and instead does real harm in numerous cases by preventing the discovery of the truth.[1] On the other hand, a number of writers (who make no claim that the physician-patient privilege is justified) have urged that the peculiarly close relationship of trust and confidence required between the patient and his psychotherapist[2]

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homicide, (2) in all proceedings the purpose of which is to determine mental competency, or in which a defense of mental incapacity is raised, (3) in actions, civil or criminal, against the psychologist for malpractice, (4) with the expressed consent of the client, or in the case of his death or disability, of his personal representative or other person authorized to sue or of the beneficiary of an insurance policy on his life, health or physical condition, or (5) upon an issue as to the validity of a document as a will of a client. [L. 1963, p. ___ (ILL. ANN. STAT., Ch. 91½ § 406 (Smith-Hurd 1963 Supp.)).]

[15] GA. CODE ANN. § 38-418.

[16] *Ibid.* This statute provides:

There are certain admissions and communications excluded from consideration of public policy.

Among these are:

1. Communications between husband and wife.
2. Between attorney and client.
3. Among grand jurors.
4. Secrets of state.
5. Psychiatrist and patient.

[Acts 1959, p. 190, added subdivision (5).]

[17] MCCORMICK § 101, at 211 (1954). "The list of states having a medical privilege is misleading. The confidentiality they protect is not substantial. Because of the numerous exceptions, as will be pointed out these statutes closely resemble a sieve." SLOVENKO at 178 n.12.

[18] SLOVENKO at 195. It should be noted that the trial court in a case arising in Illinois (a state that does not have a physician-patient privilege) recognized a psychiatrist-patient privilege. Binder v. Ruvell, Civil Docket No. 52C2535, Circuit Court of Cook County, Illinois, June 24, 1952, Judge Harry M. Fisher, presiding. The case was not appealed. The entire opinion is reported in 150 A.M.A. J. 1241 (1952).

[1] See for example: 8 WIGMORE §§ 2380-91; Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 47 YALE L. J. 194, 207 (1937); Chafee, *Privileged Communications; Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L. J. 607 (1943); Curd, *Privileged Communications Between the Doctor and His Patient—An Anomaly of the Law*, 44 W. VA. L. REV. 165 (1938); Lipscomb, *Privileged Communications Statute—Sword and Shield*, 16 MISS. L. J. 181 (1944); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285 (1943); Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388 (1906); Duque, *Interpretation of Statutes Making Communications Between Physician and Patient Privileged*, 1952 PROCEEDINGS, A.B.A. SECTION OF INSURANCE LAW 137.

[2] As used in this study, the term "psychotherapist" includes both a psychiatrist and a psychologist when functioning as a psychotherapist.

makes the situation a special one, not necessarily governed by the same considerations as the ordinary physician-patient relationship.[3]

Professor Wigmore states that there are four tests for a legitimate privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[4]

Although Professor Wigmore strongly criticizes the physician-patient privilege, he does not consider psychotherapy in connection with privileged communications. But others have urged that Professor Wigmore's well-known four conditions of legitimate privilege are fulfilled in the case of communications between a psychotherapist and patient.[5]

Professor Slovenko, demonstrating that Professor Wigmore's four conditions are fulfilled, makes a convincing case for the privilege:

> (1) First of all, communications to a psychiatrist during the course of treatment are of a confidential and secret nature. The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family. The process involves a prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient.
>
> The patient's communications to the psychiatrist always originate in a confidence that they will not be divulged. The patient reveals to the psychiatrist his private personality, that which he

[3] Judge Harry M. Fisher, the trial judge in an Illinois case, recognized a psychiatrist-patient privilege, even though Illinois does not recognize the physician-patient privilege. Binder v. Ruvell, Civil Docket No. 52C2535, Circuit Court of Cook County, Illinois, June 24, 1952. (See note 18, *supra* at 422.) Judge Fisher stated:

> The psychiatrist's sphere of interest necessarily covers every experience of the patient. He may be interested in knowing the experiences of childhood. That may weigh very heavily with him in determining the cause of the disturbance. He may be interested in the experience of the patient during puberty, during adolescence. In fact, what he seeks to do is to bring back to the conscious memory of the patient things forgotten but which lie dormant in the subconscious mind. He probes deeply, and it is necessary for him to get that information out of the mouth of the patient. . . . It doesn't require any scientific knowledge to understand that there can be no success in the effort to ascertain the true cause of the disturbance or in determining the kind of treatment that should be applied unless there is a complete confidence in the mind of the patient, not alone in the capacity and skill of the psychiatrist, but in the secrecy of the things transpiring in the doctor's chambers. That relationship in that respect is unique and is not at all similar to the relationship between physician and patient.

The above quotation is taken from Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient,* 28 IND. L. J. 32, 33 n.3 (1952).

[4] 8 WIGMORE § 2285.

[5] Comment, 47 NW. U. L. REV. 384 (1952). See SLOVENKO at 175, 184-99; *cf.* Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient,* 28 IND. L. J. 32 (1952); LOUISELL at 731.

keeps secret from the world . . . . The psychotherapeutic relationship is unique and unlike any other that the patient or anyone else is likely to encounter. The structure and rules of the psychotherapeutic relationship bear little resemblance to the usual social relationship. For example, the psychiatrist, if he thinks that it will promote treatment, will not respond to the patient's questions. Social etiquette is abandoned in psychotherapy. It has no place in the interpersonal relationship of psychiatrist and patient. Politeness is dropped. Editing of one's thoughts is discouraged in the session. The patient is encouraged to perform in the session without regard to the usual social amenities. Psychiatrists refer to this aspect of analysis as letting down defenses. To illustrate further the unconventionality of the relationship: a minister in psychotherapy reveals aggressive attributes; a patient at the end of each session leaves without saying goodbye; a lady of society regularly greets her psychiatrist with the rebuke, "Haven't you lost weight yet, you fat little fool?"; a preacher's wife talks about fecal matter. The examples are without limit, but these are sufficient to illustrate that the attitudes of a person in the psychotherapeutic relationship may be at variance with his daily life. There is no question that the patient reveals his private personality in strict confidence. Revelation by the psychiatrist of the patient's inner self would be disastrous to the patient's reputation and standing in the community.

(2) The inviolability of that confidence is essential to the achievement of the purpose of the relationship. It is true that the general practitioner of medicine to some extent may use the method of the psychiatrist in discussing with the patient his emotional problems, but this is most often irrelevant to treatment, whereas in psychotherapy almost all, if not all, information is pertinent and necessary for treatment.

In psychotherapy, the patient reports whatever goes through his mind. Saying all is the desideratum. As Sandor Ferenczi, one of the founders of modern psychotherapy, put it: "The fundamental rule of analysis, on which the whole of our technique is built up, calls for the true and complete communication by the patient of all his ideas and associations." Hall and Lindzey, in their book *Theories of Personality,* state: "[T]he free-association method requires the patient to say everything that comes into consciousness, no matter how ridiculous or inappropriate it may sound . . . [I]t demands . . . that the patient talk about everything and anything that occurs to him without restraint and without any attempt to produce a logical, organized, meaningful discourse."

Speaking every thought is a difficult thing for a patient to achieve, and an essential in overcoming the usual resistance and inhibition, is the utmost faith of the patient in the psychiatrist that his confidence will not be revealed, even in a courtroom. Psychotherapy completely depends upon the patient's ability to talk freely. There has been some judicial recognition of this fact. Judge Edgerton of the Court of Appeals of the District of Columbia pointed out, "Many physical ailments might be treated with some

degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." Judge Alverson of the Superior Court of Atlanta extrajudicially remarked, "Psychotherapy by its very nature is worthless unless the patient feels assured from the outset that whatever he may say will be forever kept confidential. Without a promise of secrecy from the therapist, buttressed by a legal privilege, a patient would not be prone to reveal personal data which he fears might evoke social disapproval." The importance of absolute secrecy should be common knowledge to members of the legal profession, but unfortunately it is not. To paraphrase a Kantian expression, it seems that too many of us have yet to awaken from our dogmatic slumber.

Without knowing why, a person may feel exceedingly anxious about any probing into his inner self. It is not easy for a person to report his feelings. A person in psychotherapy has difficulty in reporting conscious as well as unconscious data. There are conflicts in society; achievements which society rewards are often won at the cost of a diminution of personality. A person does not like to say what he knows about himself. Introspective data will come out only if the doctor will keep the confidence and will not disseminate the information.

It might be pointed out that where the patient confesses marital infidelities, it is quite likely that the patient fears litigation, and consequently he would not speak freely if he suspected that the psychiatrist could be compelled to testify. Sex laws in most all states penalize practically all sex activity, other than the most conventional heterosexual act, and hence, almost any clinical details of sexual material could conceivably be the start of criminal action or divorce proceedings against the patient. It should be noted that the avoidance of litigation is often the reason a person comes to psychotherapy. He seeks help in trying to control unconventional activity. It is sometimes thought that a patient goes to a psychiatrist to plot litigation. This is usually contrary to fact. In the exceptional case, where a patient comes to a psychiatrist seeking litigation, the psychiatrist, as he does not want to get involved in such matters, usually declines his services. There is no need to fear in this regard that the medical privilege will be used to shield nefarious schemes.

Without confidentiality, a person would hesitate to see a psychiatrist, much less to make revelations to him. Confidentiality in court as well as out is essential not only for successful treatment but also to induce a person to visit a psychiatrist. It is vital to maintain confidentiality as to the fact of treatment as well as to communications made in treatment. By and large, people in the community, even those who are well-informed on other matters, consider a person's treatment by a psychiatrist as evidence of his "queerness" or even insanity. A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men. . . .

(3) The psychiatrist-patient relationship is one that should be fostered. Psychiatry today has gained a position of popularity, respect and status. It is a relatively new science, but it has earned

world recognition. Psychotherapeutic services are now being used, at an ever-increasing rate, on a public as well as on a private basis. In World War II it was a recognized department of the operations of the military, naval and air forces. Psychiatric departments have been established to aid the courts and prison officials. A number of universities, as pointed out, have appointed part-time psychiatrists, and it is hoped, although the task is immense, that every incoming student before long will be given an interview. The potentialities of the science are great. The law of evidence should not fetter its growth.

(4) The information if revealed would produce far fewer benefits to justice than the consequent injury to the entire field of psychiatry. A great deal of time is required before a psychiatrist is able to obtain the necessary confidence of his patient, and if there were any suspicion of revelation in the courtroom or anywhere else, the psychiatrist would not have the benefit of the statement either for treatment of his patient or for use in court. The denial of the privilege begets the worst of both worlds. Guttmacher and Weihofen in their work *Psychiatry and the Law* express the view that "whatever criticism may be levelled against the privilege as applied to ordinary doctor-patient relationships, there is good reason for keeping it in cases of mental therapy because of the highly confidential nature of the relationship that must be established before the therapist can diagnose the disorder and help the patient." It is essential to note that the preservation of human dignity, a value which is transcendent for the *summum bonum,* is involved in preserving the privacy of the therapeutic relationship.[6]

The strongest argument against recognition of a psychotherapist-patient privilege is, of course, the social importance of accurate fact finding in litigation. Professors Guttmacher and Weihofen state:

Of course, these considerations, emphasizing the usefulness and even the necessity of preserving the confidentiality of the psychiatrist-patient relationship, must be balanced against the importance of getting at the truth in litigated cases before we can reach a considered judgment as to whether the privilege should be allowed. Suppose in the trial of Alger Hiss that it had transpired that Whittaker Chambers, the one all-important witness against Hiss, had been under treatment by a psychiatrist (this is a wholly suppositious illustration, let it be understood, not intended to be taken as true in fact). If the privilege were abrogated, Hiss could, in the case assumed, have summoned the psychiatrist and compelled him to testify. This might have been of the utmost value, as, for example, if the psychiatrist had been forced to state that from his examination and treatment he was convinced that Chambers was a pathological liar. The suppression of such evidence by operation of the privilege may work the most outrageous injustice, in that it may result in the conviction of an innocent man on the testimony of a witness who, but for the privilege, could have been shown to be unworthy of belief. On the other hand, what would

[6] SLOVENKO at 184-94.

have been the effect on the willingness of neurotic or psychotic individuals to consult a psychiatrist if they read in the front-page newspaper accounts of such a sensational case that a psychiatrist could be summoned by one's opponent to reveal in the court-room what one had confessed in strictest confidence in the consulting room? The question is not without difficulty, but we submit that the possible injustice that might be done by the suppression of evidence in individual cases is outweighed by the importance of assuring patients that the confidentiality of their relations with their psychiatrist is absolute, and not subject to violation even on a court summons.

The balance of interests may not be the same in criminal as in civil cases. It may be argued that even if the privilege is allowed in civil litigation, no doctor—psychiatrist or other—should be allowed to refuse to reveal to the agencies of the state information relevant to the detection and prosecution of crime. In several states the [medical] privilege is restricted to civil cases. In others, it is expressly made inapplicable to certain situations where it might defeat strong public policy, as in abortion, venereal or narcotic cases. But we believe that the rationale of these policy exceptions does not extend to denying in all criminal cases the privileged status of communications made in the course of psychotherapy. The amount of good society might derive from obtaining a certain number of additional convictions by the help of the psychiatrist's testimony would almost certainly be outweighed by the harm done in destroying the confidentiality of the psychiatrist-patient relationship. Punishment is not that much more important than therapy.[7]

How Much Protection Should the Psychotherapist-Patient Privilege Provide?

Placing Privilege on the Same Basis as Attorney-Client Privilege or Physician-Patient Privilege

The special statutes that place the psychologist-client and psychiatrist-patient privileges on the same basis as the attorney-client privilege have achieved at least the relative simplicity of definition. But the writers who have considered these statutes have condemned them.[8] Professor Louisell objects to the client-psychologist statutes because they blanket within the privilege all client-psychologist relationships whether or not they need the privilege.[9] The concept of "psycholo-

[7] Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L. J. 32, 35-36 (1952).

[8] LOUISELL at 737-45; SLOVENKO at 201-02.

[9] LOUISELL at 737-39 states:

> The client-attorney privilege is of ancient lineage with widespread if not universal acceptance at least in the Anglo-American legal world, and has been so often construed and applied that there is a well-established body of doctrine available for assimilation to the new privilege. When one considers the large number of decisions which have characterized the evolution of the client-attorney privilege, the desires of formulators of a new privilege to reap the fruits of battles fought and victories won, rather to invite new warfare by generalized statement of principle, are quite understandable. Further, blanketing the clients of psychologists as such within the scope of the privilege helps to avoid the perplexing definitional problems which would ensure from a statute granting or withholding privilege according to the function performed by the psychologist. But the problem of recognition of a new privilege is too important to be resolved exclusively or primarily by considerations of ease of definition. [Citations omitted.]

gist''[10] is descriptive of too many functions to justify its use as the definer of a confidential communication privilege. For example, almost everyone will agree that it is not in the public interest to provide a privilege covering communications to a psychologist engaged in testing or marketing surveys. Yet this is apparently within the scope of the statutory protection in those states, including California, that have enacted a special psychologist-client privilege.

Professor Slovenko also criticizes the technique of adopting the attorney-client privilege by reference as a method of framing a psychiatrist-patient privilege.[11] He points out that adoption by reference is never a good policy and that statutes that adopt others by reference rarely lead to clarity in enforcement.[12] But his major objection is that adoption by reference would be satisfactory only if the attorney-client privilege were absolute in the real sense of the word and it is not.[13]

A limited degree of protection could be provided for communications between patient and psychotherapist by placing them on the same basis as communications between patient and physician. But, as previously pointed out,[14] the physician-patient privilege under existing California law and under the Uniform Rules is subject to numerous exceptions that operate to restrict narrowly its application. These exceptions reflect the belief that the physician-patient privilege unnecessarily excludes evidence which often is essential for the fair administration of justice. Furthermore, the considerations that support the psychotherapist-patient privilege are not the same considerations that support the physician-patient privilege.[15] The basic distinction between the two privileges is noted in *Taylor* v. *United States:*[16] ''Many physical ailments might be treated with some degree of effectiveness by a doctor

[10] CAL. BUS. & PROF. CODE § 2903.5 provides:

> The practice of psychology is defined as the application of established principles of learning, motivation, perception, thinking, and emotional relationships to problems of personnel evaluation, group relations, and behavior adjustment, by persons trained in psychology. The application of said principles includes, but is not restricted to, counseling and the use of psychotherapeutic measures with persons or groups with adjustment problems in the areas of work, family, school, and personal relationships; measuring and testing of personality, intelligence, aptitudes, emotions, public opinion, attitudes, and skills; and doing research on problems relating to human behavior.

[11] SLOVENKO at 203 n.91 states:

> Adoption by reference is never a good policy. Compare the California statute which provides, "The confidential relations and communications between psychologist and client shall be placed upon the same basis as those provided by law between attorney and client." Cal. Bus. & Prof. Code § 2904 (Deering). Among other things, such statutes rarely lead to clarity in enforcement. Adoption by reference would be satisfactory if the attorney-client privilege were absolute in the real sense of the word, but it is not. See Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948) (identity of the client falls outside the privilege); Pollack v. United States, 202 F.2d 281 (5th Cir. 1953) (lawyer used as business agent or accountant or scrivener excluded); In re Selser, 15 N.J. 393, 105 A.2d 395 (1954) (no privilege when "wrongful" acts are contemplated); Note, Discovery, 47 Mich. L. Rev. 416 (1949); Selected Writings on the Law of Evidence and Trial 221-254 (ed. Fryer, 1957). Discovery procedures are invading more and more the attorney's traditional privacy in preparing his case.

[12] *Ibid.*

[13] *Ibid.*

[14] See the text, *supra* at 419-420.

[15] Professor Slovenko, suggesting the need for reappraisal of the medical privilege, states: "The criticisms which are employed against the orthodox medical privilege are inapposite to the psychatrist-patient relationship. It is true that mind and body are related, as psychosomatic illnesses so clearly point out, but this is no reason for the failure in the law of evidence to discriminate between the types of medical practice and their peculiar requirements." SLOVENKO at 199.

[16] 222 F.2d 398 (D.C. Cir. 1955).

whom the patient did not trust, but a psychiatrist must have the patient's confidence or he cannot help him." [17]

Thus, it is not desirable to place a psychotherapist-patient privilege on the same basis as the attorney-client privilege or the physician-patient privilege. A satisfactory psychotherapist-patient privilege might be formulated after resolving the following difficult questions: (1) Which communications are to be considered within the scope of the privilege? (2) What degree of protection is to be provided these communications? These questions are discussed in detail below.

Communications Within Scope of Privilege

Professor Louisell suggests that the privilege be limited to communications between a patient and his psychologist or psychiatrist for the purpose of psychodiagnosis or psychotherapy:

> [T]here is a sound rationale strongly justifying, if not requiring, confidentiality for client-psychologist communications in certain of the many types of relationships between them. In brief, it seems to this writer that the demonstrable need is for confidentiality for communications between a patient and his licensed or otherwise authorized psychodiagnostician and psychotherapist, whether the professional practitioner be a medical psychiatrist or a non-medical psychologist. This need is well put in *Taylor v. United States:*
>
> > In regard to mental patients, the policy behind such a statute [patient-physician privilege] is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have the patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.'
>
> A study of the literature of psychodiagnosis (whether psychoanalysis or otherwise) and psychotherapy sustains the quoted observations. . . . It is hard to see how the psychodiagnostic and psychotherapeutic functions adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality. Such an attitude can hardly exist without sure guarantees against disclosure of the patient's secrets.[1]

Professor Louisell's proposal is sound. He would limit the scope of the protection provided by the privilege to those communications that should in the public interest be kept confidential. His solution, however, presents a serious drafting problem—the problem of defining when the nonmedically trained psychologist is engaged in "psychodiagnosis" or

[17] *Id.* at 401.
[1] LOUISELL at 744-46.

"psychotherapy." [2] As he points out, if these terms are not defined in the statement of the privilege, the court in borderline cases will have difficulty in determining whether a communication between psychologist and patient is within the scope of the privilege.

Another writer has suggested that a psychotherapist-patient privilege should not be limited to communications to those who specialize in psychotherapy.[3] He suggests that the general medical practitioner should be included within the psychotherapist-patient privilege when he is using psychotherapy to treat a patient. The same writer, however, points out the difficulties in so extending the privilege:

> It is very common for the general practitioner of medicine to use the methods of the psychotherapist (although perhaps unwittingly) in the process of treating one of his patients—*e.g.*, in simply discussing with the patient his personal problems. In such a case, most of the same considerations supporting a privilege for the psychiatrist and psychologist are applicable here. But two distinctions should be noted: (a) the general practitioner ordinarily has not had special training in psychotherapy, and presumably is not as competent in this area as the psychotherapy specialist; (b) the general practitioner ordinarily deals with less serious cases than the psychotherapy specialist. It would seem that the public interest—the ultimate basis of any testimonial privilege—does not compel the same legal protection for the general practitioner when acting in the capacity of a psychotherapist as it does for a psychotherapy specialist. Or in terms of Wigmore's fourth criterion, in the case of the general practitioner there is more of an even balance between the benefit to justice in obtaining his testimony and the injury to the relationship which might be caused by the fear of later disclosure in court. Moreover, from the standpoint of judicial administration, it would be difficult to determine just when a physician is acting as a psychotherapist and when he is not. The

[2] Professor Louisell states:

> It must be conceded that rejection of the kind of provision . . . [which gives a psychologist a privilege on the same basis as the attorney-client privilege] in favor of the foregoing rationale justifying privilege only for the patient of the psychodiagnostician and psychotherapist has the disadvantage of substituting for the broad concept "psychologist," which because of its comprehensiveness tends to preclude problems of interpretation as to applicability, the narrower concept "psychodiagnosis and psychotherapy", which inherently invites interpretation. A judicial attempt at precise definition of psychodiagnosis and psychotherapy for purposes of fixing entitlement to the privilege would present a formidable task, occasioning perhaps an uncertain and inconclusive meandering line of interpretation. Distinguishing between psychodiagnosis and psychotherapy on the one hand, and certain other functions performed by psychologists on the other, presents all the definitional problems of distinguishing between "treating the abnormal" and "counseling the normal." Attempts at distinctions as they evolved from case to case might produce definitions as relative, hazy and overlapping as those of "health" and "sickness", "vitality" and "enervation", "well-being" and "malaise."
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> It is apparent that no attempt has been made in this article to define psychodiagnosis or psychotherapy for the purpose of prescribing the conditions of their legitimate practice by the nonmedically trained psychologist. That must await another time. Perhaps in respect to this problem the hour is so late that one should not speak at all unless he is willing to name the solution for the day. This the present writer is still unable to attempt. It is a problem in the first instance to be threshed out by the medical profession, particularly its psychiatric branch, and the psychological profession, and still to be authoritatively threshed out in some localities. This problem, the resolution of which is vital to the public welfare and which increasingly engages public interest, may represent one of those conflicts of expert opinion which ultimately has to be settled by non-professional or lay judgment. [*Id.* at 747-748.]

[3] Comment, 47 NW. U. L. REV. 384 (1952).

> only basis for such a determination would be the word of the physician himself, who presumably would prefer not to reveal damaging information about a patient. To meet these difficulties, the statute could provide that confidential communications to a general practitioner in the course of a counselling relationship can only attach at the discretion of the trial judge. This would allow the judge to weigh the interests of both sides and in any given case reach a decision which is best warranted by the facts.[4]

It is true that the general medical practitioner may use psychotherapeutic techniques in treating some of his patients. But marriage counselors, social workers, educators and others also may use psychotherapeutic techniques as a part of their professional activities. The same reasoning that justifies extending the privilege to the general medical practitioner is equally applicable to these other professions. The difficulty of defining when the privilege may be claimed to prevent disclosure of a communication to a person not specializing in psychotherapy is a practical reason for not extending the privilege to cover such communications. Moreover, as a matter of policy, there does not appear to be sufficient justification for extending the privilege. It has not been established that general medical practitioners, social workers, educators and others have been greatly hindered in their professional activities because communications between them and their patients are not protected by a psychotherapist-patient privilege. The contrary is true in the case of the psychiatrist or clinical psychologist.

Should Privilege Be Absolute or Discretionary?

From the viewpoint of the psychiatrist or psychologist, it is important to assure the patient that the confidentiality of communications between patient and psychotherapist is absolute and not subject to exception at the discretion of the judge. Professor Slovenko originally expressed the view that the privilege should be subject to the discretion of the judge.[5] After a careful study of the matter, however, he later concluded that the privilege should be absolute.[6]

Professor Louisell, likewise, recommends that the privilege be absolute:

> However appealing the argument for reduction of the conventional patient-physician privilege so that ". . . the presiding judge . . . may compel . . . disclosure, if in his opinion the same is necessary to the proper administration of justice," it is submitted that in any event such a "discretionary" privilege is clearly inadequate to the needs of the psychotherapist's patient. [Omissions in original; author's citations omitted.][7]

In justification of an absolute privilege, Professor Louisell states:

> It has accurately been noted that there is hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in

[4] *Id.* at 388.
[5] See SLOVENKO at 199 n.74.
[6] *Id.* at 198-99.
[7] LOUISELL at 746 n.53. Another writer recommends an unqualified privilege for the psychiatrist and clinical psychologist and discretionary privilege for general medical practitioner when acting in capacity of a psychotherapist. Comment, 47 NW. U. L. REV. 384 (1952).

the psychodiagnostic and psychotherapeutic relationships. Implicit in the nature and processes of psychodiagnosis and psychotherapy is a profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets theretofore unknown even to the conscious mind of the patient himself. Sometimes the processes are aided by hypnosis or drugs, temporarily putting beyond control of the patient all deliberate choice as to the extent, continuation or termination of the inquiry. Obviously disclosure at large of data thus procured might have the most significant consequences for the reputation and status of the patient, and typically he is well aware of the potentialities of disclosure. It is hard to see how the psychodiagnostic and psychotherapeutic functions adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality. Such an attitude can hardly exist without sure guarantees against disclosure of the patient's secrets. It seems clear that such guarantees must include organized society's ultimate safeguard against revelation, namely, privilege against legally coerced disclosure in all circumstances save that of voluntary and intelligent waiver of the privilege by its owner, the patient. It seems accurate to conclude, therefore, that a patient's right of confidential communication to his psychodiagnostician and psychotherapist is a function of his right to engage and get help from such services. If he has a right to obtain such services, he has a correlative right to the essential confidentiality of communication. [Footnotes omitted.][8]

Proposed Rule

It is believed that a desirable solution to this problem can be achieved by enactment of a statutory rule of privilege to protect confidential communications in this area of professional practice. The following discussion is based upon a proposed rule that would cover only a psychotherapist who is a psychiatrist or clinical psychologist and which will provide an absolute rather than discretionary privilege.

