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6/27/67

First Supplement to Memorandum 67-30

Subject: Study 63 - Evidence Code

Memorandum 67-30 points up a number of possible "bugs" in the Evidence Code. For your convenience in consideration of this memorandum, we have included in this supplement the text of the pertinent sections of the Evidence Code; and, in some cases, we have indicated language that might possibly be used to clarify the various sections in the event that the Commission determines that clarification is needed.

Section 916 (discussed on pages 2-3 of basic memorandum)

The text of this section is set out as Exhibit I (pink). Upon reviewing the discussion of this section in the basic memorandum, the staff believes that no change should be made in the section.

Sections 957, 959, 961, 999, 1004, 1005, 1023, and 1025 (discussed on page 3 of basic memorandum); also comparable Sections 958, 996, 1000, 1001, 1002, 1003, 1016, 1019, 1020, 1021, 1022, and 1024

The text of each section listed above as it might be revised is set out as Exhibit II (yellow).

A number of these sections refer to "the client" or "the patient." We believe that it is clear from these sections that the reference is to the client or patient who made the communication. The only clarification we could make in these sections is to substitute for "communication" the phrase "confidential communication between client and lawyer," "confidential communication between patient and physician," or "confidential communication between patient and psychotherapist,"

as the case may be. We do not believe that any change of these sections is needed. The sections in this category are: Sections 958, 996, 999, 1001, 1004, 1005, 1016, 1020, 1024, and 1025.

A number of sections refer to "a client" or "a patient." It is not so clear in these sections that the reference is to the client or patient who made the communication. These sections could be clarified by substituting "the client" or "the patient" for "a client" or "a patient." Also if any change is made in the first category of sections, a conforming change should also be made in these sections. Some of the sections require more than a mere substitution of "the" for "a" in order that the section will read smoothly. We doubt that the change is necessary in these sections. The sections in this category are: Sections 957, 959, 960, 961, 1000, 1002, 1003, 1019, 1021, and 1022.

One section--Section 1023--appears to be in need of revision because there is no clear indication in the section that the defendant referred to in the section is the patient.

Section 973 (discussed on pages 4-8 of basic memorandum)

The text of this section is set out as Exhibit III (green).

A modification of subdivision (a) of this section is set out at the bottom of page 4 of the basic memorandum and might be adopted if the Commission believes a serious problem exists.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

§ 916. Exclusion of privileged information where persons authorized to claim privilege are not present

916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

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

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

(b) The presiding officer may not exclude information under this section if:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

Comment. Section 916 is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, a third party—perhaps the lawyer's secretary—may have been present when a confidential communication to a lawyer 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 Section 916 which requires the presiding officer to recognize the privilege.

Section 916 is designed to protect only privileged information that the holder of the privilege could protect by claiming the privilege at the hearing. It is not designed to protect unprivileged information. For example, if the statement offered in evidence is a declaration against the penal interest of the declarant, Section 916 does not authorize the presiding officer to exclude the evidence on the ground of the declarant's privilege against self-incrimination. If the declarant were present, his self-incrimination privilege would merely preclude his giving self-incriminating testimony at the hearing; it could not be asserted to prevent the disclosure of previously made self-incriminating statements.

The erroneous exclusion of information pursuant to Section 916 on the ground that it is privileged might amount to prejudicial error. On the other hand, the erroneous failure to