Text of Proposed Rule

It is suggested that a new rule might be added to the Privileges Article of the Uniform Rules. This new rule—designated Rule 27.1 for convenience of discussion—should read as follows:

RULE 27.1. *Psychotherapist-Patient Privilege.*

(1) As used in this rule, (a) "confidential communication between psychotherapist and patient" means such information transmitted between psychotherapist and patient, including information obtained by an examination of the patient, as is transmitted in professional confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted; (b) "holder of the privilege" means (i) the patient when he is competent, (ii) a guardian of the patient when the patient is incompetent and (iii) the personal representative of the

[8] LOUISELL at 745-746.

patient if the patient is dead; (c) "patient" means a person who, for the sole purpose of securing psychotherapeutic treatment or psychotherapeutic diagnosis preliminary to such treatment, consults a psychotherapist; (d) "psychotherapist" means (i) a person authorized, or reasonably believed by the patient to be authorized, to practice as a psychiatrist in the state or jurisdiction in which the consultation takes place or (ii) when the consultation takes place in this State, a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code or (iii) when the consultation takes place in another state or jurisdiction, a person licensed or certified as a psychologist in such state or jurisdiction if the requirements for obtaining a license or certificate in such state or jurisdiction are substantially the same as under Article 4 (commencing with Section 2940) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(2) Subject to Rule 37, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and psychotherapist, and (b) the patient or the psychotherapist reasonably believed the communication to be necessary or helpful to enable the psychotherapist to make a psychotherapeutic diagnosis of the patient or to render psychotherapeutic treatment for him, and (c) the claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege by the holder of the privilege or (iii) if no other person claims the privilege and the patient is living, the person who was the psychotherapist at the time of the communication.

Comments on Proposed Rule

Proposed Rule 27.1 is based on Rule 27 of the Uniform Rules. There are, however, some important differences between the two rules. The similarities and differences are discussed in some detail below.

Confidentiality

As under Rule 27, the privilege under proposed Rule 27.1 attaches only if the judge finds that the communication was a "confidential communication."

Purpose of Communication: Psychotherapeutic Diagnosis or Treatment

Under proposed Rule 27.1(2)(a) and (b), the privilege attaches only if the judge finds that "the patient or the psychotherapist reasonably believed the communication to be necessary or helpful to enable the psychotherapist to make a psychotherapeutic diagnosis of the patient or to render psychotherapeutic treatment for him." This provision is taken from the similar requirement of Rule 27.

Professor Louisell points out that this definition is subject to the objection that the terms "psychotherapeutic diagnosis" and "psychotherapeutic treatment" invite judicial interpretation. He says:

> A judicial attempt at precise definition of psychodiagnosis and psychotherapy for the purposes of fixing entitlement to the privi-

> lege would present a formidable task, occasioning perhaps an uncertain and inconclusive meandering line of interpretation. Distinguishing between psychodiagnosis and psychotherapy on the one hand, and certain other functions performed by psychologists on the other, presents all the definitional problems of distinguishing between "treating the abnormal" and "counseling the normal." Attempts at distinctions as they evolved from case to case might produce definitions as relative, hazy and overlapping as those of "health" and "sickness," "vitality" and "enervation," "well-being" and "malaise."
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> It is apparent that no attempt has been made in this article to define psychodiagnosis or psychotherapy for the purpose of prescribing the conditions of their legitimate practice by the nonmedically trained psychologist. That must await another time. Perhaps in respect to this problem the hour is so late that one should not speak at all unless he is willing to name the solution for the day. This the present writer is still unable to attempt. It is a problem in the first instance to be threshed out by the medical profession, particularly its psychiatric branch, and the psychological profession, and still to be authoritatively threshed out in some localities. This problem, the resolution of which is vital to the public welfare and which increasingly engages public interest, may represent one of those conflicts of expert opinion which ultimately has to be settled by non-professional or lay judgment.[9]

It is doubtful that a more precise definition of the terms "psychodiagnosis" and "psychotherapy" could be drafted.

Whose Privilege?

As under Rule 27, the "holder" of the privilege is the patient.

Actions in Which Applicable

Proposed Rule 27.1 applies in all actions and proceedings. This is a significant departure from the scheme of Rule 27, which applies only to civil actions and proceedings and misdemeanor prosecutions.

Who Is a Psychotherapist?

Proposed Rule 27.1(1)(d) defines "psychotherapist" as follows for the purposes of the psychotherapist-patient privilege:

> (d) "[P]sychotherapist" means (i) a person authorized, or reasonably believed by the patient to be authorized, to practice as a psychiatrist in the state or jurisdiction in which the consultation takes place or (ii) when the consultation takes place in this State, a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code or (iii) when the consultation takes place in another state or jurisdiction, a person licensed or certified as a psychologist in such state or jurisdiction if the requirements for obtaining a license or certificate in such state or jurisdiction are substantially the same as under Article 4 (commencing with Section 2940) of Chapter 6.6 of Division 2 of the Business and Professions Code.

[9] LOUISELL at 747-748.

The definition does not require that the psychotherapist who purports to be a *psychiatrist* actually be authorized to practice as a psychiatrist; it is sufficient if the person purporting to be a psychiatrist is reasonably believed by the patient to be authorized to practice psychiatry. This is similar to the definition of physician under Rule 27.

However, reasonable belief by the patient that a *psychologist* is licensed or certified is not sufficient. This is a departure from the general scheme of the Uniform Rules which protect patients from reasonable mistakes as to unlicensed practitioners. However, it is suggested that practical considerations require this departure. There are many persons who are not licensed as psychologists who purport to render psychotherapeutic aid. The extent of the problem that would be created if the "reasonable belief" provision were extended beyond the psychiatrist is suggested in the following newspaper article:[10]

WANT TO BE A PSYCHIATRIST?

Not Enough Trained Therapists Available, Says S. F. Expert

By George Dusheck

Anybody can practice psychiatry in California.

For example, Albert O. Wehinger, a friendly, relaxed, 66-year-old chiropractor who has been unkinking backbones and washing out toxic colons since 1917, has found that the psyche is even kinkier than an aching back.

He has therefore set up in business at 2107 Van Ness Ave. as a certified Electropsychometrist, prepared to lend a psychotherapeutic hand to—

"Persons whose life is confused, unhappy, despondent or persons who suffer from tensions, anxieties, phobias, compulsions or other abnormal mental states . . . ." (Advertisement in the News-Call Bulletin, June 5.)

A few weeks ago, until the Better Business Bureau politely inquired about his claims and methods, he also specialized in relieving ". . . overweight, asthma, speech blocking and stuttering, chronic fatigue, inability to learn or remember, feeling of inferiority . . . ." (Advertisement in the Chronicle, April 13.)

The ads were thereafter toned down, with certain claims omitted.

Wehinger is the founder and staff of the San Francisco Mental Health Clinic in a Van Ness Ave. medical building. His equipment consists of a Mathison Electropsychometer, a Webcor tape recorder, a lengthy questionnaire, and his 1916 Chiropractic diploma from the National Postgraduate School of Chicago, Ill.

Graying, stocky Dr. Wehinger has discovered that anybody (in California, at least) can practice psychotherapy providing he does not use surgery or drugs.

He has joined a long list of hypnotists, grapho-analysts, metaphysicians, herb doctors, marriage counselors, psychologists, personnel managers, semanticists, clergymen, and even

[10] San Francisco News-Call Bulletin, Monday, June 26, 1961, p. 1, col. 3 and p. 4, col. 5.

newspaper lovelorn columnists who are performing high cerebral irrigations for either money or love.

There are no laws regulating the practice of psychotherapy in this state, partly because nobody knows what the regulations should be.

The Orthodox. It is a fact that orthodox medical psychiatrists, overwhelmed by the flood of mental illness they have discovered, observed, and sometimes created in modern society, are NOT prepared to dismiss all the heterodox as quacks.

One San Francisco psychiatrist has said:

"We need all the help we can get from the community. There are simply not enough trained therapists to go around."

He made it clear this is no blanket indorsement of every amateur headshrinker in the nation.

"I'm sure some of these people—particularly the hypnotists—really damage seriously ill patients."

The Joint Commission on Mental Illness, in a long report to Congress earlier this year, also granted the impossibility of making psychotherapy a medical monopoly:

"In the absence of more specific and definitive scientific evidence of the causes of mental illness, psychiatry and the allied mental health professions should adopt and practice a broad, liberal philosophy of what constitutes and who can do treatment. . . ."

Or, in other words: Until psychiatry is a more exact science, we can't be too fussy about where to turn for help when in emotional trouble, especially since there aren't enough doctors anyway.

The same report, while recommending that "deep" psychotherapy be practiced only by the well-trained, competent and medically oriented psychiatrist or psychologist, left the door more than slightly ajar to a wide variety of lay healers:

". . . nonmedical mental health workers with aptitude, sound training, practical experience, and demonstrable competence should be permitted to do general short-term psychotherapy—namely, the treating of persons by objective, permissive, nondirective techniques of listening to their troubles in an individually insightful and socially useful way."

The nice thing about prose like that is that it can mean just about anything the reader wants it to mean.

There is no question in the mind of Albert O. Wehinger about the social usefulness of his practice.

"We save our patients months and years of their lives and thousands upon thousands of dollars," he told the News-Call Bulletin.

"We have all heard about whole families who visit certain types of practitioners of the analyst type, and who keep on going week after week for years on end. Some people have spent $40,000 and $50,000 this way. And there is no guarantee of a cure."

In contrast, Electropsychometry costs only $350 to $500, and the patient himself decides when he has had enough.

"It may take 100 hours or 200 hours," said Wehinger.

> These hours aren't spent on the doctor's couch at $25 an hour. They are spent at home, listening to a tape recording made, not by Wehinger, but by his mentor and guide, Volney G. Mathison, of Los Angeles.
>
> Mathison, who invented the Electropsychometer and taught Wehinger and other electropsychometrists how to use it, has a good deal more self-confidence than the aging chiropractor on Van Ness Ave.
>
> Thus, when the San Francisco Better Business Bureau wrote to Wehinger about one of his newspaper ads, it was Mathison who replied. And in his reply he made the following stab at explaining his science:
>
> "Electropsychometry is not medical, chiropractic or psychoanalytic, but applies metaphysical and religious concepts in an ultra-modern mode."

The patient who seeks psychotherapy is fully protected against unlicensed practitioners if he consults a person purporting to be a psychiatrist. However, under proposed Rule 27.1, the patient will run the risk that a person purporting to be a psychologist is not licensed or certified as such if he consults any person other than a psychiatrist. Imposing this risk on the patient is necessary in order to draft a meaningful definition of psychotherapist.

It should be noted that the definition may cover psychologists who are not within the terms of the existing California psychologist-client privilege. The existing California privilege is apparently limited to psychologists certified under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code. Proposed Rule 27.1, on the other hand, provides protection where the psychologist is licensed or certified in another state or jurisdiction.

Guardian and Ward

Under proposed Rule 27.1, as under Rule 27, the guardian of an incompetent patient is the "holder of the privilege."

Patient's Posthumous Privilege

Under proposed Rule 27.1, the personal representative of the patient may claim the privilege if the patient is dead. A similar provision is contained in Rule 27.

Psychotherapist Claiming Privilege

Proposed Rule 27.1 permits the psychotherapist to claim the privilege for his patient if the privilege has not been waived, the patient is living, and no one else claims the privilege. Rule 27 does not contain this right; but, as suggested previously, it should be revised so as to contain a similar provision.

The Eavesdropper Exception

Proposed Rule 27.1 will provide protection against the interceptor, intermeddler and eavesdropper. Rule 27 does not provide similar protection. However, the lawyer-client privilege under the Uniform Rules provides protection against persons who obtain knowledge or possession of the communication in the course of its transmittal between the attorney and client or in a manner not reasonably to be anticipated by

the client. There is a substantial risk of eavesdropping in the case of a patient-psychotherapist relationship.

Waiver

Proposed Rule 27.1 is specifically made subject to Rule 37 relating to waiver. Concerning waiver, Professor Slovenko says:

> To many the observation is gratuitous, but it should be made clear that a person under analysis has the mental capacity to determine whether or not he should waive the privilege. Strange as it may seem, it is all too often thought that persons in psychotherapy are irrational and non compos mentis. Idiots and morons and other persons of low intelligence and sophistication are not fit subjects for psychotherapy. Persons in therapy are intelligent individuals who are in emotional discomfort, unable to fulfill themselves. Furthermore, psychiatrists do not treat, but simply manage, psychotics. Insight therapy will not work on psychotic persons.[11]

Rule 37 provides that the right to claim a privilege may be waived by the holder of the privilege. Proposed Rule 27.1(1)(b) defines holder of the privilege to include the patient when he is competent, a guardian of the patient when the patient is incompetent and the personal representative of the patient if the patient is dead. Thus, proposed Rule 27.1 sets up a comprehensive scheme specifying clearly the person entitled to waive the privilege. The same scheme is similarly suggested for use in Rule 27.

Recommendation

It is recommended that a new rule—Rule 27.1 as set out above [12]—be added to the Privileges Article of the Uniform Rules. Also, repeal of Section 2904 of the Business and Professions Code is recommended.

Acceptance of the recommendations made in this portion of the study would have the following significant effects on the present California law:

1. The psychologist-client privilege under existing California law would be restricted to cover only psychodiagnosis and psychotherapy rather than all professional activities of the psychologist. The psychologist-client privilege would be broadened to include consultations with a psychologist licensed or certified in another state or jurisdiction; the existing California law apparently grants the privilege only when the psychologist is certified in California.

2. The patient who consults a psychiatrist would be given substantially more protection against disclosure of confidenial communications between psychiatrist and patient. Under existing California law the only protection granted these communications is the very limited protection afforded by the physician-patient privilege.

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[11] SLOVENKO at 203 n.91.
[12] See pp. 432-433, *supra*.

RULE 28—MARITAL PRIVILEGE

Introduction

Rule 28 concerns the marital privilege to prevent disclosure of confidential communications. As previously indicated,[1] this portion of the study also deals with Rule 23(2) because of the similarity of subject matter. The text of these rules is as follows:

RULE 28. *Marital Privilege—Confidential Communications.*

(1) *General Rule.* Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.

(2) *Exceptions.* Neither spouse may claim such privilege (a) in an action by one spouse against the other spouse, or (b) in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

(3) *Termination.* A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

RULE 23. *Privilege of Accused.*

* * * * *

(2) An accused in a criminal action has 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, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage

[1] See the text, *supra* at 329.

relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.

* * * * *

The general rule stated in Rule 28(1) is first considered, comparing this general rule with the California rule declared in Code of Civil Procedure Section 1881(1) and the judicial construction thereof. The five exceptions stated in Rule 28(2) are next considered, comparing such exceptions with the California exceptions.[2] Finally, Rule 23(2) is considered and recommendations are made with respect to these rules.

General Rule

For convenience of discussion, the following portion of Rule 28(1) is regarded as the URE general rule of marital privilege for confidential communications:

> [A] spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The

[2] This portion of the study is not concerned with the rules which may prevent a spouse from giving *any* testimony in an action, *viz.*, § 1881(1), first part, which provides: "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent"; and Penal Code § 1322, first part, which provides: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both." These rules of privilege whereby one spouse may prohibit the other from giving any testimony whatsoever should be distinguished from the rule which is presently considered and which relates only to a particular and limited kind of testimony, *viz.*, testimony as to confidential communications. As is pointed out in *In re* De Neef, 42 Cal. App.2d 691, 109 P.2d 741 (1941):

> [T]wo distinct privileges are granted by [§ 1881(1)]—(a) the privilege making husband or wife incompetent as a witness in an action for or against the other; (b) the privilege against testifying to communications between husband and wife. The distinction is an important one. [*Id.* at 693, 109 P.2d at 742.]

Thus if one spouse is offered to testify against the other respecting a communication which may come within the second privilege, the testimony may be excluded on the basis of the first privilege and it then becomes immaterial whether or not the second privilege is likewise applicable, as in Marple v. Jackson, 184 Cal. 411, 193 Pac. 940 (1920). Moreover, in a given situation, though the first privilege is *in*applicable, the second may still be applicable, as in *In re* De Neef, 42 Cal. App.2d 691, 109 P.2d 741 (1941) (action by wife as beneficiary of husband's life insurance policy; second privilege applicable to husband's statements to wife regarding his physical condition). See also People v. Godines, 17 Cal. App.2d 721, 62 P.2d 787 (1936). Furthermore, the first privilege, though applicable when a spouse is offered to be sworn, may be waived at that point and the second privilege be claimed at some later point in the spouse's testimony notwithstanding the waiver of the first privilege. *E.g.*, suppose in the personal injury action of "P v. D," P calls Mrs. D. D does not object and Mrs. D testifies to circumstances of the injury. P then inquires of Mrs. D as to D's confidential statements to her. D's objection is sustained. D waived the first privilege, but not the second. As is said in Wolfle v. United States, 291 U.S. 7, 14 (1934), "the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved."

For a good general survey of the two privileges, see Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390 (1931).

Under the Uniform Rules the first privilege is abolished. See Rules 7 and 17.

other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.

The California general rule is in part legislative and in part decisional. The legislation is Code of Civil Procedure Section 1881(1) which states in substance as follows:

> [D]uring the marriage or afterward . . . [neither spouse can be examined] without the consent of the other, . . . as to any communication made by one to the other during the marriage.

In the following discussion the URE and California general rules are compared in several respects.

Confidentiality

The URE privilege in Rule 28(1) applies only to "*communications* found by the judge to have been had or made *in confidence.*" (Emphasis added.) On the other hand, the parallel expression in Section 1881 (1) is "*any* communication." (Emphasis added.) At one time this expression was construed literally and was therefore held to include nonconfidential spousal communications.[3] However, this view has not prevailed. The current attitude of the courts is to regard Section 1881(1) as requiring confidentiality of communication as an element of the privilege.[4]

Preliminary Finding by Judge—Burden of Establishing Privilege

Rule 28(1) is operative only when the conditions requisite for the privilege are "found by the judge." Rule 8 states how the judge should proceed in making the preliminary finding.[5]

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[3] "The provisions of our codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: the privilege at common law did not extend to communications which were not in their nature confidential; and although such communications were generally held *to be* confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our code sweeps away that embarrassing distinction by extending the privilege to *'any* communication made by one to the other during the marriage.' (Code Civ. Proc., sec. 1881.)" People v. Mullings, 83 Cal. 138, 140, 23 Pac. 229, 230 (1890).

See to the same effect Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 233 (1905).

[4] Tanzola v. DeRita, 45 Cal.2d 1, 285 P.2d 897 (1955); Leemhuis v. Leemhuis, 137 Cal. App.2d 117, 289 P.2d 852 (1955); Johnston v. St. Sure, 50 Cal. App. 735, 195 Pac. 947 (1920).

As to what has been held confidential and not confidential, see Tanzola v. DeRita, 45 Cal.2d 1, 285 P.2d 897 (1955) (noncommunicative act); Estate of Pusey, 180 Cal. 368, 181 Pac. 648 (1919) (act of communicating versus subject matter of the communication); People v. Loper, 159 Cal. 6, 112 Pac. 720 (1910) (mental condition); Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605 (1898) (delivery of a deed); People v. Morhar, 78 Cal. App. 380, 248 Pac. 975 (1926) (presence of a third party); First Nat. Bank v. De Moulin, 56 Cal. App. 313, 205 Pac. 92 (1922) (statement to a third party).

[5] Rule 8 provides:

> RULE 8. *Preliminary Inquiry by Judge.* When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

The California practice seems to be in accord with the Rule 8 procedure.[6] The privilege claimant has the burden of establishing privilege.[7]

Whose Privilege?

Outside California there are two divergent views respecting the question of who possesses the marital confidence privilege. These views are: (1) The privilege belongs solely to the communicating spouse. (2) The privilege belongs to both the communicating spouse and the addressee (listening) spouse.[8]

On its face, Section 1881(1) seems to provide a third view—namely, the privilege belongs to the nontestifying spouse. The statute provides:

> [N]or can either . . . be, without the consent of the other, *examined* as to any communication made by [either]. [Emphasis added.]

Literally this seems to mean that the only requisite for the examination is the permission of the spouse not under examination. Read in this way, the statute would give to the nontestifying spouse the election whether the testimony should be allowed. This construction would make such spouse the holder of the privilege.

However, it is clear that the California courts will not in all cases apply Section 1881(1) in accord with its literal meaning. In at least one situation there is a clearcut departure from such meaning, *i.e.*, the case of a defendant in a criminal action cross-examined by the prosecution as to confidential statements made by the defendant to the defendant's spouse. In this situation, though the accused is the testifying spouse, the accused is given the privilege to refuse to make the disclosure.[9]

Here it seems to be recognized that the matter of who happens to be the witness is a fortuity unrelated to the policy and purpose of the privilege. In other situations, whether the California courts will depart from the exact terms of the statute seems to be conjectural. For example, suppose husband (D) is a party and is cross-examined as to Mrs. D's statement to him and he objects. Or, suppose Mrs. D is examined by D's counsel as to her statement to D and she objects. Or, suppose D's adversary examines Mrs. D as to D's statement to her or her statement to him, and there is no objection by D but there is objection by Mrs. D. Assuming all other privileges to be waived, this problem remains: Which, if any, of these claims of the marital confidence privilege will the California courts honor despite the fact that the claim is made by the testifying spouse?

The preceding examples and remarks are intended to suggest that the notion of the nontestifying spouse as the sole privilege holder is a criterion of dubious validity and of uncertain application. As suggested

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[6] People v. Anderson, 26 Cal. 129 (1864); People v. Thornton, 106 Cal. App.2d 514, 235 P.2d 227 (1951); People v. Glab, 13 Cal. App.2d 528, 57 P.2d 588 (1936).
These are cases involving determination by the judge of the question of marriage *vel non* for the purpose of deciding whether the alleged spouse could testify at all. It seems that the procedure would be the same when the question arises for purposes of determining whether the parties to a communication were married.

[7] Tanzola v. DeRita, 45 Cal.2d 1, 285 P.2d 897 (1955); Leemhuis v. Leemhuis, 137 Cal. App.2d 117, 289 P.2d 852 (1955).

[8] 8 WIGMORE § 2340; MCCORMICK § 87.

[9] People v. Warner, 117 Cal. 637, 49 Pac. 841 (1897); People v. Mullings, 83 Cal. 138, 23 Pac. 229 (1890).

above, there are two alternative criteria applicable in other states. Assuming that the nontestifying spouse test should be abandoned, which of these two alternative tests possesses superior merit?

The bilateral view, *i.e.*, that both communicating spouse and addressee spouse are holders of the privilege, might possess a special appeal in criminal cases and there is something to be said for it in all cases. Today in a criminal case in which a spouse is a party, *both* spouses possess privilege to suppress *all* testimony by the nonparty spouse.[10] Although this privilege would be abolished under Rules 7 and 17, it may be urged that a vestige of it should be retained by giving both spouses the privilege to suppress evidence of a confidential interspousal communication. Furthermore, in all cases—both criminal and civil—it may be argued that spousal communication is ordinarily a two-way street making it difficult to separate the parts, determining as to each part which spouse is communicator and which is addressee. The bilateral view of privilege would avoid the necessity of making such a difficult determination.

Against the considerations just mentioned must be weighed the Wigmore-McCormick-URE approach, which favors the unilateral view. Professor Wigmore states that since the "privilege is intended to secure freedom from apprehension in the mind of the [spouse] desiring to communicate," the privilege "belongs to the *communicating* [spouse]" and the "other [spouse]—the addressee of the communication—is therefore not entitled to object."[11] Professor McCormick regards this argument as "convincing."[12] The Commissioners on Uniform State Laws are likewise persuaded, for in Rule 28(1) they provide privilege only for "a spouse who transmitted to the other the information which constitutes the communication."

The reasons stated by Professor Wigmore are persuasive that his is the best of the three views. There is no hesitancy in acknowledging the difficulty of administering it, that is, the difficulty of determining who is communicator and who is addressee in a marital exchange (especially a heated exchange). However, it is believed that Professor McCormick adequately meets this difficulty with his suggestion that even under the unilateral view "if a conversation or an exchange of correspondence between [spouses] is offered to show the collective expressions of them both, either . . . could claim privilege as to the entire exchange."[13]

[10] CAL. PEN. CODE § 1332. This would not be true under the Uniform Rules. See note 2, *supra* at 440.

[11] 8 WIGMORE § 2340, at 658 (citing cases *contra*).

[12] MCCORMICK § 87, at 176.

[13] *Ibid.* Under the URE view it seems clear that if (for example) the confidential communication is by husband to wife, the husband (being the privilege holder) may prevent his wife from revealing the confidence and may himself refuse to do so. On the other hand, if the husband elects to make the revelation, he may do so through the medium of his own testimony or that of his wife and, in either event, she (not being the privilege holder) can do nothing to preclude the disclosure. It follows, too, that if the wife is party to an action and desires herself to testify to the communication or to require her husband to do so, her desires go for nought so long as the husband (as privilege holder) objects to having her testify to his communication or objects to giving his own testimony as to the communication.

In connection with this problem regarding who should have the privilege, the action taken in New Jersey is particularly instructive. The Court Committee recommended the Wigmore-McCormick-URE approach, *viz.*, that the privilege belongs solely to the communicating spouse. N. J. COMMITTEE REPORT at 73-74. This action was rejected by the Legislative Commission, whose view prevailed in the statute which makes both spouses holder of the privilege. N. J. REV. STAT. § 2A:84A-22; N. J. COMMISSION REPORT at 36-37.

This action should be compared with the recommendation in Utah, where the privilege was restricted to the communicating spouse. UTAH FINAL DRAFT at 21.

(Note, however, the later discussion regarding Rule 23(2) whereby an accused in a criminal action possesses privilege to prevent disclosure of a confidential communication even though the accused is not the communicating spouse.) [14]

Post-Coverture Privilege

The URE privilege declared in Rule 28(1) is applicable only "during the marital relationship." On the other hand, the Section 1881(1) privilege is applicable "during the marriage *or afterward.*" (Emphasis added.)

This is a significant difference in the scope of the two privileges. To illustrate: Suppose in the civil action of "P. v. D," D is charged with a tort allegedly committed while D was married to Mrs. D. At the time of the trial the marriage has been terminated (by divorce or annulment). P calls the ex-Mrs. D to testify to a confidential statement made by D to her prior to the divorce or annulment. D objects.

Under Code of Civil Procedure Section 1881(1) the objection would be sustained.[15] However, under Rule 28(1) the objection would be overruled. The same results would follow if P attempted to cross-examine D as to D's statement to the ex-Mrs. D.[16] Also, the results would be the same if the marriage were terminated by death—*i.e.*, Mrs. D is dead at the time of the trial and P attempted to cross-examine D as to D's statements to Mrs. D.[17] That is, in each of these cases D's objection would be sustained under Section 1881(1), but the objection would be overruled under Rule 28(1).

In the post-coverture situations just mentioned the result of no after-marriage privilege under Rule 28(1) is diametrically opposed to the result of permanent privilege under Section 1881(1). These divergent results stem, of course, from differing notions as to how far implementation of the policy of encouraging marital confidence should be extended. Should maximum encouragement be provided by guaranteeing post-marital secrecy as in Section 1881(1), or should implementation stop short of such maximum encouragement, as it does in Rule 28(1)? The Rule 28(1) view is preferable to the Section 1881(1) view. The competing policies here are, on the one hand, encouragement of marital confidence and, on the other hand, the desirability of disclosing all the facts relevant to the controversy. The present view gives too much weight to the first concern and too little to the second. Therefore, it is believed that the view expressed in Rule 28(1) represents a better resolution of the policy conflict than does the Section 1881(1) view.[18]

[14] See the text, *infra* at 449-452.

[15] People v. Mullings, 83 Cal. 138, 23 Pac. 229 (1890) (divorce); Perkins v. Maiden, 41 Cal. App.2d 243, 106 P.2d 232 (1940) (same); People v. Godines, 17 Cal. App.2d 721, 62 P.2d 787 (1936) (annulment). Here D was permitted to refuse to testify to his communication. By analogy he could, of course, prevent the ex-Mrs. D from so testifying.

[16] See note 15 *supra*.

[17] Emmons v. Barton, 109 Cal. 662, 42 Pac. 303 (1895).

[18] *Cf.* the recommendation of the N.J. Court Committee that the privilege should survive the death of the noncommunicating spouse. N.J. COMMITTEE REPORT at 74. But the statute gives the privilege to *both* spouses in the following terms:

> No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure . . . . The requirement for consent shall not terminate with divorce or separation. [N.J. REV. STAT. § 2A:84A-22.]

As the Legislative Commission's Comment indicates, "the privilege as to such communication extends beyond termination of the marital relationship." N.J. COMMISSION REPORT at 57.

The Utah Committee followed the URE scheme in recommending that the privilege is available only "during the marital relationship." UTAH FINAL DRAFT at 21.

(Note, however, the later discussion of Rule 23(2) whereby an accused in a criminal action may possess post-coverture privilege.) [19]

The foregoing remarks relate to the situation in which a marital communication is offered *against* a spouse after the marriage tie has been severed. In this situation, it is not to be denied that Section 1881(1) gives to such spouse something which Rule 28(1) would take away. There is, however, possibly an opposite side to the coin. It may be that Rule 28(1) gives a spouse something not available today under Section 1881(1). This is the situation where a marital communication is favorable to a widow or widower spouse who offers it in evidence. Returning to the examples stated above, *i.e.*, civil action of "P v. D," query what the situation would be if Mrs. D were now deceased and D were seeking to testify to Mrs. D's communication to him? Here the result under Section 1881(1) is that D's attempt to give such testimony fails. Apparently the rationale here is the same as that in the cases on posthumous physician-patient privilege, namely, the privilege survives Mrs. D's death and no one can waive the privilege on her behalf.[20] However, under Rule 28(1) there would be no privilege and D could testify so far as this privilege is concerned—a better result than the present holdings under Section 1881(1).

Exceptions to General Rule

Rule 28(2) states five exceptions to the general rule propounded in Rule 28(1). The extent to which each of these exceptions prevails in California today is considered in detail in the discussion which follows.

The Exception in Rule 28(2)(a)—Action Between Spouses

Under this exception the privilege is inapplicable "in an action by one spouse against the other spouse." Code of Civil Procedure Section 1881(1) likewise provides that the privilege "does not apply to a civil action or proceeding by one [spouse] against the other." [1]

The Exception in Rule 28(2)(b)—Actions for Alienation of Affection and for Criminal Conversation

Under this exception the privilege is inapplicable "in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other." Civil Code Section 43.5 provides in part as follows: "No cause of action arises for: (a) Alienation of affection. (b) Criminal conversation." In view of this Civil Code provision, Rule 28(2)(b) would be a moot exception in this State and, as such, it should be stricken.

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[19] See the text, *infra* at 449-452.

[20] See Nicoll v. Nicoll, 22 Cal. App. 268, 133 Pac. 1144 (1913) (plaintiff widow attempts to testify to husband's declaration to her; held properly excluded under § 1881(1)); McIntosh v. Hunt, 29 Cal. App. 779, 157 Pac. 839 (1916) (similar holding where defendant widower attempted to testify to wife's declaration to him).

And Emmons v. Barton, 109 Cal. 662, 42 Pac. 303 (1895), suggests that the holding respecting the physician-patient privilege in *In re* Flint, 100 Cal. 391, 34 Pac. 863 (1893), is applicable to the marital privilege.

[1] Savings Union Bank etc. Co. v. Crowley, 176 Cal. 543, 169 Pac. 67 (1917) (husband's executor versus widow); Estate of Gillett, 73 Cal. App.2d 588, 166 P.2d 870 (1946) (same); Durrell v. Bacon, 138 Cal. App. 396, 32 P.2d 644 (1934) (same). *Cf.* Perkins v. Maiden, 41 Cal. App.2d 243, 106 P.2d 232 (1940).

The Exception in Rule 28(2)(c)—Certain Actions Against a Spouse

This exception makes the privilege inapplicable "in a criminal action in which one [spouse] is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either."

The California analogue is the provision in Section 1881(1) that the privilege does not apply "to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other."[2]

The coverage of Rule 28(2)(c) is broader than its Section 1881(1) counterpart because Rule 28(2)(c) includes criminal charges against a spouse for bigamy, adultery, or desertion. The broader provision is preferred. Section 1322 of the Penal Code allows the spouses to refuse to permit any spouse testimony in a criminal action. However, this "privilege" is inapplicable in "criminal actions or proceedings for bigamy, or adultery." It would seem that the exceptions to the marital confidence rule ought to be at least as broad as the present exceptions to the "privilege" provided in Penal Code Section 1322.

The Exception in Rule 28(2)(d)—Accused's Offer of Evidence of Communication

This exception makes the privilege inapplicable "in a criminal action in which the accused offers evidence of a communication between him and his spouse."

If an accused husband is offering evidence of *his* communication to his wife, there is no need for this exception. As to this communication, the accused is the sole privilege holder under Rule 28(1), and, as such, he may elect to waive the privilege. However, if the accused is offering his wife to testify to *her* communication to the accused or is offering himself so to testify, then the wife is holder of the privilege. Without this exception the other spouse could deprive the accused of the evidence.

The purpose of this exception is stated in the official Comment on Model Code Rule 216(d) (which Rule 28(2)(d) copies) as follows:

> The provision in Clause (d) is made to prevent the striking injustice which has been done in a few criminal cases where defendant spouse was not allowed to testify to a communication from the other spouse, although the mental effect produced by it might well have reduced the grade of the offense.[3]

The exception in Rule 28(2)(d) seems to be a very limited and merciful concession to a defendant charged with crime. Though no recognition of this exception in California has been found, its approval is recommended.

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[2] For cases interpreting and applying this provision, see People v. Schlette, 139 Cal. App.2d 165, 293 P.2d 79 (1956); People v. Marshall, 126 Cal. App.2d 357, 272 P.2d 816 (1954); People v. Pittullo, 116 Cal. App.2d 373, 253 P.2d 705 (1953); People v. Tidwell, 61 Cal. App.2d 58, 141 P.2d 969 (1943); *In re* Kellogg, 41 Cal. App.2d 833, 107 P.2d 964 (1940).

[3] MODEL CODE Rule 216(d) Comment.

The Exception in Rule 28(2)(e)—Contemplated Crime or Tort

This exception makes the privilege inapplicable "if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort."

This is included by analogy to Rule 26(2)(a), the lawyer-client privilege, and to Rule 27(6), the physician-patient privilege. Note, however, the difference in language. Whereas Rule 26(2) and Rule 27(6) relate to contemplated crime or tort by "client" and "patient," respectively, here the exception applies where the communication enables or aids "*anyone* to commit or to plan to commit a crime or a tort." Although it does not appear to be presently recognized in California, it is recommended for approval. It is recommended, however, that "sufficient evidence, aside from the communication, has been introduced to warrant a finding that" be deleted from this exception for the same reason it was recommended that this language be deleted from the analogous exception to the lawyer-client privilege.[4]

Rule 28(3)

This rule provides as follows:

> (3) *Termination.* A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

Suppose husband (H) tells wife (W) in confidence that H hit P without provocation. Later H states to W in the presence and hearing of various persons that H hit P but did so only in self-defense. Suppose further that in the action of "P v. H," H proves his public statement to W. The thought underlying Rule 28(3) seems to be that since H has given evidence of his public statement to W, H has lost his privilege as to his private, confidential statement to W. The official Comment on Model Code Rule 218—which is comparable to Uniform Rule 28(3)—states as follows:

> In so far as the Rule makes testimony to another communication upon the same subject a waiver of the privilege, it goes beyond existing decisions. The theory of the Rule is that a spouse ought not to be able to select for disclosure from among the communications upon a given subject those which he deems favorable, and to suppress the rest.[5]

This seems reasonable and is recommended.

However, there are perplexing features of Rule 28(3). This provision of the rule deals with a "spouse who would otherwise have a privilege under this rule." Under Rule 28(1) the only spouse who has a privilege is the "spouse who transmitted to the other the information which constitutes the communication." Hence under Rule 28(1) it would seem that only the communicating spouse could be "a spouse who would otherwise have a privilege" in the sense of Rule 28(3), that is,

[4] See text, *supra* at 390-392.
[5] MODEL CODE Rule 218 Comment.

such spouse (and only such spouse) *could* be holder of the privilege. Nevertheless Rule 28(3) seems to suggest the possibility that the other (the noncommunicating spouse) may be the holder of the privilege since the reference in Rule 28(3) is "he [*i.e.*, the communicator] or the other spouse while the holder of the privilege."

There is a contradiction here, namely, a recognition in Rule 28(3) of someone (addressee) as possible holder of the privilege who under Rule 28(1) could not possibly be such holder.

In the belief that this is an inadvertence, it is recommended that "or the other spouse" be deleted from Rule 28(3).

The Eavesdropper Exception

The privilege of the communicating spouse stated in Rule 28(1) is the privilege "to refuse to disclose and to prevent the other from disclosing" the communication. Note that the privilege does not extend to preventing eavesdroppers and interceptors from making the disclosure. In thus refusing to bring eavesdroppers within the ambit of the privilege, Rule 28(1) adopts the traditional [6] and the present California view.[7]

Out-of-Court Disclosure by Addressee Spouse

It will be recalled that under Rule 26(1)(c)(iii) a client may prevent any witness from disclosing a confidential communication to the client's attorney if the communication came to the knowledge of the witness "as a result of a breach of the lawyer-client relationship." Under Rule 27(2)(iii) the same result obtains under the physician-patient privilege. However, Rule 28 contains no provision whereby the communicating spouse may prevent disclosure by a witness to whom the addressee spouse has revealed the confidence. This is an intentional omission. As Professor Morgan stated while explaining Model Code Rule 215 (on which Uniform Rule 28 is based):

> I want you to notice . . . that we do not give the same protection to the communicating spouse that we give to the client. If the other spouse to whom the communication is made by a breach of confidence discloses the communication, the communication will be admitted so far as the marital privilege is concerned. Suppose that a man writes a letter to his wife in confidence and she gives the letter to the County Attorney—a kind of case that has happened—can that letter be used as an admission against him? This Rule allows it to be. There are some cases to the contrary. The cases on that are in conflict.[8]

Possibly the present California rule is in accord with the Morgan-Model Code-URE view. This thought stems from the case of *People* v. *Swaile* [9] in which defendant husband sent a letter to his wife via a police officer. After the wife read the letter, she returned it to the officer upon the officer's request. The letter was held to be admissible because "there was no examination of the wife as to a privileged com-

[6] McCormick § 86.
[7] People v. Peak, 66 Cal. App.2d 894, 153 P.2d 464 (1944); People v. Swaile, 12 Cal. App. 192, 107 Pac. 134 (1909).
[8] 19 A.L.I. Proceedings 168-69 (1942).
[9] 12 Cal. App. 192, 107 Pac. 134 (1909).

munication." To be sure, the opinion is not at all a thorough examination of the question. However, assuming it represents the present law, that law would be unchanged by adoption of Rule 28.

Other Exceptions

Code of Civil Procedure Section 1881(1) makes the privilege inapplicable "in a hearing held to determine the mental competency or condition of either husband or wife."

This exception is not included in Rule 28(2). It is recommended that Rule 28 be amended to include it.

Rule 23(2)

Introduction

As previously noted, Rule 23(2) should be considered in connection with Rule 28. Rule 23(2) relates to the special marital privilege possessed by an accused in a criminal action.

This rule provides:

> (2) An accused in a criminal action has 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, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.

Rule 23(2) is compared with Rule 28 in the discussion which follows.

Preliminarily, it is well to emphasize that Rule 28 applies in all actions—both civil and criminal. Furthermore, it applies to both parties and nonparties. On the other hand, Rule 23(2) applies only to the accused in a criminal case.

Overlap Between Rule 28 and Rule 23(2)

There is considerable overlap between the two rules. This overlap may be demonstrated by considering the following example: Suppose that a married man is defendant in a criminal action, charged with a crime other than one mentioned in Rules 28(2)(c) or 23(2)(a). Suppose, further, that defendant has made a confidential communication to his wife and at the trial the district attorney offers the wife to testify to defendant's communication to her. Defendant objects. Rule 28 requires that the objection be sustained, because it provides that "a spouse who . . . transmitted the communication, has a privilege . . . to prevent the other [spouse] from disclosing [the communication]." Rule 23(2) likewise requires that the objection be sustained, because it provides that an "accused . . . has a privilege to prevent his spouse from testifying . . . to [a] confidential communication had or made between them."

In each rule certain criminal actions are excluded. Thus, under Rule 28(2)(c) the privilege provided in Rule 28 is inapplicable

in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either.

Under Rule 23(2)(a) the privilege provided in Rule 23 is inapplicable in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse.

It appears that Rule 28(2)(c) and Rule 23(2)(a) are intended to cover the same area. This being so, would it not be well to use the same language in both? It is believed the answer should be "Yes." Therefore, it is suggested that if Rule 23(2) is accepted, Rule 23(2)(a) should be amended to read as follows:

(a) in an action in which the accused spouse is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other or bigamy or adultery, or desertion of the other or of a child of either.

Under each rule the spouse who would otherwise have the privilege there stated loses it by testifying or calling another to testify to interspousal communication. Rule 23(2)(b) so provides with respect to the privilege in Rule 23. Similarly, Rule 28(3) so provides in regard to the privilege in Rule 28. Again it is believed that the same language ought to be used in both rules. Therefore, it is recommended that if Rule 23(2) is accepted, Rule 23(2)(b) be amended to read as follows:

An accused who would otherwise have a privilege under this rule has no such privilege if he testifies or causes another to testify to any communication between the spouses upon the same subject matter.

Differences Between Rules 28 and 23(2)

The first apparent difference between these two rules is that an accused has privilege under Rule 23(2) even though he is not the communicating spouse.

Suppose again that a married man is defendant in a criminal action, being charged with a crime other than one mentioned in Rules 28(2)(c) or 23(2)(a). Suppose, further, that defendant's wife has made a confidential communication to the defendant and that the district attorney offers the wife (who does not object) to testify to such communication. In these circumstances Rule 28 does not extend the privilege there provided to the defendant since the defendant is not in this situation the communicating spouse. However, Rule 23(2) gives the defendant a privilege, notwithstanding the fact that he is not the communicating spouse. Therefore, as the Commissioners on Uniform State Laws indicate in their Comment to Rule 23(2), this rule "is broader than Rule 28 in that the accused has the privilege under [Rule 23(2)] in criminal actions regardless of whether he is or is not the communicating spouse."

A second possible difference concerns the post-coverture privilege of the accused. The privilege in Rule 28 is applicable only "during the marital relationship" and is therefore terminated by divorce or annulment. Is it the intent of Rule 23(2) to impose the same limitation on the privilege in Rule 23? Possibly so, since the person whom the accused may prevent from testifying is "his spouse," which in this context may mean his present spouse only (thereby excluding an ex-spouse). However, because this meaning is not altogether clear, Rule 23(2) might be read as creating a post-coverture privilege.

These differences may be summarized as follows: Rule 23(2) gives to an accused a privilege broader in at least one respect than that given him by Rule 28. Thus, under Rule 23(2), though the accused is the noncommunicating spouse, he is privileged to prevent the other (communicating) spouse from testifying to the confidential communication. Moreover, Rule 23(2) may mean that after the marriage tie is severed, the accused may prevent the ex-spouse from testifying to the accused's confidential statements to the ex-spouse (or the ex-spouse's confidential statements to the accused).

Two policies exert opposite pulls whenever there is an attempt to mark off the scope of any privilege. On the one hand, there is the policy of full disclosure in a law suit of all the facts relevant to the controversy. On the other hand, there is the policy of promoting some other objective, such as the free exchange of interspousal communication. The basic question is how far to yield to the one pull and how far to the other.

It is believed that this policy conflict is wisely resolved by Rule 28. Therefore, the special and broader privilege which Rule 23(2) sets up in favor of an accused should be abandoned. If, however, the principle of Rule 23(2) is approved, Rule 23(2)(a) and (b) should be amended as proposed above.

Recommendation

Concluding this discussion of the marital privileges, it appears that adoption of Rule 28 in California would have the following effects:

1. The marital confidence privilege would be vested solely in the communicating spouse. Presently the question of who possesses the privilege is in doubt.

2. There would be no post-coverture privilege. Presently there is such privilege.

3. The present exception to the privilege respecting "family crimes" would be broadened.

4. A new exception would become operative respecting evidence offered by the accused regarding communications to him by his spouse.

5. A new exception would become operative regarding communications in aid of committing a crime or tort.

6. A spouse would waive privilege as to private spousal communications on a matter by giving evidence of public spousal communication on such matter.

7. The matter of waiver of privilege would be clarified by adopting the view of the communicating spouse as sole holder of the privilege.

It is recommended that Rule 28, revised as suggested above, be approved [10] and that Rule 23(2) be disapproved.[11]

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[10] The position taken in New Jersey by the Court Committee and the Legislative Commission with respect to several matters relating to the marital privilege has been previously noted. (See, *e.g.*, note 18, *supra* at 444.) The rule adopted in New Jersey departs entirely from the Uniform Rules, being changed "so as to more nearly conform to existing New Jersey law." N.J. COMMISSION REPORT at 37. Unlike the recommendation of the Court Committee (see N.J. COMMITTEE REPORT at 73), the rule as adopted makes no provision for specific exceptions and termination of the privilege, as provided in Uniform Rule 28(2) and (3). The general rule of privilege was redrafted to read:

> Rule 28. *Marital Privilege—Confidential Communications*
>
> No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding coming within Rule 23(2) [§ 2A:84A-17]. When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication. [§ 2A:84A-22.]

The Utah Committee recommended adoption of Uniform Rule 28 in the identical form approved by the Commissioners on Uniform State Laws (except for the omission of "the" preceding the word "privilege" as it first appears in the last sentence in Uniform Rule 28(1)). UTAH FINAL DRAFT at 21-22.

[11] In New Jersey, the Court Committee recommended against adoption of Rule 23(2). Upon recommendation of the Legislative Commission, however, (see N.J. COMMISSION REPORT at 28) a revised form of this provision (adopting in "large measure the present New Jersey rule") was enacted to read as follows:

> Rule 23. *Privilege of Accused*
>
> * * * * *
>
> (2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant. [§ 2A:84A-17(2).]

The Utah Committee recommended adoption of Uniform Rule 23(2) in the identical form approved by the Commissioners on Uniform State Laws, adding at the end thereof a provision "prohibiting one spouse from testifying against the other" in the following terms:

> [B]ut a wife is not compelled to testify against her husband, nor a husband against his wife. [UTAH FINAL DRAFT at 17.]

RULE 29—PRIEST-PENITENT PRIVILEGE

Introduction

Rule 29 provides:

> RULE 29. *Priest-Penitent Privilege; Definition; Penitential Communications.*
>
> (1) As used in this rule, (a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.
>
> (2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

The parallel California provision is Code of Civil Procedure Section 1881(3), which provides as follows:

> A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

A comparison of Rule 29 and Section 1881(3) is set out below. Because there is almost a total dearth of precedent construing Section 1881(3),[1] the comparison is necessarily based upon apparent meaning rather than upon adjudicated meaning.

Denominational Limitations

Under both Rule 29 and Section 1881(3) one requisite of the privilege is that there be a minister of a church whose discipline recognizes penitential communications. Section 1881(3) expresses this thought by requiring that the communication to the minister be "in his professional character in the course of discipline enjoined by the church to

[1] Only one case has been found and that makes only brief mention of § 1881(3). Estate of Toomes, 54 Cal. 509, 516 (1880).

which he belongs." Rule 29(1)(a) expresses the thought by defining "priest" as one "who in the course of [the] discipline or practice [of his church] is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his [church]."

Manifestly, both provisions cover priests of the Roman Catholic Church and High Episcopal Church, because these churches clearly recognize the private confessional as a regular religious practice. Whether other faiths are included, however, depends in each case upon the special discipline of the faith in question.

Confidentiality

Rule 29(1)(c) expressly requires "a confession . . . made secretly." Although Section 1881(3) does not expressly mention secrecy, it does require a confession to a minister "in his professional character." Probably it would be held that this professional relationship does not exist unless the communication is secret and confidential.

Confession

Rule 29(1)(c) requires "a confession of culpable conduct." On the other hand, Section 1881(3) requires simply a "confession." Probably in both provisions the term "confession" is used in the ecclesiastical sense of confession of sin, rather than in the ordinary legal sense of confession of crime.

Penitent as Witness

Under both Rule 29 and Section 1881(3) the penitent may, of course, prevent the priest from making disclosure of the privileged matter. Rule 29 expressly provides, further, that the penitent may himself refuse to make the disclosure when he is the witness. Although Section 1881(3) is silent on this further aspect of the privilege, this feature undoubtedly would be read into Section 1881(3) just as it has been read into Section 1881(2) (the lawyer-client privilege) with reference to the client as witness.[2]

Whose Privilege?

Rule 29(2) gives the privilege to the penitent. By analogy to the rule that the client possesses the attorney-client privilege and the patient the physician-patient privilege,[3] it probably would be held that the penitent is sole possessor of the privilege declared in Section 1881(3), especially since disclosure is prohibited where it is "without the consent of the person making the confession." Note, however, the problem presented where consent *is* given and the practice of the religious organization nevertheless places a moral duty upon the priest not to disclose the communication. This was one of the reasons for the New Jersey Court Committee recommending against adoption of Rule 29.[4]

No substantive differences between Rule 29 and Section 1881(3) are apparent. It seems, therefore, that adoption of Rule 29 would not change the present California law concerning the priest-penitent privilege.

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[2] See discussion in the text under lawyer-client privilege, *supra* at 386.

[3] See discussion in the text under lawyer-client privilege (*supra* at 382-383) and physician-patient privilege (*supra* at 406).

[4] See N.J. COMMITTEE REPORT at 77. The Court Committee recommended retaining the existing New Jersey law. This recommendation (with only minor modification to

include confidential communications as well as confessions) was accepted by the Legislative Commission. See N.J. COMMISSION REPORT at 38. The text of the New Jersey rule is as follows:

> Rule 29. *Priest-Penitent Privilege*
>
> Subject to Rule 37 [Section 2A:84A-29], a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes. [N.J. REV. STAT. § 2A:84A-23.]

The Utah Committee recommended adoption of Uniform Rule 29 in the identical form approved by the Commissioners on Uniform State Laws. UTAH FINAL DRAFT at 22-23.

RULE 30—RELIGIOUS BELIEF

Rule 30 provides:

> RULE 30. *Religious Belief.* Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or non-adherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.

Suppose a defendant charged with murder takes the stand and testifies to an alibi. The district attorney then cross-examines as follows:

Q. Do you realize that you are under oath?

A. Yes I do.

Q. Well, now, I ask you: What is your religion?

Rule 30 gives a defendant the privilege to refuse to answer. Although some possible answers (such as, "I am an atheist" or "I am a freethinker") might be thought to impeach defendant's credibility,[1] the defendant nevertheless is privileged to refuse to answer the inquiry.

Professor McCormick eloquently states the rationale for this privilege:

> The history of modern Europe whence our people come is the history of religious persecution. From this derives a strong common feeling of revulsion against interrogation of a man about his religious beliefs. Often in our history have such inquiries been the aftermath of the rack and the prelude to the flaming faggot. There is a feeling also that such inquiries into faith offend against the dignity of the individual. Moreover, the disclosure of atheism or agnosticism, or of affiliation with some new strange or unpopular sect, will often in many communities be fraught with intense prejudice. For all these reasons many states recognize a privilege of the witness not to be examined about his own religious faith or beliefs, except so far as the judge in his discretion finds that the relevance of the inquiry upon some substantive issue in the case outweighs the interest of privacy and the danger of prejudice.[2]

The exception to Rule 30 states that a person has no privilege when his religious belief is material to an issue in the case. Professor McCormick illustrates this exception with the case of a personal injury plaintiff who was required to reveal her belief in Christian Science and to state whether such belief caused her to refuse to take prescribed medicine, such revelation and statement being relevant on the issue of damages.[3]

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[1] Arguably, such matters as the witness' atheism, agnosticism, or unorthodoxy are irrelevant on the issue of his credibility. See MCCORMICK at 105 n.12.

[2] MCCORMICK at 104.

[3] *Id.* at 104 n.11.

Professor Wigmore also supports the privilege [4] as does the American Law Institute's Model Code of Evidence.[5] Moreover, the privilege has been adopted in New Jersey and recommended for adoption in Utah, both in language identical to that of Rule 30.[6]

No California authority recognizing this privilege has been found. However, it is believed that if there is not now a privilege of this character, there should be. Therefore, approval of Rule 30 is recommended.

[4] 8 WIGMORE § 2213.
[5] MODEL CODE Rule 224 and Comment thereon.
[6] See N.J. REV. STAT. § 2A:84A-24 and N.J. COMMISSION REPORT at 38. See also UTAH FINAL DRAFT at 23.

RULE 31—POLITICAL VOTE

Rule 31 provides:

> RULE 31. *Political Vote.* Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

Rule 31 copies Model Code Rule 225. The official Comment on the latter is as follows:

> This Rule is generally accepted. It is deemed necessary to preserve the secrecy of the ballot.

Professor Wigmore also supports the privilege as "a corollary of the secrecy of the ballot."[1]

A similar privilege was recognized by the California Supreme Court at an early date. In *Smith* v. *Thomas*,[2] the Court held that a person who had voted at a general election and who subsequently was called as a witness in an action to contest the election could not be made to disclose the tenor of his previous vote. Mr. Justice Temple, speaking for the Court said:

> The requirement of secrecy is based upon the idea that voters may find it inconvenient to have it known for whom they voted—may, in fact, be weak enough to desire to create the impression that they voted otherwise than as they did vote.[3]

The California Court describes one significant limitation upon the scope of the privilege. This is the superior right of a party injured by the casting of an illegal vote. In *Patterson* v. *Hanley*,[4] the court stated:

> The policy of the law is, it is true, to preserve secrecy of the ballot, but this policy does not extend to illegal votes. If the elector disregards the terms upon which he is allowed to vote, and thereby secures the counting of an illegal ballot, he forfeits the privilege of secrecy in favor of the superior right of a party injured by his act to have the truth disclosed.[5]

The California Legislature has enacted no laws relating to the secrecy of a citizen's vote in the specific context of subsequent judicial proceedings,[6] although the California courts have suggested that the privilege is to be found in the language of the California Constitution, Article II, Section 5, which provides:

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[1] 8 WIGMORE § 2214.
[2] 121 Cal. 533, 54 Pac. 71 (1898).
[3] *Id.* at 536, 54 Pac. at 72.
[4] 136 Cal. 265, 68 Pac. 821 (1902).
[5] *Id.* at 276, 68 Pac. at 825.
[6] Tenor of vote secrecy outside the ballot box is presently provided for in Elections Code Section 14422: "Only a member of the precinct board may receive from any voter a ballot prepared by him. No person may examine or solicit the voter to show his ballot"; Elections Code Section 14433: "An election officer shall not disclose the name of any candidate for whom any voter has voted"; and Elections Code Section 14434: "No person, at a polling place, shall ask another for whom he intends to vote."

> All elections by the people shall be by ballot or by such other method as may be prescribed by law; provided, that secrecy in voting be preserved.

Bush v. *Head*[7] involved a 1905 Act passed to increase the number of superior court judges in Shasta County from one to two, providing that the additional judge should be elected at the general election of 1906. At the Republican Convention, plaintiff was nominated as candidate. At the Democratic Convention, defendant was nominated, allegedly on the strength of promises that he would "fail, neglect and refuse to . . . enter upon the discharge of the duties of said office," thereby in effect defeating the Act of 1905 in order to save the taxpayers of Shasta County the expense of an additional judge. Plaintiff sought to have defendant's election annulled, and also to have the court declare plaintiff elected instead. On appeal from a demurrer sustained for defendant, the court held that plaintiff's complaint stated a good cause of action under the Purity of Election Laws[8] to have defendant's election annulled, but that he could not have the court declare him elected under the bribery laws,[9] since he admitted having no evidence of any voter's participation in a bribery. To plaintiff's argument that he was prepared to show this by examination of certain voters at trial, the court answered:

> An unworthy motive could not convert the exercise of this right into an illegal vote, within the meaning of the code provision under discussion. Apart from other considerations, it must be obvious that public policy, demanding, *inter alia,* the preservation of "secrecy in voting" (Const., art. II, sec. 5) would not be subserved by permitting the vote of a lawful elector, who had cast his ballot in regular manner and form, to be impeached by a judicial inquiry into the reasons which led him to cast that ballot in favor of one candidate rather than another.[10]

In another California case involving an election contest, the court in *Robinson* v. *McAbee*[11] stated the rule in California as follows:

> [T]he rule that the secrecy of the ballot shall be maintained is "justly regarded as an important and valuable safeguard for the protection of the voter, . . . against the influence which wealth and situation may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is sacredly guarded by the law for all time unless the voter himself shall voluntarily divulge it." . . . [But this rule] is to be restricted in its application to those electors who have the legal qualifications which entitle them to vote. . . . "A person who votes without being qualified is a mere intruder and not entitled to the privileges which belong to legal voters."[12]

Though there is no statute on this subject, the present California law relating to the political vote privilege can be summed up as follows: The tenor of a qualified voter's legal vote at a political election

[7] 154 Cal. 227, 97 Pac. 512 (1908).
[8] Cal. Stats. 1893, Ch. 16, pp. 12-29.
[9] CAL. CODE CIV. PROC. § 1111(3), now CAL. ELEC. CODE § 20021(e).
[10] Bush v. Head, 154 Cal. 277, 282, 97 Pac. 512, 514-15 (1908).
[11] 64 Cal. App. 709, 222 Pac. 871 (1923).
[12] *Id.* at 714, 222 Pac. at 874.

is privileged from disclosure in subsequent legal proceedings, unless such voter has waived the privilege by consent.

Since Rule 31 would do no more than codify existing California law, approval of this rule is recommended.[13]

[13] The privilege has been adopted in New Jersey and recommended for adoption in Utah, in both cases in the identical language of Uniform Rule 31. See N.J. REV. STAT. § 2A:84A-25 and N.J. COMMISSION REPORT at 38. See also UTAH FINAL DRAFT at 23.

RULE 32—TRADE SECRET

Rule 32 provides:

> RULE 32. *Trade Secret.* The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

A somewhat typical case involving this privilege is *Putney* v. *Dubois Co.*,[1] a Missouri case in which the situation was as follows: Plaintiff was a dishwasher at the lunch counter in a department store. The store purchased a dishwashing compound from defendant. Plaintiff claimed that her use of the compound resulted in injuries to her hands. In a discovery proceeding plaintiff sought to require defendant to answer an interrogatory as to the ingredients and proportions thereof used in the compound. Defendant resisted on the ground that the information sought was a trade secret.

The nature, scope and rationale of the privilege thus asserted by defendant are expounded as follows by Professor Wigmore:

> In a day of prolific industrial invention and active economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense, and the like.
>
> Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as *trade secrets.*
>
> * * * * *
>
> What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can hardly be ventured.[2]

In the *Putney* case, the Missouri court held that plaintiff's need of the information (the need to make a prima facie case of causal connection between use of the compound and her injury) prevailed over

[1] 240 Mo. App. 1075, 226 S.W.2d 737 (1950). The case is cited in the official Comment on Uniform Rule 32.

[2] 8 WIGMORE § 2212.

defendant's interest in keeping its formula secret. *Wilson* v. *Superior Court* [3] is a similar California case. On the other hand, in *Spain* v. *U.S. Rubber Co.*,[4] a New Hampshire court held upon facts similar to those of the *Putney* case that defendant need not reveal its formula.

These cases emphasize, as is suggested by the Commissioners on Uniform State Laws in the Comment on Rule 32, that the "limits of the privilege are uncertain."

A provision of California's 1957 Discovery Act involves at least indirect recognition of the existence in this State of the trade secrets privilege. Thus, Code of Civil Procedure Section 2019(b) provides in part that "the court . . . may make an order that . . . secret processes, developments, or research need not be disclosed." [5]

Approval of Rule 32 is recommended.[6]

[3] 66 Cal. App. 275, 225 Pac. 881 (1924).
[4] 94 N.H. 400, 54 A.2d 364 (1947). The case is cited in the official Comment on Uniform Rule 32.
[5] See also CAL. CODE CIV. PROC. § 2030(b) whereby Section 2019 is made applicable when answers to interrogatories are sought.
[6] In New Jersey, the Court Committee and Legislative Commission were in accord in recommending adoption of Rule 32 in the identical form approved by the Commissioners on Uniform State Laws. N.J. REV. STAT. § 2A:84A-26. See N.J. COMMISSION REPORT at 39; N.J. COMMITTEE REPORT at 78.
Similarly, the Utah Committee recommended adoption of this rule unchanged. See UTAH FINAL DRAFT at 23.

RULE 33—SECRET OF STATE

Rule 33 provides:

> RULE 33. *Secret of State.*
>
> (1) As used in this Rule, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations.
>
> (2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not a secret of state, or (b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action.

According to Professor McCormick, it "is generally conceded that a privilege and a rule of exclusion should apply in case of writings and information constituting military or diplomatic secrets of state." [1] Rule 33 is thus a codification of this concensus.

What Is a "Secret of State"?

Rule 33 answers this question in these terms: "information not open or theretofore officially disclosed to the public involving the public security [2] or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations." This description in general terms seems intended to apply to such specific matters as the following: a contract to engage in espionage for the government,[3] blue-prints of armor-piercing shells,[4] drawings of a military range finder,[5] plane accident report referring to secret electronic equipment aboard the plane.[6]

Procedure to Determine Whether a Matter Is a "Secret of State"

Under Rule 33(2)(a) a matter is admissible (so far as Rule 33 is concerned) when the judge finds that such matter is not a secret of state. Note that the judge is not bound by the conclusion of an executive officer that the matter is a secret of state but must himself make an independent finding.[7] This, according to Professor McCormick, is in accord with the "preponderance of view among the lower federal courts and among the writers [which view supports] the judge's power and responsibility for inquiry as opposed to the conclusiveness of the claim of privilege by the executive." [8] The Supreme Court of the United

[1] MCCORMICK at 303.
[2] Uniform Rule 33 is based upon Model Code Rule 227 but is broader in that Rule 33 includes information involving "public security." This was not included in Rule 227 of the Model Code.
[3] Totten, Administrator v. United States, 92 U.S. 105 (1875).
[4] Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa. 1912).
[5] Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939).
[6] United States v. Reynolds, 345 U.S. 1 (1953).
[7] Uniform Rule 8 prescribes the procedure for preliminary inquiries of this type.
[8] MCCORMICK at 308.

States has similarly expressed the view that "The court itself must determine whether the circumstances are appropriate for the claim of privilege." [9]

Does the judge possess power to require disclosure *in camera* of the disputed matter as a preliminary to his decision on whether the matter is or is not a secret of state? According to the Supreme Court, the answer seems to be "Yes," with a caveat, however, that the power is to be cautiously and sparingly exercised. As Mr. Chief Justice Vinson puts it in *United States* v. *Reynolds:*

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[10]

Suppose the judge finds that the disputed matter is a secret of state but that it is absolutely necessary to a plaintiff to enable him to make a prima facie case. Under Rule 33 the judge must exclude the evidence, for such evidence "is inadmissible unless the judge finds that . . . the matter is not a secret of state." This accords with the dictum in the *Reynolds* case to the following effect: "[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." [11]

Whose Privilege?

Rules 23-32, the first group of Uniform Rules in Part V, entitled "Privileges," are all framed solely in terms of privilege. By way of contrast, Rule 33 is phrased in terms of both privilege and inadmissibility. Thus, Rule 33(2) provides that "A witness has a privilege . . . , and evidence of the matter is inadmissible."

This rule is based on Model Code Rule 227. The official Comment to the Model Code rule explains this dual phrasing as follows:

> This Rule . . . is phrased in terms of privilege and of admissibility, so that either the witness or a party may object to a question calling for disclosure. If both the witness and the parties desire the disclosure, still the judge . . . may prevent it.[12]

To illustrate the impact of this phrasing, suppose at the trial in the civil action of "P v. D," P calls a subordinate in an executive department to testify to a classified matter. The witness does not object.

[9] United States v. Reynolds, 345 U.S. 1, 8 (1953).
[10] *Id.* at 9-10.
[11] *Id.* at 11.
[12] MODEL CODE Rule 227 Comment. The Comment to Rule 33 indicates that the same purpose underlies that rule. The Comment states: "Either the witness or a party may object to a question calling for disclosure. The judge may also exclude such evidence without objection." UNIFORM RULE 33 Comment.

D, however, does object and the objection is overruled. D appeals from a judgment for P, assigning as error the overruling of D's objection.

It is clear that if Rule 33 were a rule of privilege only, D could not obtain a reversal of the judgment. This is because Rule 40 provides:

> A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

Supposing (for the moment) Rule 33 to be only a rule of privilege and supposing further that such privilege is possessed only by the witness, the overruling of D's objection would not be error and D could not obtain reversal of the adverse judgment on this basis.

The situation changes, however, when Rule 33 becomes, as it is, a rule both of privilege and of inadmissibility. Now Rule 33 operates like any other rule of inadmissibility (*e.g.*, the hearsay rule) and D is, of course, in a position to "predicate error" on a ruling that admits matter which is inadmissible.

Making the rule a rule of inadmissibility as well as of privilege thus broadens the possibilities of reversal of the trial judge for erroneous rulings and thereby motivates him to exercise special care in his ruling. Such special care is particularly desirable where the matter claimed to be privileged is an alleged state secret.

A further consequence of making the rule a rule of inadmissibility is that the party is in a position to resist disclosure by a witness in *un*lawful possession of a state secret. Thus, suppose that in the civil action of "P v. D," P calls a friendly witness who by unlawful means has gained knowledge of a classified matter. Of course, neither P nor the witness objects to disclosure. If Rule 33 were only a rule of privilege, the privilege being possessed by the witness, D's objection would be meaningless. (The witness, being the privilege holder, would be waiving the privilege by not objecting and that would be the end of the matter.) However, since the rule prescribes both privilege and inadmissibility, D is entitled to have the matter excluded. Again, a special safeguard is afforded to protect state secrets.

Prior to the decision in *United States* v. *Reynolds*,[13] there seemed to be little doubt that the state secrets rule was more than a simple rule of privilege. For example, consider the following pre-*Reynolds* statement respecting "the common law doctrine which has long protected secrets of state":

> This doctrine has been expressed in terms of privilege, and it does have some of the characteristics of privilege. . . .
>
> * * * * *
>
> On the other hand, it is clear that the doctrine is something more than a simple personal privilege. Thus, the power to object to the introduction of the evidence is not confined to the witness or the Government, but may be exercised by the court. And whereas the erroneous admission of evidence protected by an ordinary privilege is generally reversible only on appeal by the holder of the privilege, this limitation does not apply to secrets of state.[14]

[13] 345 U.S. 1 (1953).
[14] Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468, 472-473 (1948).

However, in the *Reynolds* case, decided five years after Professor Haydock's article, from which the above excerpt is quoted, Mr. Chief Justice Vinson stated that

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. . . . There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.[15]

This was a prefatory statement in the opinion and was dictum. Although one case was cited for the proposition, arguably the case does not support the proposition.[16] It seems doubtful, therefore, that Mr. Chief Justice Vinson's dictum should be regarded as repudiating the view that the state secrets rule is a rule of both privilege and inadmissibility.

California Law

No California authority expressly recognizing the secret of state privilege has been found. However, in view of the fact that this was a common law privilege[17] and in view of the further fact that the policy supporting the privilege is so compelling, it is most likely that the California courts would recognize and enforce the privilege if the occasion arose.

The secret of state privilege has been recommended for adoption in Utah in language identical to that of Rule 33.[18] In New Jersey this privilege has been combined with Rule 34, the official information privilege.[19]

Recommendation

Approval of Rule 33 is recommended.

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[15] 345 U.S. 1, 7-8 (1953).

[16] Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa. 1912). Bethlehem Steel had by agreement with the United States Navy certain secret drawings. Some undisclosed person surreptitiously obtained the drawings and turned them over to an employee of Firth. Firth offered the drawings in evidence. They were admitted without objection. Subsequently, Bethlehem moved to expunge the drawings from the record. At the request of the Navy an Assistant United States Attorney appeared in behalf of Bethlehem's motion. Motion was granted. The court nowhere stated that participation by the government was requisite to the ruling, but emphasized that the court should "on grounds of public policy, strike out evidence of this nature."

[17] See Haydock, *op. cit. supra* note 14.

[18] See UTAH FINAL DRAFT at 23-24.

[19] See N.J. REV. STAT. § 2A:84A-27. See also N.J. COMMISSION REPORT at 39-40.

RULE 34—OFFICIAL INFORMATION

Rule 34 provides:

> RULE 34. *Official Information.*
>
> (1) As used in this Rule, "official information" means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.
>
> (2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity.

Professor McCormick states as follows:

> It is generally conceded that a privilege and a rule of exclusion should apply in the case of writings and information constituting military or diplomatic secrets of state. Wigmore seems to regard it as doubtful whether the denial of disclosure should go further than this, but statutes in this country have often stated the privilege in broader terms, and the English decisions seem to have accepted the wide generalization that official documents and facts will be privileged whenever their disclosure would be injurious to the public interest. Probably this wider principle would likewise generally be accepted by the courts of this country as a matter of common law, and doubtless it is justified in point of policy. The obvious danger of oppressive administration from such a broad principle of immunity must be sought in a widened conception of the judge's controlling responsibility for the balancing of the public and the private interests involved.[1]

From this point of view Rule 34 is thus the codification of a common law principle.

Comparison With Rule 33

The Rule 33 concept of secret of state covers only security, military and diplomatic matters. On the other hand, the Rule 34 concept of official information comprehends the all-inclusive category of "information . . . relating to internal affairs." However, "secret of state" means such secrets of the United States or of *any state or territory.* On the other hand, "official information" means only such information concerning the internal affairs of *this State* or of the United States.

[1] MCCORMICK at 303-04.

Note that since Rule 34 is like Rule 33, in that each is a rule not only of privilege but also of inadmissibility, what is said above in the discussion of this point as to Rule 33 is also germane here.

Compulsory Versus Discretionary Exclusion

It was previously noted that if the judge finds that a matter is a secret of state, he is required by Rule 33 to exclude evidence of the matter whatever the needs of the litigant may be.[2] In such circumstances exclusion must automatically and necessarily result from a finding which classifies the matter as a secret of state. The same may be true under Rule 34. Exclusion is required if the judge finds the matter is official information and within Rule 34(2)(a), namely, that "disclosure is forbidden by an Act of the Congress of the United States or a statute of this State." If, however, the judge finds the matter is official information and Rule 34(2)(a) is not applicable, then under Rule 34(2)(b) the judge possesses wide discretion as to whether he should order or refuse to order disclosure. In these circumstances the evidence is inadmissible only if the judge finds that disclosure will be "harmful" to the "government." Manifestly, the intent here is that the judge should weigh the consequences to the government of disclosure against the consequences to the litigant of nondisclosure and should then decide which is the more serious. Of course, no hard and fast rules can be laid down to guide the judge in this process of balancing the public and private interests. Nor is it here undertaken to review the many cases involving this balancing operation. By way of summary, however, the following résumé from an excellent law review Note may be borrowed:

> [T]he recognition or denial of [the] privilege turns upon almost innumerable factors. The relative necessity for secrecy on the part of the government, the demonstrated need of the private litigant for the information, whether the government is a party to the suit, whether the government is plaintiff or defendant and whether the suit is civil or criminal, the type of document or information involved, whether and to what extent the information can be obtained from private sources, whether the government unit is national or more localized, whether the information has been previously revealed in some way and the attitude of the particular court toward such claims are all factors which are weighed in reaching the final conclusion.[3]

California Law

It seems reasonably clear that the official information privilege is presently recognized and enforced in California. This results from a congeries of statutory provisions regarding public records and the citizen's right of inspection of them, qualified, however, by a rule of privilege stated in Code of Civil Procedure Section 1881(5). In *City*

[2] See the text, *supra* at 463-464.

[3] Note, *Evidence—Three Nonpersonal Privileges*, 29 N.Y.U. L. REV. 194, 211 (1954). See also MCCORMICK, Ch. 15; 8 WIGMORE, Ch. LXXXV; Berger & Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950); Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468 (1948); Sanford, *Evidentiary Privileges Against the Production of Data within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949); Comment, 22 CALIF. L. REV. 667 (1934); Comment, 47 NW. U. L. REV. 259 (1952); Note, 47 NW. U. L. REV. 519 (1952); Comment, 18 U. CHI. L. REV. 122 (1950).

& County of San Francisco v. *Superior Court*,[4] the court summarizes as follows the terms and the effect of these various statutory provisions:

> Section 1032 of the Political Code [now Government Code Section 1227] provides that the public records and other matters in the office of any officer are at all times during office hours open to inspection of any citizen. Section 1888 of the Code of Civil Procedure states that all written acts or records of official bodies, tribunals and public officers are public writings. Section 1892 of the same code accords every citizen the right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute; and section 1893 requires a public officer to give a certified copy thereof on demand and payment of the fee therefor.
>
> Section 1881, subdivision 5, of the Code of Civil Procedure, provides the exception to the foregoing by the requirement that a public officer may not be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure.[5]

The combination of these provisions seems to give California the substance of the general principle of Rule 34, namely, official information is subject to disclosure unless such disclosure is either prohibited by law or would be contrary to the public interest. In administering this principle today it is necessary for our courts to weigh the public interest of secrecy against the private interest of disclosure—a necessity which would in no wise be abated if Rule 34 were adopted. Thus, in the *San Francisco* case, the court, drawing upon a Wisconsin case, states as follows concerning the policy choice in administering the official information rule:

> In *Gilbertson* v. *State, supra,* 236 N.W. at 541, it was said that in all such situations a choice must be made between policies, each independently desirable; that not only are the courts faced with the necessity of making the choice, but with the extremely delicate question concerning the relation between the courts and other branches of the government; and that the right of the state to preserve the secret may be superior to that of the litigant to compel its disclosure even though he may thereby be handicapped as an unavoidable consequence.[6]

A review of some California holdings applying the official information rule is set out in the appended footnote.[7] It is believed that these

[4] 38 Cal.2d 156, 238 P.2d 581 (1951).
[5] *Id.* at 161, 238 P.2d at 584. See also the similar summary in Jessup v. Superior Court, 151 Cal. App.2d 102, 106-07, 311 P.2d 177, 180-81 (1957).
[6] City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 163, 238 P.2d 581, 585 (1951).
[7] City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581 (1951) (disclosure not required of documents and data in possession of municipal civil service commission); Coldwell v. Board of Public Works, 187 Cal. 510, 202 Pac. 879 (1921) (disclosure required of documents in re Hetch Hetchy Water Project); Jessup v. Superior Court, 151 Cal. App.2d 102, 311 P.2d 177 (1957) (disclosure not required of report of drowning in city swimming pool); People v. Denne, 141 Cal. App.2d 499, 297 P.2d 451 (1956) (disclosure required of letter by parolee to parole officer); Runyon v. Board etc. of Cal., 26 Cal. App.2d 183, 79 P.2d 101 (1938) (disclosure not required of letters and documents in possession of Board of Prison Terms and Paroles).
For an instance of disclosure forbidden by statutes (inadmissible, therefore, under Rule 34(2)(a)), see CAL. VEH. CODE §§ 20012 and 20013.

holdings would not be affected by adopting Rule 34 since there is substantial identity of principle between that rule and the law presently in force.

Recommendation

It is recommended that Rule 34 be approved.[8]

[8] New Jersey adopted a similar rule which combines both the secret of state and the official information privileges. See N.J. COMMISSION REPORT at 39-40. The text of the New Jersey rule is as follows:

> Rule 34. *Official Information*
> No person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public. [N.J. REV. STAT. 2A:84A-27.]

The Utah Committee recommended adoption of Uniform Rule 34 in the identical form approved by the Commissioners on Uniform State Laws. See UTAH FINAL DRAFT at 24.

RULE 35—COMMUNICATION TO GRAND JURY

This rule provides as follows:

> RULE 35. *Communication to Grand Jury.* A witness has a privilege to refuse to disclose a communication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (a) the matter which the communication concerned was not within the function of the grand jury to investigate, or (b) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (c) disclosure should be made in the interests of justice.

Two Privileges in Grand Jury Proceedings

Professor McCormick states:

> To guard the independence of action of the accusatory body, to protect the reputations of those investigated but not indicted, and to prevent the forewarning and flight of those accused before publication of the indictment, the taking of evidence by the grand jurors and their deliberations have traditionally been shrouded in secrecy. The ancient oath administered to the jurors bound them to keep secret "the King's counsel, your fellows' and your own." Two privileges are incident to this system. First, the grand jurors have a privilege against the disclosure by any one of their communications to each other during their deliberations and of their individual votes.
>
> Second, the communications of complainants and other witnesses in their testimony before the grand jury are privileged against disclosure by anyone, but this privilege is temporary only.[1]

Rule 35 deals only with the second of these two privileges. There follows a comparison of that privilege as it exists in California and as it is set forth in Rule 35. A word about the first privilege then follows.

Second Privilege—Testimony Before Grand Jury

Penal Code Section 911 provides that the oath of a grand juror shall contain, *inter alia,* the following:

> I . . . will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before the grand jury.

Penal Code Section 924.2 provides in part as follows:

> Any court may require a grand juror to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before the

[1] MCCORMICK at 313.

> grand jury by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor.

Section 911 states the general rule that a grand juror must not reveal grand jury testimony. Section 924.2 declares the two exceptions to the general rule stated in Section 911.[2]

Suppose that in the course of a grand jury investigation the jury receives evidence relating to a possible charge against D, but no indictment is returned. Later in the civil action of "P v. D," P calls a grand juror and questions him regarding relevant items of testimony received by the grand jury. D objects. Objection is overruled. On appeal may D take advantage of this ruling?

Under two early California cases the answer seems to be "No." In *People* v. *Young*,[3] the court states as follows:

> If the [grand juror] violated the obligation of secrecy imposed upon [him] . . . the defendant could not take advantage of it. The obligation is due and owing to the public, and not to the witness [before the grand jury], and therefore its violation cannot be an occasion of offense to him. . . . Under our system, it cannot be considered that the rule of secrecy has any reference to the protection of witnesses testifying before grand juries.[4]

The following from the opinion in *People* v. *Northey*[5] is to the same effect:

> [T]he rule of secrecy set forth in the statute is intended only for the protection of grand jurors, and not of the witnesses before them, and . . . the witnesses cannot invoke it.

Rule 35 is built upon a different plan. In the first place, the exceptions to the general rule of nondisclosure are much broader. Thus under Rule 35(c) disclosure may be required whenever the judge finds that such disclosure "should be made in the interests of justice." Secondly, when the occasion is appropriate for nondisclosure (*i.e.*, neither condition (a) nor (b) nor (c) is met), the proposed witness to the grand jury testimony (whether he be a grand juror or another) is given privilege so that he may refuse disclosure. Furthermore, the party may resist disclosure, since the evidence is both privileged and inadmissible.[6] Finally, if disclosure is ordered and made, the party may (notwithstanding Rule 40) predicate error upon the wrongful receipt of the inadmissible evidence.[7]

The Rule 35 scheme is preferred to the scheme set up in Penal Code Sections 911 and 924.2. It is desirable to have a broad and flexible principle of disclosure in the interests of justice. On the other hand, in those situations where nondisclosure is appropriate, it seems desirable to give full protection to the policy of secrecy which is afforded by Rule 35.

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[2] See *Ex parte* Sontag, 64 Cal. 525, 2 Pac. 402 (1884). Compare the requirement of Penal Code § 938.1 that in case of indictment stenographic transcripts of the grand jury testimony be filed with the clerk and be by him delivered to the district attorney and also a copy be delivered to defendant.

[3] 31 Cal. 563 (1867).

[4] *Id.* at 564.

[5] 77 Cal. 618, 633, 19 Pac. 865, 871 (1888).

[6] See discussion in the text (*supra* at 464-466) regarding a similar provision in Rule 33.

[7] *Ibid.*

First Privilege—Testimony as to Votes and Statements by Grand Jurors

Penal Code Section 911 further provides that the oath of each grand juror shall contain, *inter alia,* the following:

> I . . . will not, except when required in the due course of judicial proceedings, disclose . . . anything which I or any other grand juror may have said, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury.

Similarly, Penal Code Section 924.2 provides in part as follows:

> Each grand juror shall keep secret whatever he himself or any other grand juror has said, or in what manner he or any other grand juror has voted on a matter before them.

Since Rule 35 deals only with "a communication made to a grand jury *by a complainant or witness*" (emphasis added), this rule does not touch upon the obligation of grand jurors to keep secret *their* statements and votes.

Would the rule declared in Penal Code Sections 911 and 924.2 be repealed by the Uniform Rules? Whether it be regarded as a rule of privilege or of competency, it would be repealed by Rule 7 *unless* there is provision in some other rule continuing it in operation.

By the provisions of Rule 44(a) the present rule enjoining secrecy would probably remain operative. Rule 44(a) provides in part:

> These rules shall not be construed to (a) exempt a [grand] juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the . . . indictment.

This means that one must look to present law to see whether a grand juror may testify to intramural or extramural conditions or occurrences. Thus, this continues in force the permissive features of such law, if any. By implication it would also seem to continue in force the prohibitive aspects, such as Sections 911 and 924.2 of the Penal Code.

Recommendation

It is recommended that Rule 35 be approved.[8]

[8] Rule 35 was not recommended for adoption by the N.J. Commission (see official Comment to Rule 35 in N.J. COMMISSION REPORT at 40).
The rule as revised by the Utah Committee is stated as follows:
> The privilege of a witness with respect to a communication to a grand jury or participation in its proceedings shall be governed by statute. [UTAH FINAL DRAFT at 24.]

RULE 36—IDENTITY OF INFORMER

Rule 36 provides:

> RULE 36. *Identity of Informer.*
>
> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

Rule 36 Is a Common Law Privilege

Professor McCormick summarizes the scope and rationale of this privilege:

> Informers are shy and timorous folk, and if their names were subject to be readily revealed, this source of information would be almost cut off. On this ground of policy, a privilege and a rule of inadmissibility are recognized in respect to disclosure of the identity of such an informer, who has given information about supposed crimes to a prosecuting or investigating officer or to someone for the purpose of its being relayed to such officer.[1]

This is a common law privilege. Moreover, Rule 36 is in essence a codification of the privilege in its common law form. This is evident by comparing the provisions of the rule with the following capitulation by Mr. Justice Traynor in *People* v. *McShann*[2] of the highlights of the common law privilege:

> The common-law privilege of nondisclosure is based on public policy. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." [Citation omitted.] The informer is thus assured of some protection against reprisals. The use of informers is particularly effective in the enforcement of sumptuary laws such as those directed against gambling, prostitution, or the sale and use of liquor and narcotics. Disclosure of the informer's identity ordinarily destroys his usefulness in obtaining information thereafter. [Citations omitted.]
>
> There is a divergence of opinion as to whether the common-law privilege covers only the identity of the informer or also includes

[1] McCORMICK at 309-10.
[2] 50 Cal.2d 802, 330 P.2d 33 (1958).

> the contents of the communication. [Citations omitted.] Since the reasons for the privilege relate primarily to the identity of the informer, some authorities take the position that the privilege does not extend to the communications unless the contents would disclose or tend to disclose the identity of the informer. [Citations omitted.]
>
> At common law the privilege could not be invoked if the identity of the informer was known to those who had cause to resent the communication. . . .
>
> There is general agreement that there is no privilege of non-disclosure if disclosure "is relevant and helpful to the defense of the accused or essential to a fair determination of a cause . . . ."[3]

Comparing the first part of this quotation with the main body of Rule 36 and the last part with paragraphs (a) and (b) of the rule, it is seen that the rule enacts the privilege in its common law form.

The California Statute

Code of Civil Procedure Section 1881(5) provides:

> A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

This is a broader principle than the informer privilege but, at least to some extent, it includes that privilege.[4] In the discussion which follows, Section 1881(5) is compared with the traditional informer privilege as this privilege is codified by Rule 36.

Disclosure by Officer Versus Disclosure by Another Witness

Typically, disclosure of the identity of the informer will be sought on cross examination of the officer and the objection will come from the prosecution. Suppose, however, defendant calls a witness and asks the witness whether he was an informer and the objection comes from the witness. Rule 36 expressly gives the witness a privilege under these circumstances. Although Section 1881(5) expressly deals only with examination of the officer, it probably would be construed as also covering the witness.[5]

If the witness made no objection, would the evidence be excluded upon objection by the prosecution? Clearly so, under Rule 36, which is a rule both of witness privilege *and* of inadmissibility.[6] Again the same result probably would be true under Section 1881(5). Under that provision the court is to determine whether the public interest would suffer by disclosure.[7] This implies that the court may so find and therefore preclude disclosure even though the witness is willing to testify.

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[3] *Id.* at 806-07, 330 P.2d at 35-36.
[4] See discussion in the text, *supra* at 468-470.
[5] See discussion in the text under lawyer-client privilege (*supra* at 386) and under physician-patient privilege (*supra* at 406-407). See also MCCORMICK at 310 n.5.
[6] See discussion in the text, *supra* at 464-466. In saying the objection would be sustained it is, of course, assumed that neither exception (a) nor (b) is applicable. It is, however, probable that one of these exceptions would apply when defendant calls the witness. See People v. Lawrence, 149 Cal. App.2d 435, 308 P.2d 821 (1957).
[7] See People v. McShann, 50 Cal.2d 802, 807, 330 P.2d 33, 35 (1958). See also MCCORMICK at 310 n.7.

What if the witness is neither the officer nor the suspected informer but is one who knows the identity of the informer? Such witness is clearly covered by Rule 36. Again it is probable that Section 1881(5) would be construed as applicable to such witness.

If the above conjectures as to the construction of Section 1881(5) are valid, it follows that there are no substantive differences between that provision and Rule 36 insofar as the witnesses covered by each are concerned.

State Versus Federal Informers

Conceding that the State's interest in the successful enforcement of its laws requires an informer's privilege, is there any reason for the State to recognize a similar privilege when the informer's information is given to an officer of another sovereignty respecting the violation of its (the other sovereignty's) laws? The answer of Rule 36 is "Yes," provided the other sovereignty is the United States. This is because Rule 36 provides privilege where disclosure is made "to a representative of the State or the United States . . . charged with the duty of enforcing" "the laws of this State or of the United States." It cannot be determined what the answer is in California today. However, the Rule 35 view seems to be a wise measure of state-federal cooperation in this area.

The Exception in Rule 36(b)

Under Rule 36(b) there is no privilege and evidence of the informer's identity is admissible if "disclosure of his identity is essential to assure a fair determination of the issues."

The same result was reached in California in the *McShann* case by applying the rule that "there is no privilege of nondisclosure if disclosure 'is relevant and helpful to the defense of the accused or essential to a fair determination of a cause.'"[8]

At one time it was thought that this principle did not require disclosure of the identity of an eyewitness informant who was not a participant in the crime alleged.[9] However, this proposition is now repudiated. Cases supporting it were overruled by the recent *McShann* decision in which Mr. Justice Traynor said for the court:

> Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" even though the informer was not a participant. For example, the testimony of an eyewitness-nonparticipant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously

[8] People v. McShann, 50 Cal.2d 802, 807, 330 P.2d 33, 35 (1958). In the application of this principle the practical result is that the prosecution must elect between disclosure of the informer and having the officer's testimony struck. Hence defendant must inquire of the officer as to the informer and upon objection sustained defendant must move to strike the officer's testimony, thereby compelling the prosecution to elect. See Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569 (1959).

A comparable situation arises under the legislation (18 U.S.C.A. § 3500 (1957)) modifying the decision in Jencks v. United States, 353 U.S. 657 (1957). See Professor Falknor's discussion in his article, *Evidence*, 33 N.Y.U. L. Rev. 334, 347-49 (1958).

[9] See cases cited and disapproved in People v. McShann, 50 Cal.2d 802, 808, 330 P.2d 33, 36 (1958).

be relevant and helpful to the defense of the accused and essential to a fair determination of the cause.

Disclosure is frequently a problem in such cases as the present one involving violations of the narcotics laws, when the so-called informer is also a material witness on the issue of guilt. A mere informer has a limited role. "When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged." (*People* v. *Lawrence, supra,* 149 Cal.App.2d at 450.) His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial. 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. (See *Roviaro* v. *United States, supra,* 353 U.S. at 61.) Any implications to the contrary in *People* v. *Cox,* 156 Cal.App.2d 472, 477 and *People* v. *Gonzales,* 136 Cal.App.2d 437, 440-441, are disapproved.

Jencks v. *United States,* 353 U.S. 657, 671-672, involved a comparable situation wherein the defendant sought the production of F.B.I. reports made by the two principal witnesses against him on a charge that he falsely swore in an affidavit that he was not a member of the communist party. The court stated: "It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. . . . The Attorney General has adopted regulations . . . declaring all Justice Department records confidential and that no disclosure, including disclosure in response to a subpoena, may be made without his permission.

"But this Court has noticed in *United States* v. *Reynolds,* 345 U.S. 1, the holdings of the Court of Appeals for the Second Circuit that, in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .' 345 U.S., at 12." [10]

At one time it was thought that disclosure would not be required on the issue of reasonable cause to make arrest and search in cases where the prosecution seeks to show reasonable cause by testimony as to communications by an unnamed informer.[11] Similarly, this proposi-

[10] *Id.* at 808-09, 330 P.2d at 36-37. If the informer is participant disclosure is required. See *id.* at 806, 330 P.2d at 35 and People v. Castiel, 153 Cal. App.2d 653, 315 P.2d 79 (1957).

[11] See cases cited and disapproved in Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39, 43 (1958).

tion also is now repudiated; cases supporting it were overruled by the recent decision in *Priestly* v. *Superior Court* [12] in which Mr. Justice Traynor again speaks for the court:

> The People contend that defendant was not entitled to the disclosure of the informers' identities invoking section 1881, subdivision 5 of the Code of Civil Procedure: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." In *People* v. *McShann, ante,* p. 802, the informer was a material witness on the facts relating directly to the question of guilt. The policy conflict there involved was between the encouragement of the free flow of information to law enforcement officials and the right of the defendant to make a full and fair defense on the issue of guilt. In the present case the communications of the informers are material to the issue of reasonable cause to make the arrest and search, and the policy conflict is between the encouragement of the free flow of information to law enforcement officers and the policy to discourage lawless enforcement of the law. (See *People* v. *Cahan,* 44 Cal.2d 434, 445.)
>
> The federal rule under such circumstanecs [*sic*] is set forth in *Roviaro* v. *United States,* 353 U.S. 53, 61: "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."
>
> The foregoing rule requiring disclosure of the identity of an informer whose communications are relied upon to establish probable cause to make a search is sound and workable. (See *People* v. *Wasco,* 153 Cal.App.2d 485, 488; *People* v. *Lundy,* 151 Cal.App.2d 244, 249; *People* v. *Dewson,* 150 Cal.App.2d 119, 136; *People* v. *Alaniz* [*dissent*], 149 Cal.App.2d 560, 570; *Wilson* v. *United States,* 59 F.2d 390, 392; *Hill* v. *State,* 161 Miss. 518; *Smith* v. *State,* 169 Tenn. 633; 13 N.Y.U. Intra.L.Rev. 141, 147-152; 83 L.Ed. 155, 157.) If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue.

[12] 50 Cal.2d 812, 330 P.2d 39 (1958).

> Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause. When the prosecution relies instead on communications from an informer to show reasonable cause 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 to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer.
>
> In sum, when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant. Any holdings or implications to the contrary in *People* v. *Johnson,* 157 Cal.App.2d 555, 559; *People* v. *Salcido,* 154 Cal.App.2d 520, 522; *People* v. *Moore,* 154 Cal.App. 2d 43, 46-47; *People* v. *Merino,* 151 Cal.App.2d 594, 597; *People* v. *Alaniz,* 149 Cal.App.2d 560, 567; and *People* v. *Gonzales,* 141 Cal. App.2d 604, 606-607, are disapproved.[13]

Evaluation of these more or less controversial decisions is not germane to the present discussion. It should be noted, however, that the general principle applied in deciding these cases is substantially the same as that propounded in Rule 36(b). Hence adoption of Rule 36(b) would not in and of itself have any impact on these decisions.

The Exception in Rule 36(a)

Under Rule 36(a) there is no privilege and evidence of the informer's identity is admissible if such identity "has already been otherwise disclosed." This was true at common law and is generally true today.[14] The thought seems to be that it is idle to provide secrecy for something that is already known.

It may be, however, that Section 1881(5) would operate to prevent in-court disclosure even though out-of-court disclosure has been made. In the following passage Mr. Justice Traynor makes this suggestion:

> Under section 1881, subdivision 5 the test is whether the public interest would suffer by the disclosure. Conceivably, even when the informer may be known to persons who have cause to resent the communication, disclosure in open court might still be against the public interest.[15]

[13] *Id.* at 816-19, 330 P.2d at 41-43. *Cf.* People v. Rodriguez, 168 Cal. App.2d 452, 336 P.2d 266 (1959). As to the necessity to move to strike the officer's testimony when disclosure of the informant is refused, see Coy v. Superior Court, 51 Cal. 2d 471, 334 P.2d 569 (1959); People v. Lopez, 169 Cal. App.2d 344, 337 P.2d 570 (1959).

[14] McCormick § 148; 8 Wigmore § 2374(2). See also Mr. Justice Traynor's statement quoted in the text, *supra* at 474-475.

[15] People v. McShann, 50 Cal.2d 802, 807, 330 P.2d 33, 36 (1958).

He adds that under such circumstances refusal to disclose in open court can scarcely prejudice defendant since, by hypothesis, defendant already knows and, therefore, is not in need of disclosure.

Assuming there are such situations as those suggested by Mr. Justice Traynor, that is, situations in which, though out-of-court disclosure has been made, in-court disclosure would be both needless to the accused and harmful to the public interest, the present California rule would be preferable to Rule 36(a) which declares automatic termination of the privilege in cases of prior disclosure of identity. Furthermore, the present rule could, in effect, be preserved by striking Rule 36(a), thereby making previous disclosures a relevant but not a conclusive factor in applying the principle of Rule 36(b). However, in the absence of specific knowledge of the kind of situation which Mr. Justice Traynor describes as "conceivable," perhaps it is premature to recommend elimination of Rule 36(a).

Recommendation

Accordingly, it is recommended that Rule 36 be approved.[16]

[16] New Jersey enacted Rule 36 in the identical form approved by the Commissioners on Uniform State Laws. N.J. REV. STAT. § 2A:84A-28. See also N.J. COMMISSION REPORT at 40.

Similarly, the Utah Committee recommended adoption of Rule 36 unchanged. UTAH FINAL DRAFT at 25.

A CALIFORNIA PRIVILEGE NOT COVERED BY THE UNIFORM RULES—NEWSMEN'S PRIVILEGE

Introduction

This portion of the study is concerned with whether a newsman should have a privilege to prevent disclosure of his source of information.

Typically, the situation for invoking this privilege arises where a newsman authors an exposé charging corruption, dereliction or incompetence in public office or indicating that certain illegal or immoral activities are taking place. The publicity and resulting public interest generates an investigation by a grand jury or other investigative body. The inquiring authority subpoenas the author in its search for information on the subject. When requested to reveal the source of his information, usually by identifying an informant [1] or describing the means of procurement,[2] the newsman asserts a claim of occupational privilege, refuses to disclose, and is cited in contempt.

Judicial, legislative and administrative authorities uniformly deny the existence of any newsmen's privilege in the absence of statute. California is one of a minority of 12 states [3] which provides a statutory

[1] See People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

[2] See State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943); *Report and Study Relating to Problems Involved in Conferring Upon Newspapermen a Privilege Which Would Legally Protect Them From Divulging Sources of Information Given to Them,* 1949 N.Y. LAW REVISION COMM'N. REP., REC. & STUDIES 23, 49-51 (hereinafter cited as N.Y. STUDY).

[3] These 12 states and their respective statutes are as follows:

(1) Alabama. ALA. CODE, Tit. 7, § 370:
No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed.

(2) Arizona. ARIZ. REV. STAT. ANN. § 12-2237:
A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

(3) Arkansas. ARK. STAT. § 43-917:
Before any editor, reporter, or other writer for any newspaper or periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station, shall be required to disclose to any Grand Jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast, it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare.

(4) California. CAL. CODE CIV. PROC. § 1881 (6):
A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper. Nor can a radio or television news reporter or other person connected

privilege permitting a newsman to refuse to disclose his source of information. No similar privilege is contained in the Uniform Rules. Because the Uniform Rules are intended to supplant existing privileges —to wipe the slate clean except as new rules are adopted—it is imperative to consider this privilege in connection with this study of the Uniform Rules.

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with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

(5) Indiana. IND. ANN. STAT. § 2-1733:
Any person connected with a weekly, semi-weekly, tri-weekly or daily newspaper that conforms to postal regulations, which shall have been published for five consecutive years in the same city or town and which has a paid circulation of two percent of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio station or television station by which he is employed.

(6) Kentucky. KY. REV. STAT. § 421.100:
No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

(7) Maryland. MD. CODE ANN. Art. 35, § 2:
No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed.

(8) Michigan. MICH. COMP. LAWS, Mason's 1956 Supplement § 767.5a:
In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informants are hereby declared to be priviledged [*sic*] and confidential. . . .

(9) Montana. MONT. REV. CODES ANN. § 93-601-2:
No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the state, or before any county or municipal body, officer or committee thereof.

(10) New Jersey. N. J. STAT. § 2A:84A-21:
Rule 27. Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.
[These are rules of evidence, adopted in 1960 and patterned after the Uniform Rules of Evidence. Rule 37 (§ 2:A84A-29) is titled "Waiver of Privilege by Contract or Previous Disclosure; Limitations" and is similar to Rule 37 of the Uniform Rules of Evidence. The numbers of the rules were intended to coincide with those of the Uniform Rules of Evidence where possible (§ 2A:84A-46).]

(11) Ohio. OHIO REV. CODE ANN. § 2739.04:
No person engaged in the work of, or connected with, or employed by any commercial radio broadcasting station, or any commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating,

Newsmen's Privilege in California

Historical Development of Privilege

There is only a shallow history of the newsmen's privilege in California. The earliest reported case arose in 1897.[4] Claiming protected confidentiality, the defendant in a murder trial unsuccessfully attempted to prevent a newspaper reporter from testifying to certain damaging statements allegedly made by him to the reporter. The California Supreme Court dismissed the informant's claimed privilege with the remark that "the claim scarcely merits comment." [5]

In the same year, two San Francisco newspapermen published a series of articles charging bribery of State Senators. When questioned by a Senate investigating committee, they claimed an occupational privilege against disclosure, refused to reveal their source of information, and were cited in contempt. In denying a subsequent habeas corpus petition, the California Supreme Court noted: "It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names [of informants] upon the ground that the communications were privileged." [6]

In an unreported case in 1933, a San Diego reporter refused to reveal to a grand jury his source of information about a murder

publishing or broadcasting news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof. Every commercial radio broadcasting station, and every commercial television broadcasting station shall maintain for a period of six months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news. Record as used in this section shall include a tape, disc, script or any other item or document which sets forth the content of the statements which are required by this section to be recorded.

OHIO REV. CODE ANN. § 2739.12:

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

(12) Pennsylvania. PA. STAT. ANN. Tit. 28. § 330:

(a). No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof.

(b). The provisions of subsection (a) hereof in so far as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

[4] People v. Durrant, 116 Cal. 179, 48 Pac. 75 (1897).
[5] *Id.* at 220, 48 Pac. at 86.
[6] *Ex parte* Lawrence, 116 Cal. 298, 300, 48 Pac. 124, 125 (1897).

charge. A trial court dismissed an order to show cause why he should not be held in contempt because the jury had already found an indictment on the basis of other evidence in the case.[7]

Legislation

In 1935, the California Legislature added the following to Section 1881 of the Code of Civil Procedure to grant a journalist's privilege:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases:
>
> * * * * *
>
> 6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper can not be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.[8]

Only one California case involving the newsmen's privilege has been reported since the enactment of this provision. A finding of contempt for a newspaper reporter's claim of privilege against disclosure of the identity of an informant was dismissed.[9] The trial court found prior disclosure by the use of quotation marks in the newspaper article and held that such disclosure constituted a waiver of the statutory privilege. The appellate court accepted as a fact that prior disclosure would operate as a waiver of the privilege [10] but held that the use of quotation marks in this case did not disclose the identity of the informant.

A 1961 amendment [11] to Section 1881 extended the scope of the privilege to reporters and other persons connected with press associations, wire services and radio and television stations. As amended, the pertinent portion of Section 1881 of the Code of Civil Procedure now reads:

> 6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.
>
> Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

Despite the absence of reliable evidence in the form of legislative history or judicial interpretation, the effect of the statutory privilege in California appears to be a carte blanche grant of an absolute and unqualified privilege to newsmen to refuse to disclose the source of any information procured for and used in the protected news media.

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[7] Editor & Publisher, Aug. 19, 1933, p. 20, as noted in N.Y. STUDY at 61.
[8] Cal. Stats. 1935, Ch. 532, p. 1609.
[9] *In re* Howard, 136 Cal. App.2d 816, 289 P.2d 537 (1955).
[10] *Id.* at 819, 289 P.2d at 538.
[11] Cal. Stats. 1961, Ch. 629, p. 1797.

Statutory Deficiencies

Inconsistency. Section 1881 declares in part that "a person cannot be examined as a witness in the following cases." Subdivisions 1 through 5 are framed in these same terms. Thus, "a husband cannot be examined"; "an attorney cannot . . . be examined"; "a clergyman, priest or religious practitioner . . . cannot . . . be examined"; "a licensed physician or surgeon cannot . . . be examined"; and "a public officer cannot be examined." Section 1881(6) then declares in part that "a publisher, editor, reporter, or other person . . . cannot be adjudged in contempt." The proscription against a specific penalty in no way coincides with an affirmative grant of a privilege as is accorded in the other paragraphs of this section.

Ambiguity and Definition. Moreover, there are ambiguities in the statutory language. What is meant by "or other persons" in Section 1881(6)? Does it include secretaries, copyboys, printers and news vendors who incidentally are "connected with or employed upon a newspaper"? Or is the phrase limited to persons similar in position to those enumerated? What is a newspaper: a labor or societal organ? a paper with limited or generalized circulation? paid or free? Does "source of any information" include places as well as persons; the means or manner of procurement or the circumstances surrounding procurement, as well as identity?

The only decided case touching upon this statute is *In re Howard.*[12] Following the language of the statute, the court declared that the privilege attaches only where there is actual publication of the information procured for publication. How much of what is procured must be published before the privilege attaches? Will generalized innuendoes be considered publication of specifically detailed confidential information?

The 1961 amendment creates a special problem not heretofore present. Suppose a newspaper reporter gains information for publication but relates it to the public via radio or television. Although there has been dissemination, the information definitely was not "published in a newspaper." Would the reporter be privileged to prevent disclosure of the source?

Some of these problems could be solved by judicial interpretation. Others are indicative of serious statutory deficiencies. Even if the principle of the present newsmen's privilege were desired to be retained, the statutory scheme in California is incongruous and unsatisfactory. There is no apparent exception to the operation of the privilege. The greatest public interest might be thwarted easily by invoking statutory protection of the smallest private interest. There is no safeguard against abuse.

The Law in Other States

Legislation

Enactment of the first newsmen's confidence statute in the United States was precipitated by a Maryland case in 1896.[1] A Baltimore *Sun* reporter accurately reported the proceedings of a grand jury. He re-

[12] 136 Cal. App.2d 816, 289 P.2d 537 (1955).
[1] Note, 36 VA. L. REV. 61 (1950).

fused to disclose to that body his source of information and was jailed for contempt. Maryland enacted a statute protecting a newsman's source of information that same year.[2] It has since been expanded to include radio and television personnel within its scope.[3]

New Jersey enacted a newsmen's confidence statute in 1933.[4] The newsmen's privilege was retained in New Jersey when a modified form of the Privileges Article of the Uniform Rules was enacted in 1960.[5]

In 1936, a New York reporter was jailed for contempt after refusing to disclose to a grand jury the source of information on which he based a series of articles on gambling.[6] The resulting nationwide publicity contributed in part to the enactment of newsmen's confidence statutes in six states,[7] but not in New York. Four other states [8] have extended statutory protection to this occupational privilege at varying times since 1937.

Scope of Legislation

The statutes which have been enacted are varying in scope and effect. There is clearly some divergence in the language of the several statutes relating to this privilege. However, their differences are not nearly as significant as their common patterns.

Newspapers are specifically protected in all of the twelve states which have established a statutory privilege. Some of these statutes expressly extend to other printed media, such as journals and periodicals.[9] Others include news gathering services within their scope, such as wire services and press associations.[10] The scope of the privilege has been extended in ten states to include either or both radio and television newsmen.[11] All of the statutes name the officials or bodies before whom the privilege may be asserted. By direction or inference, the

[2] Md. Laws 1896, Ch. 249, § 1, which provided:

> [N]o person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

[3] Md. Ann. Code, Art. 35, § 2. See note 3, *supra* at 481, for complete text of this and other statutes.

[4] N.J. Laws 1933, Ch. 167, § 2, which provided:

> No person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceedings or trial, before any court or before a grand jury of any county or a petit jury of any court or before the presiding officer of any tribunal or his agent or agents, or before any committee of the Legislature, or elsewhere, the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.

[5] N.J. Rev. Stat. § 2A:84A-21. See note 3, *supra* at 481, for complete text of this and other statutes.

[6] People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936).

[7] Alabama and California (1935), Arkansas and Kentucky (1936), Arizona and Pennsylvania (1937). See note 3, *supra* at 481, for complete text of these and other statutes.

[8] Indiana and Ohio (1941), Montana (1943), Michigan (1949). See note 3, *supra* at 481, for complete text of these and other statutes.

[9] The Arkansas statute specifically refers to "periodical"; the Maryland statute specifically refers to "journal"; other statutes would seem to include either or both, as well as other news media, under such general phrases as "other publications" (Michigan) or persons engaged in "reportorial work" (Arizona).

[10] Press associations are specifically included in the statutes of California, Indiana, Montana, Ohio and Pennsylvania; additionally, the California statute specifically includes wire services.

[11] Only the statutes in Michigan and New Jersey fail to include newsmen on radio or television or both. The Arkansas statute includes radio newsmen only. The Pennsylvania statute declares that the privilege is unavailable to radio and television newsmen unless a record of the broadcast is maintained and open for inspection for one year thereafter; a similar requirement of six months is contained in the Ohio statute, but the latter does not affirmatively declare the privilege to be unavailable if not complied with.

privilege may be asserted in the courts of all of these states. Some statutes do not specifically name legislative or administrative authorities, though each or both of these are frequently included by implication.[12] Some statutes specifically include local political subdivisions in addition to state authorities.[13] The language used in all of the statutes save one indicates the grant of an absolute privilege.[14] However, several indirect limitations are imposed in some of the statutes. Thus, publication or other dissemination of the information gained from the protected source is required in some states.[15] Specific definitions of some of the protected media are used in some statutes.[16] Each limitation of this type, however, is mechanical only and leaves no room for intelligent weighing of conflicting interests sought to be protected.

Attempted Legislation

Numerous attempts have been made to secure similar protective legislation in other states and in Congress. None has succeeded.

For example, consider the following abortive attempts. In 1948 a New York grand jury cited two reporters in contempt for refusing to disclose where they had obtained certain lottery tickets which were reproduced in a newspaper in connection with an exposé on gambling. Although the contempt judgment was later vacated on procedural grounds,[1] the case precipitated extensive study of the newsmen's confidence problem by the New York Law Revision Commission. Its recommended legislation[2] for a discretionary privilege was rejected by the legislature, and New York still does not provide a newsmen's privilege.

Similarly, in 1959, the Massachusetts Legislative Research Council conducted a study of the newsmen's confidence laws in the various states. Included in its report was a model statute[3] drafted by the Harvard Law School Legislative Research Bureau. Like the New York proposal, it was discretionary in effect. Massachusetts has not enacted any statutory newsmen's privilege.

The case which precipitated the Massachusetts study is *Garland* v. *Torre*.[4] A New York gossip columnist printed alleged defamatory remarks about the actress Judy Garland, attributing the statements to an executive of the Columbia Broadcasting System. In connection with the ensuing libel action, the reporter claimed an occupational privilege against identifying her informant and was jailed for contempt. In

[12] The legislature is specifically referred to in the statutes of six states; it is considered as included by the phrase "or elsewhere" (Indiana).

[13] Kentucky, Montana, Ohio, Pennsylvania.

[14] The Arkansas statute is in terms conditional. Its conditional effect may be doubted, however, since the privilege is available unless it is shown "that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare."

[15] Alabama, California, Kentucky, Maryland, New Jersey. The previous Arizona statute specifically required publication. Whether the present statute now requires publication or broadcast is a matter for judicial interpretation.

[16] The Indiana privilege statute specifically defines newspaper. The Pennsylvania statute refers to "newspaper of general circulation as defined by the laws of this Commonwealth."

[1] People *ex rel.* Clarke v. Truesdell, 79 N.Y.S.2d, 413 (Sup. Ct. 1948); N.Y. Times, Mar. 30, 1948, p. 25, col. 6, as noted in N.Y. STUDY at 50 n.40.

[2] See N.Y. STUDY, pp. 28-29. See also Desmond, *The Newsmen's Privilege Bill*, 13 ALBANY L. REV. 1 (1949); Gallup, *Further Considerations of a Privilege for Newsmen*, 14 ALBANY L. REV. 16 (1950).

[3] Mass. Legislative Research Council, *Report Relative to Confidence Laws and the Newsman's Privilege*, H. Doc. No. 2756, at 31-32 (1959) (hereafter cited as MASS. REPORT).

[4] 259 F.2d 545 (2d Cir. 1958) *cert. denied*, 358 U.S. 910 (1958).

sustaining the contempt conviction, the United States Court of Appeals for the Second Circuit rejected the reporter's defense that legal recognition of such privilege was essential to the maintenance of a free press. Having noted that the First Amendment freedoms of speech and privacy were clearly circumscribed by the duty to bear knowledgeable testimony, the court had little difficulty in disposing of the claimed privilege.

> If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.[5]

The *Torre* case is consistent with other declared limitations on the constitutional protection of newspapers where the activity has interfered with the functioning of the judiciary.[6] Moreover, it is one of the few examples of the federal practice in the field of newsmen's privilege.

Federal Practice

There is no federal statute or independent body of federal law on this subject. It is clear that a claim of newsmen's privilege will not be sustained by any federal court sitting in a state which does not legally recognize it.[7] The extent to which a federal court will recognize the privilege, particularly in criminal cases, in those states which provide it by statute may be questioned.[8]

Common Law

The *Torre* case (and others) adequately demonstrates that the newsmen's privilege is entirely alien to the common law. There is no legally

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[5] *Id.* at 549.

[6] Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958) (upholding restrictions against newsmen taking photographs in the courtroom); United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954) (upholding restrictions on newsmen attending trials from which general public is excluded).

[7] Garland v. Torre, 259 F.2d 545 (2d Cir. 1958) *cert. denied*, 358 U.S. 910 (1958); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957).

[8] Rule 43(a) of the Federal Rules of Civil Procedure provides in part:

> All evidence shall be admitted which is admissible under the statutes of the United States, . . . or under the rules of evidence applied in the courts of general jurisdiction of the State in which the United States court is held.

In the absence of federal statutory law, a rule of privilege which would *exclude* evidence otherwise admissible could or could not be followed depending upon the interpretation of Rule 43(a). Generally, this rule is liberally interpreted so as to admit evidence which is not specifically prohibited by federal law. As a practical matter, however, federal courts have followed state law relating to statutory privileges not granted by federal statute. See Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955) (sustaining claim of accountant-client privilege) and *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953) (sustaining claim of newsmen's privilege).

Some doubt is cast with respect to the availability of this privilege in criminal cases because of the language in Rule 26 of the Federal Rules of Criminal Procedure. The applicable portion of that rule provides:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

In the absence of congressional legislation and recognition of this privilege at common law, it is possible that federal courts will look to state law in criminal as well as civil cases. However, in the interest of uniform administration of federal criminal law, it is equally possible that somewhat unique privileges of this type will not be recognized. For an illustrative opinion reviewing both civil and criminal cases relating to federal recognition of privileges, see Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (involving attorney-client privilege). See also Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958); Comment, 11 STAN. L. REV. 541 (1959).

S.Ct. 237, 3 L.Ed.2d 231. By stipulation we have been furnished a copy of the record in an unreported Colorado case, In re Murphy, in which a reporter was held in contempt for refusing to disclose her confidential source of news. The constitutional issue was also directly raised in that case. Again, certiorari was denied. See Murphy v. State of Colorado, 365 U.S. 843, 81 S.Ct. 802, 5 L.Ed.2d 810. (Footnote by the court.)] Our attention has been directed to one case, Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476, in which that Court upheld the right of an editor to refuse to reveal his source of information. The right asserted was, however, under the Fifth, and not the First Amendment.[14]

* * * * *

Appellant contends that the freedom to gather news is inseparable from the freedom to print news, that both are equally indispensable to a free press and therefore a restraint on gathering news (such as would occur in the absence of a reporter's ability to assure the confidentiality of his news sources) is, in itself, an infringement of the free press clause of the First Amendment. We readily perceive the disadvantages to a news reporter where his desire to remain silent under a pledge of confidentiality is not accommodated, but we are unable to find, in any of the many decisions touching on the First Amendment that we have been referred to and have considered, any basis for concluding that the denial of a claim under the newsman's code constitutes an impairment of constitutional rights.

In arguing the point, appellant incidentally refers to a report of the New York Law Revision Commission's exhaustive study on the problems of protecting newsmen against disclosure of news sources and quotes from the report as follows: "The newsman's case differs from other cases where no privilege exists as to information obtained in confidence, in that the newsman is performing the important function of keeping the public informed. A privilege to newsmen may therefore be justified when a privilege to others receiving information in confidence would not." State of New York Legislative Document (1949) No. 65(A), p. 4.

While the statement quoted reflects the commission's views and is one of the bases for its recommendation to the New York legislature that a privilege "with safeguards essential to the protection of the public interests" may be safely granted by the legislature to newsmen, it clearly affords no support for the argument that a newsman's privilege exists on a constitutional or any other basis. In this connection it might be noted, as more in point, that the same report also states (at p. 5): "The present absence of a privilege to newsmen does not infringe on the freedom of the press. Constitutional guarantees when enacted did not themselves grant the privilege. The power to compel disclosure has stood side by side with the constitutional guarantee of freedom of the press since the enactment of the Bill of Rights. There is no more infringement of constitutional rights in compelling a newsman to disclose the sources of his information than there is in compelling

[14] *Id.* at 479.

tional aspects of this case and are duly impressed by the citation of and the quotations from many of the landmark cases of the persuasive sweep intended to be given to the Federal Bill of Rights, generally, and with particular reference to the protection afforded by the privileges covered by the First Amendment. We cannot and do not ignore the force of the argument made on appellant's behalf in that respect. There can be no question but that each of the First Amendment freedoms and privileges is to be zealously protected against infringement. The particular freedom involved in this case, that of the press, is one of this country's greatest and most cherished heritages. Its guarded status as well as the reasons and necessity for preserving that status have been affirmed and reaffirmed by the Supreme Court of the United States in the many persuasive pronouncements of that Court to which we are referred and which we have carefully considered.

As appellant emphasizes, one of the primary purposes of the freedom-of-press clause of the First Amendment is to preserve the right of the American people to full information concerning the doings or misdoings of public officials in order to guard against maladministration in government.[12]

* * * * *

However, despite the broad scope and protective status of the First Amendment freedoms and privileges, it is clear that none of them is absolute, and that whether, in any given case, an asserted right under that amendment will prevail or not depends upon the particular circumstances involved and the weighing and balancing of the protection afforded by the right asserted against the purposes that would be defeated or denied by recognition of the freedom or privilege. The private or individual interest involved must, in each case, be weighed in balance against the public interest affected.

* * * * *

Another fundamental principle inherent in our form of government as an essential part of due process of law is that a litigant, when resorting to the courts for redress of grievances or determination of rights, is entitled to judicial aid in compelling the attendance and the testimony of witnesses. Correlatively, every person, properly summoned, is required to attend court and give his testimony unless specially exempted or privileged. "[I]t is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375.[13]

* * * * *

The Supreme Court of the United States has never ruled on the question of whether compelling a reporter to disclose his confidential news source constitutes an infringement of the freedom of the press. [In Garland v. Torre, infra, the issue was squarely raised but certiorari was denied. See Torre v. Garland, 358 U.S. 910, 79

[12] *Id.* at 476-477.
[13] *Id.* at 478.

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[14] *Id.* at 479.

any other person to make a disclosure. No limitation whatever on the right to publish is imposed."

We have not been convinced that there is a First Amendment protection available to deponent. However, in the absence of any authoritative ruling by the court having the final say on the matter, we will assume, for the purposes of this case, that the forced disclosure of a reporter's confidential source of information may, to some extent, constitute an impairment of the freedom of the press. We nevertheless conclude, in accord with the analysis and the holding on the same hypothesis in Garland v. Torre, 2 Cir., 259 F.2d 545, that such an impairment may not be considered of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel the attendance of witnesses and to exact their testimony if not otherwise privileged or protected.[15]

* * * * *

Since we hold the deponent has no constitutional right to refuse to answer questions respecting his source of information, the next question is whether he is protected against disclosure on any other basis or for any other reason. [The court then quotes from Rule 26, Hawaii Rules of Civil Procedure, providing in material part that "*the deponent may be examined regarding any matter, not privileged,* which is relevant to the subject matter involved in the pending action, . . . *including . . . the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.*" (Emphasis by the court.)]

The term "not privileged" as used in Rule 26 and in the other discovery rules refers to privileges as the term is understood in the law of evidence [citation omitted], and it is a firmly established principle of law that in the absence of statutory grant a newsman has no evidentiary privilege permitting him to refuse to disclose the source of information given to him in confidence.

> "It is clearly the general rule that communications made to a journalist do not enjoy any privilege against use as evidence, and newspapermen may be compelled to reveal information given to them in their professional capacity." 102 A.L.R. 771.
>
> "The rule of privileged communications does not, in the absence of statute, apply to communications to a newspaper editor or reporter, for, although there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, it is subject to qualification and must yield when in conflict with the interests of justice." 97 C.J.S. Witnesses § 259, p. 743.
>
> "Unless otherwise specifically provided by statute, communications to newspapers or to newspaper reporters or editors are not privileged. And so, a reporter cannot claim exemption as a witness from answering a question, on the ground that

[15] *Id.* at 479-480.

he had received the information under a promise that he would not divulge the name of his informant, and that to do so would subject him to ridicule and contempt, and would cause him to lose his position as a newspaper reporter." 58 Am.Jur., Witnesses, § 546, p. 305.

In 1914, Judge Clemons, in denying the efficacy of an editor's claim of privilege in this jurisdiction, stated in In re Wayne, 4 U.S.D.C.Haw. 475, at p. 476:

> "In the opinion of the court, the position of the witness is untenable. Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, —a canon worthy of respect and undoubtedly well-founded, it is subject to a qualification: It must yield when in conflict with the interests of justice,—the private interests involved must yield to the interests of the public."

The opinion quotes Wigmore, as follows:

> "For 300 years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule." 4 Wigmore, Evidence, § 2192, p. 2965.
>
> "In general, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. This rule is not questioned to-day. No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice. * * * Accordingly, a confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person not holding one of the specified relations hereafter considered, is not privileged from disclosure." Id., § 2286, p. 3186.

Other cases [indicate] the uniformity of holding in this country that in the absence of statute there is no evidentiary privilege in favor of a newsman . . . .[16] We have been cited no case holding to the contrary.

Appellant makes the point that, "There is no judicial precedent in this jurisdiction or elsewhere requiring newsmen in private litigation to divulge their sources of information relating to the administration of the government."

[16] The court cites the following cases (each presented in the order and as cited by the court): Clein v. State, Fla.1950, 52 So.2d 117, 120; People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769; Pledger v. State, 77 Ga. 242, 3 S.E. 320, 322; Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781, 785, 35 L.R.A.,N.S., 583; Joslyn v. People, 67 Colo. 297, 184 P. 375, 377, 7 A.L.R. 339; People v. Durrant, 116 Cal. 179, 48 P. 75, 86; State v. Donovan, 129 N.J.L. 478, 30 A.2d 421, 425; Brewster v. Boston Herald-Traveler Corp., D.C.Mass., 20 F.R.D. 416.

While it is true that most of the cases on the question of a newsman's privilege directly involved public interest in the subject matter of litigation which was prosecuted by a public official, the distinction appellant urges is not compatible with the generality of the language used in the decisions in laying down the broad rule that a newsman does not have an evidentiary privilege. No authority is cited by appellant in support of his unique proposal to engraft this exception on the general rule. We see no reason for or logic in limiting a private litigant's right to testimony merely because his cause arises out of or involves official action.

In this jurisdiction no statutory privilege against disclosure is extended to newsmen. Consistently with the foregoing general rule, therefore, no such privilege should be judicially recognized. However, it is stated that this is a vitally important case to the new State of Hawaii and as the issue presented is a matter of first impression, we are urged to pioneer in the field and take advantage of the "opportunity to establish unequivocally that the right of a free press guaranteed by the constitution of our state shall be given as broad a scope as is necessary to insure a truly free press." Also, it is said: "To accomplish this objective confidential sources of information must be held to be immune from compulsory disclosure and appellant's silence a constitutionally protected right." Although urged primarily from a constitutional standpoint, alternately, it is argued that the same result is necessary from a modernistic public policy standpoint. What, in effect, is actually asked of us is to create an evidentiary privilege in favor of newsmen. We are not favorably disposed to the invitation and our reasons for declining it are well put in People ex rel. Mooney v. Sheriff of New York County, supra, 199 N.E. at pp. 415-416, as follows:

> "There is no statute in this state covering the subject. It is urged by appellant that the basis for the privilege granted in the cases where it is conceded to be properly granted exists in the case of a reporter. Attention is called to the fact that in addition to the statutory privileges existing between attorney and client, husband and wife, physician and patient, and certain others (Civil Practice Act, §§ 353, 349, 351, 352), there also exist certain common-law cases where the privilege is granted, like communications made to a judge, to a district attorney, and to police officers in the performance of their duties, and it is urged that the principle underlying the granting of those privileges exists in the case of a reporter. Appellant admits that no court has ever so decided, but urges that the development of the law and changes in social relations require that courts now extend the privilege to a reporter.
>
> * * * * *
>
> "The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that general rule. In the administration of justice, the existence of the privilege from disclosure as it

now exists often, in particular cases, works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.

"On reason and authority, it seems clear that this court should not now depart from the general rule in force in many of the states and in England and create a privilege in favor of an additional class. If that is to be done, it should be done by the Legislature which has thus far refused to enact such legislation."

That there is neither a constitutional nor an evidentiary privilege justifying the deponent's refusal to disclose does not, however, determine the issue. The answers sought by the plaintiff, which the deponent refused to give, could not in themselves be relevant to the subject matter involved in the action. They were not sought for that purpose, but for the purpose of obtaining information "of persons having knowledge of relevant facts." As such, the plaintiff's right to pursue the inquiry and to obtain deponent's testimony on the source of his information is controlled by the last sentence of Rule 26(b), reading: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[17]

* * * * *

"It cannot be said that the matters inquired into were not relevant to the subject matter or that they would not 'lead to the discovery of admissible evidence.' . . ." [T]he inquiry desired to be made by plaintiff in this case could be considered likely enough to lead to the discovery of sufficiently important admissible evidence to warrant the trial court's permitting her to pursue it notwithstanding deponent's claim of ethical privilege.

* * * * *

Appellant urges also that the trial court committed error in refusing to exercise judicial discretion and in holding it had no discretion but to compel deponent's testimony.[18]

* * * * *

[T]he court did recognize the newspaperman's code of confidence, but denied the application of it in this case because it was the court's judgment that consideration of other factors in the case warranted and required such action. . . . Upon a complete review of the record in the light of the principles discussed above, we can find no merit in the contention that the trial court abused its discretion in granting the motion [to compel disclosure of the reporter's] . . . source of confidential information.[19]

Arguments Pro and Con

The following discussion is presented without regard for the particular form or content of a privilege statute. In other words, the discussion is concerned with whether *any* statutory privilege should be

[17] *In re* Goodfader, 367 P.2d 472, 480-83 (Hawaii 1961).
[18] *Id.* at 484-85.
[19] *Id.* at 487.

accorded newsmen, without regard for its being discretionary or absolute and without concern for the specific persons or media to be protected. Thus, the concern here is not so much as to the merits of confidentiality as a code of ethics as it is to the desirability of a statutory privilege.

In Support of the Privilege

Though not all newsmen favor the grant of a statutory privilege and some are definitely opposed, it seems safe to say that they are the strongest proponents of the privilege.[1] In justification, as demonstrated in the *Goodfader* case, *supra*, they generally advance two arguments for legal protection of their sources of information. First, they claim that such protection is required for the maintenance of a free press. Second, they assert that legal recognition of newsmen's confidentiality is in the best interest of the public.

In support of their position, newsmen point to the public service they perform in exposing waste and corruption in public office. They assert their role as independent guardians of the public interest. They emphasize that the threat of public exposure of derelict public officials is a powerful deterrent to governmental corruption. They point to the need for legal protection to allay a fear of reprisal through contempt, fines and jail sentences. They insist that in the absence of a statutory privilege unprotected sources of information would dry up, the flow of news would be vitally curtailed, and the well of knowledge which could be supplied by informants would go untapped. In turn, this is said to threaten their livelihoods.[2]

Factually, newsmen claim only legal recognition of their code of ethics. Newsmen normally hold in confidence their sources of information and steadfastly adhere to a long tradition embodied in a written code of ethics:

> [N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in courts or before other judicial or investigating bodies.[3]

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[1] See, for example, INTERNATIONAL PRESS INSTITUTE, PROFESSIONAL SECRECY AND THE JOURNALISTS (IPI Survey No. VI 1961), reporting the results of an international survey in regard to newsmen's confidence laws. Generally, journalists believed themselves entitled to a privilege to protect their sources of information, *but* a privilege which was discretionary only. The journalists believed they should have no privilege where their silence would jeopardize the proper administration of justice—for example, where substantive rights of an individual would be adversely affected or where the public welfare or security would be impaired. They agree that the determination of a claim of privilege should be made by a court.

Compare testimony given at the public hearing before the 1959 General Law Committee of the Connecticut Legislature on House Bill 2333, relating to a grant of a newsmen's privilege, and testimony of Mr. William J. Foote, representing the Connecticut Daily Newspapers Association, given on March 16, 1959:

Q. . . . Could you briefly tell us why your Association opposes this?
A. We oppose it on the grounds that if we're given a special privilege, we invite regulation in case of use of that privilege. In effect, we invite regulation by the State.
Q. Is that all, just that one point?
A. Also that we don't think that newspapers as a group want to have any special privileges.

[2] The text represents a summation of several arguments variously presented in cases, law review notes and both the MASS. REPORT and the N.Y. STUDY. See Garland v. Torre, 259 F.2d 545 (2d Cir. 1958); *In re* Goodfader, 367 P.2d 472 (Hawaii 1961); Tryon v. Evening News, 39 Mich. 636 (1878); Note, 32 TEMP. L.Q. 432 (1959); Note, 35 NEB. L. REV. 562 (1956); Note, 45 YALE L.J. 357 (1935).

[3] Note, 45 YALE L.J. 357, 360 n.24 (1935).

The extent to which newsmen respect this concept is epitomized in the joint statement to the court by two reporters sentenced for contempt in New York:

> The code of ethics of the newspaper profession, without any statutory authority, stipulates without compromise that violation of a confidence is the gravest ethical omission of which a newspaper man can stand accused.
>
> We feel that we are bound to comply with this principle and to make any sacrifice to perpetuate the lofty ideals of the newspaper profession.[4]

In Opposition to the Privilege

Several forceful arguments are presented by opponents of the privilege. These are summarized below.[5]

Statutory Privilege Not Necessary. Opponents of the privilege state that the public interest said to be served by nondisclosure, namely, the accurate reporting of news events, is equally served without statutory recognition of the newsmen's code of ethics. They rely on a 170-year history of free press in the United States. They point out that the power to compel disclosure and the freedom to publish have coexisted since the adoption of the Bill of Rights. They argue that, in light of this history and the absence of conditions constituting any real threat to freedom to publish, it cannot seriously be contended that freedom of the press is actually curtailed for lack of a legal privilege.

Public Interest Promoted by Disclosure. Opponents point to the newsman's private and individual proprietary interests that are served by nondisclosure. Even admitting some public interest in nondisclosure, they assert a greater interest would be served the public by full disclosure. This position rests upon the established duty to testify which is now axiomatic in our system of justice and is zealously guarded against unwarranted intrusion. Why, they ask, should known evidence be kept secret?

This argument has been recognized by the courts:

> [T]he position of the witness is untenable. Though there is a canon of journalistic ethics forbidding disclosure of a newspaper's source of information,—a canon worthy of respect and undoubtedly well-founded, it is subject to a qualification: It must yield when in conflict with the interests of justice,—the private interests involved must yield to the interests of the public.[6]

> The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. . . . The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict the privilege.[7]

> In effect he pleaded a privilege which finds no countenance in the law. Such an immunity, as claimed by the defendant, would be

[4] N.Y. Times, Feb. 28, 1948, p. 1, col. 2, as noted in N.Y. STUDY at 50.
[5] See Garland v. Torre, 259 F.2d 545 (2d Cir. 1958); Note, 32 TEMP. L.Q. 432 (1959); Note, 35 NEB. L. REV. 562 (1956); Note, 45 YALE L.J. 357 (1935).
[6] *In re* Wayne, 4 U.S.D.C. Haw. 475, 476 (1914); see also Annot., 102 A.L.R. 771, 772 (1936).
[7] People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

> far reaching in its effect and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice.[8]

Newsmen's Privilege Unlike Other Recognized Privileges. Some have objected to the newsmen's privilege because there are a number of differences between the newsmen's privilege and other recognized occupational privileges. They point out:

(1) Historically recognized occupational privileges seek to preserve the substance of communications. Contrariwise, the newsmen's privilege is founded on public disclosure of the communication or other information but seeks protected silence as to the *source.*

(2) Other occupational privileges are not held by the occupational incumbent, such as the attorney or physician. The holders of these privileges are the persons seeking professional assistance—the clients or patients. The newsmen seek the privilege in their own right, primarily to protect their own interests.

(3) Other occupational privileges involve a profession subject to license and governmental or professional control (*e.g.,* attorneys and physicians) or a profession the nature of which is thought to eliminate the need for such control (clergymen). On the other hand, newsmen are not effectively controlled and licensed by either a professional society or a governmental authority. Professional responsibility is lacking, and no occupational safeguards are apparent to prevent reckless publication and abuse of the privilege.

(4) Other occupational privileges protect communications which are only incidental to the purpose of the relationship. In other words, they are designed to protect persons seeking aid and to encourage the means of providing assistance. The newsman-informant relationship is founded solely on the communication itself. The only purpose of this relation is personal gain by public dissemination of acquired information. The newsman performs no service for the informant.

The Privilege in Balance

The divergence of opinion in this area rests primarily upon the varying views concerning how the public interest is better served. Proponents of the privilege assert that an unbridled press is in the best interest of the public. Opponents submit that the public interest is equally served without statutory protection and, in any event, is best served by minimizing the encroachments upon testimonial duty. There is obvious merit to both positions. The problem is whether a balance which has been reached in practice in the great majority of states requires statutory codification.

As a practical matter, newsmen's confidences are respected by judicial, legislative and administrative authorities.[9] The sparsity of reported cases in this field bears witness that a conflict of competing interests is seldom presented newsmen. Moreover, to the extent a conflict exists, it is equally present in other occupations (such as stockbrokers, accountants, teachers and social workers) whose operative

[8] *In re* Grunow, 84 N.J.L. 235, 236, 85 Atl. 1011, 1012 (1913).
[9] N.Y. STUDY at 155 *et seq.*

ethics, whether or not canonized by national associations, dictate that confidentiality be maintained.

In his well-recognized treatise on evidence, Professor Wigmore sets out four conditions requisite to the establishment of a privilege against disclosure of confidential communications:

> (1) The communications must originate in *confidence* that they will not be disclosed.
>
> (2) The element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[10]

Professor Wigmore indicates that the four conditions are met in communications between husband and wife, attorney and client, between jurors, and between informers and the government.[11] He forcefully argues against the somewhat recent trend of statutory protection of several occupations, including newsmen.[12]

Although extension to newsmen of a privilege of confidentiality appears to provide protection for persons in that occupation, in reality it is the informants who are actually protected. There appears to be no adequate justification for such protection; a newsman's informant, whatever service he performs, is adequately encouraged by existing practice in the numerous jurisdictions which do not provide statutory protection.

The attempted tying-in of newsmen's confidence statutes to a First Amendment free press argument is wholly without merit because there is no restraint, actual or implied, imposed by denial of a statutory privilege.

In the newsmen's favor is the fact that they frequently do perform a substantial public service. The fact that public exposure operates as a deterrent to governmental corruption is self-evident. Thus, in a particular case it may be in the public interest to protect the source of a newsman's information. This is not to say, however, that such interest is *always* better served by nondisclosure, nor does it imply that newsmen are the persons most competent to determine in which way the interest of the public is better served.

The arguments against the newsmen's privilege based upon its dissimilarity to other recognized occupational privileges are unimportant. They indicate only that differences exist. The fact that something is different does not deter from its possible merit. Moreover, it is clear that what is sought to be protected by the newsmen's privilege is something other than is protected by other occupational privileges.

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[10] 8 WIGMORE § 2285.
[11] *Id.* at § 2286.
[12] *Id.* at § 2286. Regarding the 1896 Maryland statute, *supra* note 2, at 486, Wigmore remarked that "the . . . statute, as detestable in substance as it is crude in form, will probably remain unique." 5 WIGMORE, EVIDENCE § 2286, n.7 (2d ed. 1923), quoted in Note, 46 J. CRIM. L., C. & P.S. 843, 848 (1956).

In this regard, the newsmen's privilege is somewhat analogous to the government informer privilege. The primary purpose of each of these is to withhold the identity of the *source* of information; unlike all other privileges, there usually is disclosure of the substance of the information gained. Each seeks to encourage the flow of information from informants. Accepting the newsmen's assertion that they are the guardians of the public interest, the recipients under both privileges are somewhat similar (although newsmen adopt a responsibility with which public authorities are duly charged). Lastly, the primary holders of the privileges are the recipients in both cases.

Curiously, this analogy to the government informer privilege is perhaps both the strongest and the weakest argument for and against the statutory grant of a newsmen's privilege. On the one hand, news media perform a public service similar to public authorities in exposing matters which require public attention. To continue this service, their sources of information may require legal protection. On the other hand, it may be noted that unlike the news media who are responsible to no one, every public authority is ultimately responsible to the people who create it; the only interest served by a public authority is the public interest. It is far better in the public interest to grant maximum encouragement for divulging pertinent information to proper authorities publicly empowered to correct undesirable situations than to private persons. In balance, if some occupational privilege is to be accorded newsmen, it seems appropriate to grant no greater privilege than is extended to proper governmental authorities.

It is believed the most compelling reason dictates against legal recognition of any special privilege for newsmen. However, in light of the 1961 extension of the scope of the statutory privilege in California,[13] practical considerations militate against repeal of the present statutory scheme without substantial replacement. Accordingly, it is assumed for the purposes of this study that some sort of statutory protection will be provided newsmen. The remaining problem is, of course, the extent of the protection to be provided.

Policy Considerations

If practical considerations require that some statutory protection be provided for newsmen's confidences, several questions arise with respect to desirable scope and purpose. For example, to whom should the privilege be granted? To what extent should protection be accorded?

As a vehicle for properly introducing the range and depth of possible problems to be considered, the following material from a similar study by the New York Law Revision Commission is presented:

> A. What sorts of news-gathering or news-disseminating activity should come within its scope? Only a daily paper? A weekly? A monthly magazine? A novel? A tipsheet or "service letter"? Must it have any prescribed circulation? How independent must it be?

[13] For a recent expression of this attitude, see Senate Joint Resolution 41, CONCURRENT AND JOINT RESOLUTIONS, Cal. Stats. 1961, Ch. 211, p. 5004.

> [T]he Congress of the United States is respectfully requested to enact legislation to protect *all reporters, who through the use of any available communication media report the news to the public,* against being forced to disclose the sources of their information. [Emphasis added.]

Will a "house organ" or a propaganda sheet, issued by some business or some other organization come within the privilege? What of radio or television? Talking movies?

B. What persons associated with the enterprise in question should be protected? Owners? Corporate officers? Stockholders? Employees? Only reportorial and editorial employees? Part time employees? Anybody who occasionally turns in an item? Does a volunteer of news come within the protection? What of the man who writes letters to the Editor? Must the reporter or other person who gets the news receive it when he is on his "beat", or should the privilege be available with respect to any communication which comes to him no matter when or how? What of a crime he himself observes? What if he participates in its commission? If the City Editor learns from a reporter that Alderman X told the reporter a story of corruption in the City Hall, should the City Editor, if subpoenaed, be compelled to disclose Alderman X's name?

C. Should there be any difference depending on the nature of the news? If the justification for the privilege is the public interest in the exposure of official neglect or misconduct, should the privilege cease to exist where the news concerns private matters only? Assuming that the public is well served by an exposé of Mayor X's official misdeeds, is there any similar public interest in permitting a reporter to refuse to tell where he got the story of Mr. Y's private indiscretions?

D. In what sort of proceedings should the privilege exist? Criminal cases only? Civil cases? Libel actions against the paper or other enterprise doing the publishing? "Examinations before action brought"? All proceedings of any sort, whether judicial, executive, or legislative?

E. Before what sort of body may the privilege be asserted? All courts? Administrative officers or tribunals? Commissions or Commissioners of Investigation? Legislative committees? The whole of a legislative body? Local agencies and bodies as well as state agencies? Grand juries?

F. Should the privilege be a disqualification to testify or should the statute merely bar compulsion to testify? If waivable, who may waive? The witness alone? The witness and his employer? The witness and his informant?

G. Must the matter have been published to be privileged? Or should it be privileged simply because disclosed to a newspaperman or other publicist even if never printed or broadcast?

H. Should the privilege be absolute, or should there be left with the courts (or other bodies) any discretionary power to permit or withhold the compulsion to speak? [14]

The problems presented here are by no means an exclusive list. However, they are indicative of several pertinent areas requiring definite resolution. Some of these may be adequately resolved by legislative

[14] N.Y. STUDY at 52-56.

action involving statutory form. Others, particularly those presenting varied factual situations and definitional distinctions, are better solved by judicial interpretation. There follows a discussion of individual problem areas which appear to be of paramount importance.

Discretionary or Absolute Privilege?

The first major problem is whether a newsmen's privilege statute should be in terms and effect absolute or discretionary. An absolute privilege would give newsmen an uncontrolled license to refuse to disclose the source of any information used for news purposes, regardless of any compelling necessity for such disclosure. On the other hand, a discretionary privilege statute would in effect require disclosure in a case where the statutory standard compels it. Such standard may be framed in terms so that disclosure is necessary to the proper administration of justice or required in the public interest. Administration of the standard may be in the hands of an unbiased authority, such as a judge.

The present California statute grants an absolute privilege to newsmen included within its scope. This amounts to a legislative determination that the public interest is best served by nondisclosure in every situation. This the Legislature has been unwilling to determine in the analogous government informer situation. If such broad and sweeping protection for informants is necessary or desired, it seems more reasonable to encourage the flow of information to proper public authorities publicly charged with the responsibility of law enforcement and directly answerable to the people of this State, than to private persons. Such an extensive grant to newsmen finds no common law precedent and is without justification in reason.

The competence of a court to weigh competing interests and to make a finding with respect to the manner in which the public interest is better served cannot be questioned seriously. Placing a duty upon the court removes the possibility of capricious conduct on the part of individual newsmen, yet preserves their confidence. As a practical matter, confidences would be respected unless a proper case demanded disclosure. Accordingly, it is believed that a combination of reason and practicality compels that any privilege extended to newsmen be discretionary in scope. This quite adequately protects any interest requiring legal sanctity while exposing those matters that demand revelation.

Scope of Privilege

Having determined the more desirable form, some general questions may be considered with respect to the desirable scope of such privilege.

Protected Media. Should the privilege be extended only to newspapers—however they may or may not be defined—or should it cover other or all other news media, such as radio, television, magazines and press associations? If to newspapers only, what is the difference in the nature or presentation of their news from that of news magazines? Logically, there is none. It should be noted, however, that the bill introduced in California in 1961, relating to the newsmen's privilege, included news magazines. But this coverage, after further expansion to

other regular news media, was deleted in the final form of the bill which became law.[15]

Arbitrary exclusion of some news media is an acceptable method of limiting too extensive expansion of exclusionary rules. The present California statute as amended includes newspapers, wire services, press associations and radio and television stations. Though not logically complete, a revised statute should provide no greater span than is presently protected.

Applicable Proceedings. Should the privilege be operative only in legal proceedings before a court, or should it extend also to legislative, investigative, and administrative proceedings? Also, should these include local as well as State authorities? This raises a substantial question with respect to the applicability of the entire Privileges Article of the Uniform Rules to other than judicial proceedings. That matter is considered elsewhere.[16]

For present purposes, it is necessary only to indicate that the privilege, to be effective, must be operative in other proceedings as well as judicial proceedings. The decided cases in this field indicate that the privilege is generally invoked in other than judicial proceedings. To limit this privilege to legal actions would, therefore, effectively diminish the effect of such privilege. (This same statement regarding scope is, of course, equally forceful with respect to the other privileges.) [17] The present California statute as amended names courts, the Legislature, and administrative bodies without reference to applicability at local levels. The suggested rule is drafted in the framework of the Privileges Article of the Uniform Rules under the assumption that it will be applicable to at least these bodies.

Holder of the Privilege. Should the holder of the privilege be either or both the newsman and informant? Giving the privilege to the informant would effectively emasculate the privilege since his identity would be revealed by his or his representative's asserting the claim of privilege. It is possible that under the same rationale presented in the study on the government informer privilege, an informant would hold the privilege if given in terms to the newsman only. Note, however, that this would require evidence as to a newsman's source of information to be inadmissible, which is an additional question to decide in and of itself. On this point, if other evidence pointed to an informant's identity or he desired self-disclosure, there would seem to be no basis for excluding such evidence.

Following the form of the present California and other statutes in this field and based upon the similarity to the government informer privilege, it is probable that this privilege should be granted in terms to newsmen only.

Definition of "Holder of the Privilege." If it is assumed that the newsman should be the holder of the privilege, should he be a person who actually gathers and reports the news, or should the statutory privilege extend to other writers, editors, analysts, announcers, and the like?

[15] *Compare* Cal. Stats. 1961, Ch. 629, p. 1797, *with* A.B. 65, Reg. Sess. (1961).
[16] The scope of the Uniform Rules of Evidence, and particularly the Privileges Article, is a question of policy. See the discussion regarding this problem contained in the portion of this study titled "Scope of the Privileges Article," *supra* at 309-327.
[17] *Ibid.*

If limited to newsmen in the strictest sense, an additional problem of precise definition would be presented, since the line between pure newsmen and others in the field is shadowy at best. Also, this would raise additional problems with respect to the definition of "news." For example, would "news" and "newsmen" include the subject matter and authors of so-called gossip columns? If newspaper gossip columns were protected, what of so-called scandal magazines? There is logically no substantial difference in their content. Of course, if the purpose of the statute is to stimulate the free flow of news, to encourage fair and accurate reporting and to provide a vehicle for exposing matters that require public attention, query the desirability of protecting miscellaneous matters that may be of interest only to a small segment of the populace. Any attempt to define by statutory language narrow differences of this type would only clutter up the law and hamstring the courts. It seems more desirable to leave precise definitions of this type up to the courts to decide in individual cases, framing a statute in general terms pointing to the policy sought to be achieved.

Dissemination. A further question is presented as to whether public dissemination should be required. As previously noted, this is an acceptable means of limiting the potential breadth of a statute of this type. Several problems are created by its inclusion, however. If dissemination to the public is required as a condition to attachment of the privilege, how much of what is gathered must be disseminated before the privilege attaches? A steady and reliable informant may disclose information to a newsman on several matters, some of which are disseminated and others of which are not. If the purpose of the protection is to assure anonymity and prevent news sources from drying up, of what value is a requirement of publication? Naturally, it serves the obvious purpose of fulfilling one of the reasons for the statute, namely, the public's right to be informed and prevents a newsman from claiming a privilege merely because of his occupation as opposed to his being a vehicle for public exposure. In effect, however, a requirement of publication or other public dissemination may breed reckless journalism in the example cited because the newsman, in order to effectively protect his source, would necessarily have to disseminate *everything* that was furnished. Similarly, what is the permissible period of time lapse between gathering and dissemination? Although a requirement of publication is frequently used as a method of curtailing the scope of protection, it would seem to breed inherent problems not readily solvable. The present California statute requires "publication in a newspaper" or "broadcast" by a radio or television station. These are but two means of dissemination and the problem specifically created by the 1961 amendment has been previously noted.[18] Though perhaps not entirely sufficient the broader requirement of dissemination should be retained as a means of limiting the statute.

Special Problem Regarding Mitigation

One of the most serious problems with respect to the grant of a statutory privilege to newsmen is the conflict created by the exercise of the privilege at one time and the waiver of the privilege with respect to the same matter at another time. Thus, a newsman might

[18] See discussion in the text, *supra* at 485.

claim the privilege before a grand jury or legislative committee. In a subsequent libel action respecting the same matter, the newsman could disclose the identity of the source of his material in mitigation of damages. This problem arises because of California Code of Civil Procedure Section 461 regarding giving evidence in mitigating circumstances. The specific problem has not arisen because of the limited interpretation available regarding the application of the statutory privilege in California. It was a sufficient problem in New York,[19] however, to demand separate treatment. The most reasonable answer is to preclude the mitigating effect of subsequent disclosure once a claim of privilege has been asserted with respect to the same subject matter. The most desirable limitation would be with respect to the same source, but since that is the subject of the privileged matter, a statute in such terms would be meaningless.

Summation

Several other pertinent questions may be asked with respect to the newsmen's privilege. Consider again the numerous problems suggested by the quoted matter from the New York Study.[20] However, these important considerations could not be fully covered in detail in any workable statute unless quite lengthy and clearly too detailed for inclusion within the scheme of the Uniform Rules. Positive action on those matters particularly highlighted, however, would result in a wholly workable statute. These and additional problems are presented here to illustrate the practical necessity of presenting a statute, if one be needed at all, which in effect leaves some discretionary power to the courts to determine in which way the public interest may be better served.

Proposed Rule

It is believed that a desirable solution to this complex problem can be achieved by enactment of a statutory rule of privilege to protect the source of newsmen's informants. The following discussion is based upon a proposed rule which would grant only a discretionary privilege to newsmen to prevent disclosure of their sources of information.

Text of Proposed Rule

It is suggested that a new rule might be added to the Privileges Article of the Uniform Rules. This new rule—designated Rule 36.1 for convenience of discussion—should read as follows:

> RULE 36.1. *Newsmen's Privilege.*
>
> (1) As used in this rule, (a) "newsman" means a person directly engaged in procurement or distribution of news through news media; (b) "news media" means newspapers, press associations, wire services and radio and television.
>
> (2) A newsman has a privilege to refuse to disclose the source of news disseminated to the public through news media, unless the judge finds that (a) the source has been disclosed previously, or (b) disclosure of the source is required in the public interest.

[19] N.Y. STUDY at 27-29.
[20] See the text at 500-501.

Comments on Proposed Rule

Proposed Rule 36.1 is based on Rule 36 of the Uniform Rules. This is because of the basic similarity of the proposed rule to the government informer privilege. However, there are several important differences in the two rules because of the nature of the subjects covered. These similarities and differences are discussed in some detail below.

Purpose of Rule. Like Rule 36, the primary purpose of the proposed rule is to protect the identity of informants so as to maintain confidential sources of information considered of interest to the public. The proposed rule is not definitely limited to identity of persons, however, because such language would be more restrictive than the present California statute and, strictly speaking, would exclude from coverage other means and methods of acquiring news.

Scope of Rule. Just as Rule 36 is designed to include all public officers charged with the administration of laws, so the proposed rule includes most of the important channels of communication of news to the public. The arbitrary exclusion of other media reflects no logical consistency but rather parallels the coverage of the present California statute.

Holder of the Privilege. Like Rule 36, the recipient of the information is the primary holder of the privilege. The portion of this study on the government informer privilege indicates that Rule 36 also extends the privilege to the informant and effectively protects against eavesdroppers by making evidence as to the informant's identity inadmissible. Unlike that rule, the proposed rule vests the privilege solely in the newsmen. This is because of the different considerations applicable to this rule in that the recipient is a private party not publicly charged with responsibility. Moreover, the maintenance of some difference between these two rules in this regard is thought to encourage divulging information to proper public authorities.

Moreover, a newsman's informant is very likely to be a participant or material witness in the subject activity. If other evidence points to his identity, his privilege against self-incrimination is sufficient protection if he is a participant in illegal activity. If he is a material witness, there appears to be no justifiable reason for excluding his knowledgeable testimony on the ground that he happened to communicate it to a newsman. Providing the protection for government informants may encourage disclosure to governmental authorities. No harm is perceived in such encouragement without similar aid being given newsmen.

Definition of Holder. A precise definition of "newsman" other than in general terms has been purposely omitted to avoid the problems noted previously with respect to narrow distinctions. The term is broad enough to point to the desirable coverage without unduly restricting interpretation by a court. The use of the phrase "directly engaged in" is intended to eliminate incidental personages.

Application. The proposed rule is drafted in the framework of other privileges so that its specific applicability will be the same as the other privileges. If later action were taken to limit the agencies before whom a privilege could be claimed, consideration should be given to revise

this coverage so that the privilege is applicable in at least the same cases as under the present statute.

Dissemination. A requirement of dissemination has been retained in the proposed statute. Despite the inherent problems engendered thereby, it is thought to be a desirable means of limiting the breadth of the statutory coverage. The use of the single word "disseminated" eliminates the specific problem created in the 1961 California amendment.

Assertion. The privilege would be available in all cases unless the judge finds that the source has been previously disclosed or that disclosure of the source is required in the public interest.

The provision concerning previous disclosure of the source merely states the existing law with respect to waiver. Thus, if disclosure were previously made, there is no reason for preventing the disclosure at a later time.

Similarly, if disclosure were required in the public interest, there is no justifiable reason for protecting the private interests served by nondisclosure. This provision, therefore, establishes the discretionary quality of the proposed rule. Of course, as a practical matter, newsmen's confidences would be respected the same as they are now respected, even in states without a statutory privilege. Information is generally available from other sources. But, if the only available source is the newsman himself and the activity is sufficiently serious to require public action, then the newsman should have no privilege to withhold knowledgeable testimony. Moreover, some exception is required to prevent abuse in the event a newsman is a percipient witness. For example, suppose a newsman himself observes a serious public offense and bases an exposé thereon. His occupation should not shield him from bearing knowledgeable testimony on the claim that the information was supplied by an unnamed informant. An exception phrased in terms of public interest is sufficiently broad to expose this practice in any given case.

As a practical matter, the courts will be the ultimate place for determination of whether the privilege attaches. This is because the practical result of findings in contempt by other governmental bodies is appeal to the courts for enforcement. Accordingly, it is proper to place discretionary decisional power in the hands of the judge.

In Mitigation. Consideration of the problem raised with regard to a possible claim of privilege and subsequent disclosure by way of mitigation of damages demands a practical result which will preclude this possibility. Since the effect of a claim of privilege does not directly affect admissibility on other grounds, it may be better to treat this problem by amending Section 461 of the Code of Civil Procedure to the effect that disclosure of a newsman's source after a previous claim of privilege will not effectively mitigate damages.

Recommendation

It is recommended that a new rule—Rule 36.1 as set out above [21]—be added to the Privileges Article of the Uniform Rules. Also, revision of Section 461 of the Code of Civil Procedure is recommended.

Acceptance of the recommendation made in this portion of the study would have the following significant effects on the present California law:

1. The newsmen's privilege under existing California law would be changed from an absolute to a discretionary privilege. This would more nearly parallel the analogous privilege provided government informers. As a practical matter the privilege would be respected to the same extent as it is today, but this change would preclude the possibility of inequitable results in cases where the public interest demands disclosure.

2. Acceptance of the proposed rule would merely codify what is undoubtedly the present California law with respect to previous disclosure.

[21] See the text, *supra* at 505.

RULE 37—WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE

Rule 37 provides:

> RULE 37. *Waiver of Privilege by Contract or Previous Disclosure.* A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

Rule 37 is a rule of waiver which seems intended to apply to all of the privileges stated in Article V of the Uniform Rules. The two conditions of this rule are considered in inverse order.

Rule 37(b)

Rule 37(b) provides:

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has . . . (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

Professor McCormick calls the doctrine of this subdivision the "once published, permanently waived" doctrine.[1] In the discussion which follows, this doctrine is examined in reference to some of the privileges provided in the Uniform Rules.

Lawyer-Client Privilege (Rule 26)

The doctrine has been most fully developed in connection with the lawyer-client privilege. Here, the "specified matter" of Rule 37 is, of course, the "communications" described in Rule 26(1). The following three propositions may be advanced as statements of the law under Rule 37(b) (and generally under present California law):

1. If a client, knowingly possessed of privilege under Rule 26, voluntarily testifies in an action as to any part of the privileged communications, he or his attorney must then testify fully respecting the communications.[2]

California agrees with this as a general proposition. Thus the court states as follows in *Rose* v. *Crawford*:[3]

[1] MCCORMICK at 198.
[2] The same result would, of course, follow if the client consented to the otherwise privileged testimony of others, such as the attorney, or the client's agent.
[3] 37 Cal. App. 664, 174 Pac. 69 (1918).

> [W]here . . . a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto.[4]

There is, however, some uncertainty as to what constitutes voluntary testimony to confidential communication in this sense.[5]

2. If a client testifies as stated in the first proposition, *supra,* he thereby waives privilege not only in the action in which he testifies but also in any subsequent judicial proceeding.[6]

This is probably California law. There is a suggestion to this effect in *Wilson* v. *Superior Court.*[7]

3. If a client without coercion and with knowledge of his privilege makes an *out-of-court* disclosure of all or part of a Rule 26(1) communication, thereafter the communication is not privileged.[8] California law is probably in accord with this rule.[9]

In the three preceding formulations, knowledge of the privilege holder that he possessed the privilege is predicated as an element of the hypothesis. Moreover, Rule 37 requires such knowledge as a condition of waiver. The thought probably is that waiver should depend upon intent to waive, and, since intent requires knowledge, knowledge is an element of waiver. Wigmore is, however, contra, contending that the overriding consideration is not intent but fairness. "[W]hen," says Wigmore, "conduct [of the privilege holder] touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not," and, therefore, the holder of the privilege "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."[10]

It is recommended that Rule 37 be amended to conform to the Wigmorean view, deleting from the rule the requirement of knowledge.

Physician-Patient Privilege (Rule 27)

As to waiver of the physician-patient privilege, suppose that a patient possessed of privilege under Section 1881(4) takes the witness stand and testifies concerning the facts, nature, and extent of his ailments; or, suppose such patient calls another witness who gives like testimony.

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[4] *Id.* at 667, 174 Pac. at 70. See People v. Ottenstror, 127 Cal. App.2d 104, 273 P.2d 289 (1954).

[5] Thus in People v. Kor, 129 Cal. App.2d 436, 277 P.2d 94 (1954), neither the client's statement on direct examination that he "told the attorney what happened" nor his response on cross examination as to whether he had told his attorney a certain fact was operative as waiver of privilege. The decision has been much criticized. See 2 U.C.L.A. L. REV. 573, 573-76 (1955); 10 STAN. L. REV. 297, 315 (1958).

[6] The same result would, of course, follow if the testimony were that of the attorney or agent with the client's consent.

[7] 148 Cal. App.2d 433, 446 n.9, 307 P.2d 37, 45 n.9 (1957). *Cf.* People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951), in which the client was not present at the first trial and thus had no opportunity to object and it was held that he was not foreclosed from asserting privilege in later proceedings.

[8] The same result would, of course, follow if the disclosure were by another (such as attorney or client's agent) with the client's consent.

[9] Title Ins. etc. Co. v. California Dev. Co., 171 Cal. 173, 220, 152 Pac. 542, 562 (1915); Seeger v. Odell, 64 Cal. App.2d 397, 405, 148 P.2d 901, 906 (1944). Each of these cases involved voluntary out-of-court disclosure of the contents of a confidential letter.

As to the necessity for knowledge, see People v. Kor, 129 Cal. App.2d 436, 447, 277 P.2d 94, 100-01 (1954) (concurring opinion).

[10] 8 WIGMORE, EVIDENCE § 2327 (McNaughton rev. 1961).

In either event the patient waives his privilege and consequently his physician may then be required to testify. As the court says in *Moreno* v. *New Guadalupe Mining Co.:* [1]

> [T]he privilege . . . is waived by the patient taking the witness-stand and voluntarily testifying in detail concerning the facts, the nature, and the extent of his ailments, or by calling other persons as witnesses in his behalf and requiring them to testify to the same facts. [Citations omitted.] This is so because "it is only the secrets of the sick room or of the consultation . . . that the physician is forbidden to reveal, and what is made public by pleadings and evidence in a court of justice can by no possibility be privileged to benefit the party who thus gives it such wide publicity." [Citation omitted.]
>
> We are aware that there are to be found authorities dealing with the doctrine of waiver which declare a rule contrary to the rule declared in the authorities here cited and relied upon, but in our opinion the latter rule is more in consonance with the spirit and purpose of the privilege, and certainly more in accord with the exact administration of justice, for clearly a patient should not be permitted to describe "at length to the jury in a crowded courtroom the details of his supposed ailment and then neatly suppress the available proof of his falsities by wielding a weapon, nominally termed a privilege." (4 Wigmore, sec. 2389, p. 3360.) Any other construction and application of the privilege would, as is aptly illustrated by the author last cited, permit a patient suing for damages for personal injuries to make and sustain a claim obviously unfair somewhat as follows: "One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim. I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury and I can keep it secure if the court will forbid his testimony." (4 Wigmore, 2389, p. 3359.) [2]

A like result would obtain, it seems, under Rule 37(b), which provides in part as follows:

> A person [the patient] who would otherwise have a privilege . . . to prevent another [the physician] from disclosing a specified matter [patient's condition] has no such privilege with respect to that matter if the judge finds that he . . . (b) without coercion . . . made disclosures of any part of the matter [as, for example, by volunteering his testimony] or consented to such disclosure made by any one [as, for example, consented by calling witness to make such disclosure].

The privilege is also waived if the patient himself calls the physician or omits to object when his adversary calls the physician. As the court states in *Lissak* v. *Crocker Estate Company:* [3]

[1] 35 Cal. App. 744, 170 Pac. 1088 (1917).
[2] *Id.* at 754-55, 170 Pac. at 1092. See also Estate of Visaxis, 95 Cal. App. 617, 273 Pac. 165 (1928).
[3] 119 Cal. 442, 51 Pac. 688 (1897).

> The privilege given by the statute is personal to the patient, and may be waived by him. It is waived when he calls the physician himself as a witness, or when he permits him to give his testimony without making any objection thereto. If the patient once consents to his testifying, he cannot, after the testimony has been given, revoke the consent and ask to have it excluded. Such consent may be either implied or express, and there was in the present instance an implied consent when the plaintiff permitted the witness to be examined in full by the defendant without any objection. The testimony of the witness was not received through any mistake or inadvertence on the part of the plaintiff, or through any ignorance on his part that he was being interrogated respecting his treatment, or of the nature of what his testimony would be. The plaintiff in his own testimony had stated that he visited the doctor's office, and had been treated by him, and when the doctor was called as a witness by the defendant the plaintiff not only knew that he was to be examined in reference to the same matters, but before the witness had given his testimony the plaintiff's counsel requested and was granted permission to make a preliminary examination and to question the witness with reference to his examination of the plaintiff. It was the duty of the plaintiff, if he intended or desired to object to any further examination, to make his objection at that time, and not to wait until he had learned whether the testimony was favorable or unfavorable, and then ask to have it excluded. "The contestant could not sit by during the examination of the physicians and after their evidence had been elicited by examination and cross-examination, upon finding it injurious to her case, claim as a legal right to have it stricken out. There are bounds to the enforcement of the statutory provisions which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the code provisions by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed, and the proposed evidence must be seasonably objected to. The rule of evidence which excludes the communications between physician and patient must be invoked by an objection at the time the evidence of the witness is given. It is too late after the examination has been insisted upon, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out."[4]

The same result would obtain under Rule 37(b) because the patient is a "person who would otherwise have a privilege," which privilege he has lost by consenting to a disclosure "made by any one," such as the physician.

Marital Privilege (Rule 28)

So far as the relationship of Rule 37 to Rule 28 (the marital privilege) is concerned, the reference in Rule 37 to the "person who would otherwise have . . . privilege" means the communicating spouse under

[4] *Id.* at 445-46, 51 Pac. at 689. See also Estate of Huston, 163 Cal. 166, 124 Pac. 852 (1912). *Cf.* Hirschberg v. Southern Pac. Co., 180 Cal. 774, 183 Pac. 141 (1919).

Rule 28(1); the "specified matter" referred to in Rule 37 is the communication of the communicating spouse mentioned in Rule 28. Thus, under Rule 37 a communicating spouse waives the privilege by voluntary in-court or out-of-court revelation of the communication or by consent to such revelation by the addressee spouse.

As previously pointed out,[5] the question of who is holder of this privilege in California is in doubt. It is not certain, therefore, that the results just stated are or are not current California law.

A further difficulty is presented by a group of California cases which develop a doctrine of waiver that may not be literally embraced by Rule 37. The doctrine is that the spouses as litigants may lose the privilege merely because of the theory they adopt in prosecuting or defending the law suit. The scope of this doctrine is somewhat imprecise.[6] A full exposition would probably not be germane to the pur-

[5] See discussion in the text, *supra* at 442-444.

[6] The leading case is Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927). Here a judgment creditor of the husband sued husband and wife to set aside allegedly fraudulent conveyances from husband to wife. Defendants defended in part on the basis of a written agreement between themselves whereby husband relinquished to wife community interests in the property. Held, both defendants could be required to testify as to the transactions between themselves because (1) such transactions were not confidential communications, and (2) even if they were confidential communications, defendants had waived their § 1881(1) privilege respecting them. The court stated:

> It is manifest that the testimony here excluded was pertinent to the issue tendered by the defendants in their answer setting up said written agreement of September 17, 1926, which was exhibit "A" thereto. Every question and answer related specifically to such matter covered by said agreement. It must be held that defendants as husband and wife by filing for record a written agreement between themselves and by pleading it in defense to plaintiff's action and by introducing it in evidence put the *bona fides* of such paper in issue and thereby waived expressly any privilege thrown around them by the law. It would be monstrous if husband and wife might between themselves conspire to defraud the creditors of the one or the other and to conceal their act produce a written instrument which is immune from all inquiries and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or *vice versa* by agreement between themselves renders it imperative that when such an agreement is relied upon by their joint answer, thereby the whole subject matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in *Johnston* v. *St. Sure*, 50 Cal. App. 735, rehearing denied by this court. [*Id.* at 699, 258 Pac. at 592.]

See also Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448 (1929).

In *In re* Strand, 123 Cal. App. 170, 11 P.2d 89 (1932), wife and husband sue for injuries to wife. Wife refuses to answer questions propounded upon the taking of her deposition. Refusal is based on § 1881(1). Held, wife must answer. The court states:

> Subdivision 1 of section 1881 relates to privilege rather than to competency and such privilege may be waived. We are not convinced that said section was intended in any case to shield a party to an action and deprive the adversary of the benefit of the testimony of such party; but be that as it may, we are of the opinion that as a wife is given the right to bring an action for her own injuries on behalf of the community, her act in so doing constitutes a waiver on behalf of the community of the right to invoke that section so far as her testimony is concerned. We are further of the opinion that where the husband and wife join as parties plaintiff in such action, their voluntary act in so doing constitutes a waiver of the right to invoke that section as to the testimony of either. [*Id.* at 172, 11 P.2d at 90.]

Note that the privilege which is here involved is the first of the two § 1881(1) privileges. (See note 2, *supra* at 440.) Query: Does the court mean that the second privilege (marital communication privilege) is also waived?

In Credit Bureau of San Diego v. Smallen, 114 Cal. App.2d Supp. 834, 249 P.2d 619 (1952), the facts were as follows: Plaintiff's assignor (the husband) lends defendant (his wife's brother) money to be repaid by purchase by defendant of U.S. Series E bonds in name of defendant, husband and wife. Defendant discovers he can purchase bonds in name of only two persons. Defendant inquires of sister whether this would be O.K. Sister replies, "Yes." Later defendant turns bonds over to sister who is then estranged from her husband. In the present action defendant claims that what he did constituted payment of the loan. Defendant examines the wife as to whether her husband told her it would be O.K. for defendant to purchase bonds in names of defendant and wife. On authority of the *Adams* case, the court here held as follows:

> We think, on the authority of that case, it was not error to admit the testimony of the wife under the similar circumstances here present. The

pose of this study. It is proper, however, to suggest that since the doctrine has been developed in terms of the general dogma that the spouses may waive their privilege, adoption of Rule 37 would probably have no effect on the doctrine as developed thus far or upon its development in the future. This is because Rule 37(b) is intended as and would probably be construed as a statement of the general principle of waiver presently prevailing.[7]

Other Privileges (Rules 29-36)

No reason is apparent why there should not be results similar to those expounded above when considering waiver of the priest-penitent privilege (Rule 29) and the religious belief (Rule 30), political vote (Rule 31), and trade secret (Rule 32) privileges.

Special considerations, however, are applicable to the other privileges. It will be remembered that Rule 33 (secrets of state), Rule 34 (official information), Rule 35 (communication to grand jury) and Rule 36 (identity of informer) are all rules both of privilege and of inadmissibility.[8] Because of their dual nature, the interrelation of these rules and Rule 37(b) is somewhat peculiar. Nevertheless, the aspect of these rules as rules of privilege is predominant insofar as waiver is concerned. In other words, the privilege being waived, the evidence may thereby become admissible.[9]

Special considerations also are involved in the application of Rule 37(b) to the privilege against self-incrimination. The Commissioners on Uniform State Laws suggest this in the following Comment: "As to the privilege against self-incrimination [Rule 37(b)] goes beyond the

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nature of the contract between the husband and wife and the wife's brother is the issue made by the complaint. By raising this issue, the husband thereby opened the door to determine what that contract was in its entirety, including any amendments or novations thereof.

"It would be monstrous (says the court in the *Adams* case, page 699) if husband and wife might between themselves conspire to defraud the creditors of the one or the other and to conceal their act produce a written instrument which is immune from all inquiries and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or *vice versa* by agreement between themselves renders it imperative that when such an agreement is relied upon by their joint answer, thereby the whole subject matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in *Johnston* v. *St. Sure,* 50 Cal.App. 735 [195 P. 947], rehearing denied by this court."

The informality of the family agreement sufficient for the needs of the parties until divorce litigation commenced, gives the agreement here in suit all the weight due to a written, recorded, agreement between the husband and wife alone. We think, under the circumstances here present, the privilege was waived by the husband, and find no error in the admission of the evidence.

Section 1881, subdivision 1, of the Code of Civil Procedure, was not enacted to be used as an instrument to prevent justice, or to permit a husband to initiate litigation which could only succeed by locking the lips of his former wife. [*Id.* at 840-41, 249 P.2d at 623-24.]

In Hagen v. Silva, 139 Cal. App.2d 199, 293 P.2d 143 (1956) (quiet title action against husband and wife), it was held, in view of the nature of defendants' answer, that they were in a position akin to that of plaintiffs in the *Strand* case and therefore the privilege was waived. It is not clear, however, whether the waiver is only of the first of the two § 1881(1) privileges or whether it is a waiver of both privileges. See also Rinehart v. First Cupertino Co., 154 Cal. App.2d 842, 317 P.2d 30 (1957).

These cases seem to indicate that we are in the course of developing a judge-made spouse-litigant exception to the rule of marital communication quite analogous to the patient-litigant exception to the physician-patient privilege. See discussion in the text on the latter privilege, *supra* at 412-414.

[7] The Commissioners on Uniform State Laws state that its "principle is recognized generally." UNIFORM RULE 37(b) Comment.

[8] See discussion on Rules 29-36 in the text, *supra* at 453-480.

[9] See discussion on Rules 33-36 in the text, *supra* at 463-480.

majority of the decisions." [10] As indicated in the discussion of the self-incrimination privilege, there is also the question whether Rule 37(b) goes beyond the scope of legislation permitted by Article I, Section 13 of the California Constitution.[11]

Rule 37(a)

Rule 37(a) provides:

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege.

Like Rule 37(b), considered above, this provision is considered in relation to some of the privileges provided in the Uniform Rules.

Lawyer-Client Privilege (Rule 26)

Insofar as the lawyer-client privilege is concerned it seems to be the intent of Rule 37(a) to provide waiver of privilege in a situation like the following: Suppose that in the civil action, "P v. D," P and D enter into a stipulation that upon the trial of the action neither will interpose any objection on the basis of privilege to any evidence offered by the other. Before this action of "P v. D" is tried, the criminal action of "People v. D" comes to trial. There are issues common to both actions. Upon the trial of the criminal action, the district attorney calls D's attorney to testify to D's communications respecting one of the aforementioned common issues. In this situation, it seems that under Rule 37(a) D's objection should be overruled.

Rule 37(a) is derived from Model Code Rule 231(b). The official Comment on this Model Code rule is in part as follows:

> This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise.[12]

Is this theory sound? Or to rephrase the question, is Rule 37(a) desirable? The answers should be "Yes," even though the theory of Rule 37(a) probably exceeds present California law with respect to waiver. Note that in the illustrative case, if the civil action had been tried first and if pursuant to the stipulation D's attorney had testified, this would be a waiver under Rule 37(b). To hold that the contract has the same effect in terms of waiver seems to be a slight and reasonable concession to the interest of adjudication in the light of all relevant facts.

[10] UNIFORM RULE 37(b) Comment.
[11] See discussion in the text, *supra* at 370-373.
[12] MODEL CODE RULE 231 Comment.

Physician-Patient Privilege (Rule 27)

Considering Rule 37(a) in light of the physician-patient privilege, suppose an applicant for insurance states as follows in his application: "I hereby authorize any doctor at any time to give to [insurer] any information he or she may have regarding me."[13] The insurance is issued. Thereafter, in an action between the insured and another (not the insurer) the insured's physician is called to testify against the insured. Under Rule 37(a) objection by the insured should be overruled.

It was pointed out in the discussion immediately above on the lawyer-client privilege that Rule 37(a) probably exceeds present doctrines of waiver. For the same reasons there stated, however, Rule 37(a) is heartily endorsed.[14]

Marital Privilege (Rule 28)

Viewing Rule 37(a) in relation to the marital privilege, suppose a communicating spouse possessed of privilege applies for insurance, agreeing with the insurer that the insurer may require the addressee spouse to disclose any confidential communications of the communicator. The insurance is issued. Later the action of "People v. D (the communicating spouse)" is brought. Under Rule 37(a) the district attorney apparently may require the addressee spouse to testify to the communication. This, however, is believed to be a sound result because of the reasons stated previously.

Recommendation

Assuming the soundness of doubts regarding the constitutionality of Rule 37 as applied to the privilege against self-incrimination,[15] should the rule be amended to state expressly its nonapplication to that privilege?

The final paragraph of the prefatory note to the Uniform Rules states in part as follows:

> It should be noted that no special effort has been made to relate the rules of admissibility to all possible limitations arising out of constitutional requirements of due process, personal security and the like. Of course a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional rights. That goes without saying. . . . The rule[s] in no way [attempt] to modify or impair any constitutional right. This is true throughout the work.

If this official statement of purpose is used as a guide in construing the Uniform Rules, there is no danger that any rule will be overthrown as infringing constitutional guarantees (unless, of course, the only possible area of coverage or manner of operation of the rule would constitute infringement of constitutional right.)[16]

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[13] Turner v. Redwood Mutual Life Ass'n, 13 Cal. App.2d 573, 575, 57 P.2d 222, 223 (1936).

[14] See discussion in the text, *supra* at 515.

[15] See discussion in the text, *supra* at 370-373.

[16] The opinion has been previously advanced that Rule 23(4) and Rule 25(g) are unconstitutional because of the "unless" clause. See discussion in the text, *supra* at 334-338 and 367-369, respectively.

There is no necessity to state in express terms that Rule 37 is subject to Article I, Section 13 of the California Constitution. In fact, it is believed that there would be danger of confusion in so amending Rule 37 and in not amending other rules, the application of which may be limited by constitutional considerations.

Therefore, approval of Rule 37 in the form in which it is now stated (except for the suggested deletion of the knowledge requirement) is recommended.[17]

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[17] New Jersey adopted the substance of Uniform Rule 37 with only slight change in language. There was added, however, a clarifying paragraph to make clear that a disclosure which is itself privileged does not operate as a waiver under this rule. See N.J. COMMISSION REPORT at 41. The full text of the rule as adopted in New Jersey is as follows:

> Rule 37. *Waiver of Privilege by Contract or Previous Disclosure; Limitations.*
>
> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.
>
> A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question. [N.J. REV. STAT. § 2A:84A-29.]

The Utah Committee recommended adoption of Uniform Rule 37 in the identical form approved by the Commissoners on Uniform State Laws. See UTAH FINAL DRAFT at 25.

RULE 38—ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

Rule 38 provides:

> RULE 38. *Admissibility of Disclosure Wrongfully Compelled.* Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

This rule copies Model Code Rule 232. In the debates on the Model Code, Professor Morgan explained as follows the scope of the rule:

> [The rule] excludes or makes inadmissible evidence where the [evidence] has been obtained by the violation of a privilege claimed. For instance, a judge in an action between A and B compels X to incriminate himself and then later in the prosecution of X the former testimony of X is offered against him. Or suppose that he compels him wrongfully to disclose a communication between an attorney and client in an action between two other persons. Then, in an action against the client himself, the communication is offered. This Rule 228 will make that evidence inadmissible.[1]

It seems clear that Rule 38 accords with prevailing law insofar as evidence seized in violation of the privilege against self-incrimination is concerned.[2] And further, the Commissioners on Uniform State Laws are apparently of the opinion that this rule states the prevailing view as to all privileges since they say that it "states the generally accepted view."[3] Be that as it may, the policy of the rule is clearly sound. (In the words of the Commissioners on Uniform State Laws, the policy is to safeguard "the privileges against destruction by their very violation.")

This sound policy would be more clearly effectuated by eliminating a possible restriction. The language of the rule seems to limit its application to cases where the holder of the privilege claimed it but "was nevertheless required to make" disclosure. This neglects those cases in which the privilege holder has a privilege not only to himself refuse to disclose, but also has a privilege "to prevent any other witness from disclosing . . ." the communication, *e.g.*, the client's privilege to prevent disclosure by his attorney. Rule 38 does not sufficiently protect the client against wrongfully compelling disclosure by such "other witness." Accordingly, Rule 38 should be amended to read:

> Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had

[1] 19 A.L.I. PROCEEDINGS 180 (1942).
[2] See MCCORMICK §§ 127 and 137.
[3] UNIFORM RULE 38 Comment.

and claimed a privilege to refuse to make the disclosure or to prevent another from making the disclosure, but nevertheless the disclosure was required to be made.

As so revised, Rule 38 is recommended for approval.[4]

[4] In New Jersey the rule was modified to read as follows:

Rule 38. *Admissibility of Disclosure Wrongfully Compelled.*

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the disclosure was wrongfully made or erroneously required. [N.J. REV. STAT. § 2A:84A-30]

The Utah Committee recommended adoption of Uniform Rule 38 in the identical form approved by the Commissioners on Uniform State Laws. See UTAH FINAL DRAFT at 25.

RULE 39—REFERENCE TO EXERCISE OF PRIVILEGES

Rule 39 provides:

> RULE 39. *Reference to Exercise of Privileges.* Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and 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 adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

Inference and Argument Based on Suppression of Evidence—General Rule

Professor Wigmore states:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.[1]

In California, this general principle is codified in terms of the presumption "that evidence willfully suppressed would be adverse if produced."[2]

Exception to General Rule—Invoking Rule of Inadmissibility

Professor Wigmore states the following by way of exception to the general rule noted above:

> Of course, a rule of evidence *other than a rule of privilege* for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage, since by hypothesis the evidence is prohibited, not for his personal sake on grounds independent of

[1] 2 WIGMORE § 285.
[2] CAL. CODE CIV. PROC. § 1963(5).

the value of the evidence, as privileged evidence is . . . but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by innuendo to give an unfavorable meaning to such objections. But the rules of Evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that no inference can lawfully be urged in consequence of such objections." [3]

Should There Be an Exception by Invoking Privilege?

If a party or a witness suppresses evidence by invoking a rule of privilege, should this be a legitimate basis for adverse inference and argument against the party? In other words, should there be applied here the general rule above stated (allowing such inference and argument in general) or should an exception to such rule analogous to the exception above stated be recognized? Manifestly, Rule 39 proceeds upon the theory that, save for a special rule regarding the self-incrimination privilege,[4] inference and argument predicated upon a privilege claim is prohibited. Moreover this seems to be substantially the majority [5] and the present California view. For example, consider the following extract from the opinion in *Estate of Carpenter:* [6]

> The court also instructed the jury, at the instance of the plaintiffs, that "it is a presumption of law that evidence willfully suppressed would be adverse if produced."
>
> I have examined the voluminous record in vain to find any evidence that there has been any suppression of evidence. Respondents, in their brief here on this point, say that Dr. Stockton's testimony would naturally be considered the best evidence upon Carpenter's condition of mind, and that there was evidence that proponents would not use it; that they suppressed it by objecting to it when offered by contestants.
>
> Of course this, if it occurred, was not a suppression of evidence, and it would be strange that the court, having decided that the evidence was not admissible, should, nevertheless, instruct the jury that the party offering it should have the benefit of a presumption that it was favorable, and that the other party, because he made a legal and proper objection, should thereby lay his case under the suspicion that he had been guilty of suppressing testimony. The instruction would naturally have an injurious effect.[7]

The rationale supporting this view is, in the words of the Commissioners on Uniform State Laws, that a "recognized privilege not to introduce evidence should not be impaired by giving the judge any right to comment on the exercise of the privilege to the prejudice of

[3] 2 WIGMORE § 286.
[4] See discussion in the text, *infra* at 523.
[5] See UNIFORM RULE 39 Comment.
[6] 94 Cal. 406, 29 Pac. 1101 (1892).
[7] *Id.* at 419, 29 Pac. at 1105. See also Cook v. Los Angeles Ry. Corp., 169 Cal. 113, 145 Pac. 1013 (1915) and Thomas v. Gates, 126 Cal. 1, 58 Pac. 315 (1899).

the one exercising the privilege."[8] Or, in the eloquent words of Lord Chelmsford, the rationale is as follows:

> "The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?"[9]

The opposing view is illustrated by Model Code Rule 233, which provides as follows:

> If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom.

The argument in behalf of this rule is set forth in the official Comment thereon, which reads in part as follows:

> This Rule is the subject of sharp conflict in the authorities. Where a party to the action claims a privilege and thereby excludes relevant matter, it is impossible to prevent the trier of fact from drawing unfavorable inferences against him. A party's privilege is of great practical importance only where the exclusion of the privileged matter will keep the issue from the trier of fact, and in such a case the Rule is inapplicable. The lessening of the value of the privilege by allowing comment on its claim by a party is therefore comparatively slight.[10]

This argument refers to the situation in which the *party* claims privilege. The argument in behalf of the rule in the situation in which a nonparty witness claims privilege is as follows:

> When a witness, other than a party, claims a privilege, the party desiring the answer may take one of two positions: (1) that the witness is falsely trying to aid the opponent by giving the jury the impression that the answer would be unfavorable to the witness but not to the opponent, or (2) that the answer would injure the opponent. In either event there can be no weighty objection on the ground that the comment will lessen the value of the privilege. No rights or duties of the witness are to be adjudicated; the comment can do him no harm in the action. The one objection which the opposing party might make is that the claim of privilege shuts off all possibility of inquiry into the validity or invalidity of the claim. By further examination he might develop facts which would destroy all basis for the argument. He has no means of testing the truth of the inference, as he would have if the witness testified directly to the inferred fact. This is to say that some of the objections applicable to hearsay are applicable to the com-

[8] UNIFORM RULE 39 Comment.
[9] MCCORMICK at 163-64. Wigmore seems to support this view as a general proposition (2 WIGMORE § 286) and as applied to lawyer-client privilege (8 WIGMORE § 2322) and to physician-patient privilege (8 WIGMORE § 2386) but apparently he thinks the view should not be applicable to marital privilege (8 WIGMORE § 2340 n.2).
[10] MODEL CODE Rule 233 Comment.

ment. If hearsay statements by persons whose direct testimony is unavailable are to be received, then the comment should be permitted.[11]

Although Professor McCormick leans toward the Model Code view,[12] the view expressed in Rule 39 is recommended.

Special Rule for Self-Incrimination Privilege

As pointed out in the previous discussion on the self-incrimination privilege,[13] there is in Article I, Section 13 of the California Constitution a special rule as to comment and inference when an accused elects at his trial to exercise the self-incrimination privilege.[14] As was also pointed out in the same discussion, Rule 39 is inconsistent with the present California law as to inference from a claim of privilege by a party in a civil action and as to such inference impeaching the credibility of a witness.[15] The recommendation there suggested was to amend Rule 39 so as not to alter the present law above mentioned.[16]

Recommendation

It is recommended that the first sentence of Rule 39 be amended as follows (new matter shown in italics):

~~Subject to paragraph (4), Rule 23,~~ If a privilege (*other than the privilege against self-incrimination*) is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and 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 adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.[17]

It is further recommended that Rule 39, as thus amended, be approved.[18]

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[11] *Ibid.*
[12] See MCCORMICK § 80.
[13] See discussion in the text, *supra* at 334-338 and 374-377.
[14] *Ibid.*
[15] See discussion in the text, *supra* at 374-377.
[16] See discussion in the text, *supra* at 374.
[17] As to reasons for striking the "Subject to" clause, see discussion in the text, *supra* at 374.
[18] New Jersey adopted Uniform Rule 39 in the identical form approved by the Commissioners on Uniform State Laws. N.J. REV. STAT. § 2A:84A-31. See also N.J. COMMISSION REPORT at 42; N.J. COMMITTEE REPORT at 84-86.
Similarly, the Utah Committee recommended adoption of Uniform Rule 39 in the identical form approved by the Commissioners on Uniform State Laws except that the word "inference" was substituted for the word "presumption" in the first sentence. See UTAH FINAL DRAFT at 25-26.

RULE 40—EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

Rule 40 provides:

> RULE 40. *Effect of Error in Overruling Claim of Privilege.* A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

Professors Wigmore [1] and McCormick [2] support the principle of this rule. Professor McCormick expounds the rationale as follows:

> If the court erroneously recognizes an asserted privilege and excludes proffered testimony on this ground, of course the adverse party has been injured in his capacity as litigant and may complain on appeal. But if a claim of privilege is wrongly denied, and the privileged testimony erroneously let in, the distinction which we have suggested between privilege and rule of exclusion would seem to be material. If the adverse party to the suit is likewise the owner of the privilege, then, while it may be argued that the party's interest *as a litigant* has not been infringed, most courts decline to draw so sharp a line, and permit him to complain of the error.
>
> Where, however, the owner of the privilege is not a party to the suit, it is somewhat difficult to see why this invasion of a third person's interest should be ground of complaint for the objecting party, whose only grievance can be that the overriding of the outsider's rights has resulted in a fuller fact-disclosure than the party desires. In view of the usual willingness of trial courts of their own motion to safeguard the privileges, it can hardly be necessary to afford this extreme sanction to prevent a breakdown in their protection.[3]

An identical rule is proposed by the American Law Institute in Model Code Rule 234. The official Comment on and illustrations of Model Code Rule 234 are as follows:

> This represents the English common law view. The American cases are in conflict.
>
> *Illustrations:*
>
> 1. In a civil action against D for damages inflicted by D's automobile, D's chauffeur C is called as a witness against D. Asked to describe his manner of driving in connection with the accident, C claims privilege against self-incrimination, the claim is improperly overruled, and C gives testimony incriminating himself and tending to subject D to liability. D may not effectually assign error.

[1] 8 WIGMORE § 2196.
[2] MCCORMICK § 73.
[3] *Id.* at 152-53.

2. If an action similar to that described in Illustration 1 is brought against C, and C's claim of privilege is improperly overruled, C may effectually assign error upon this ruling.[4]

California cases are in accord with Rule 40.[5] It is recommended that Rule 40 be approved.[6]

[4] MODEL CODE Rule 234 Comment.

[5] People v. Gonzales, 56 Cal. App. 330, 204 Pac. 1088 (1922) (Rape prosecution. Prosecutrix claims privilege. Overruled. Appeal from judgment of conviction assigning error in overruling privilege claim. Judgment affirmed.)

> The point is not well made. Conceding for the purposes of the argument that the court should have allowed the privilege to the young girl and not have compelled her to answer questions, the error was not an error committed as against the defendant, and, therefore, not a matter about which he may complain. The testimony was relevant and competent when given and, being so, it was proper to be considered by the jury. Had the witness stood upon her refusal to answer and been committed for contempt in consequence, the question as to whether the court had ruled properly would be presented in a proceeding brought to test the validity of the imprisonment. That matter would be a thing wholly outside of any question proper to be considered in defendant's case. [*Id.* at 331, 204 Pac. at 1088-89.]

People v. Mann, 148 Cal. App.2d 851, 307 P.2d 684 (1957) (similar); People v. Judson, 128 Cal. App. 768, 18 P.2d 379 (1933) (similar). These cases show that the nonholder of the privilege may not predicate error upon the denial of the privilege. As to the ability of the holder to predicate error, see People v. Mullings, 83 Cal. 138, 23 Pac. 229 (1890). (Murder prosecution. Defendant testifies. On cross-examination prosecution asks as to defendant's statement to his wife. Defendant's objection overruled. Appeal from judgment of conviction, assigning as error overruling of objection. Judgment reversed on ground objection should have been sustained.) People v. Warner, 117 Cal. 637, 49 Pac. 841 (1897) (similar).

See discussion by Professor Kidd in *Some Recent Cases in Evidence*, 13 CALIF. L. REV. 285, 295-96 (1925).

[6] In New Jersey the rule was revised to read as follows:

> Rule 40. *Effect of Error in Overruling Claim of Privilege.*
>
> (1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.
>
> (2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, [Sections 2A:84A-17 to 2A:84A-30] after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous. [N.J. REV. STAT. § 2A:84A-32]

The Utah Committee recommended adoption of Uniform Rule 40 in the identical form approved by the Commissioners on Uniform State Laws. See UTAH FINAL DRAFT at 26.

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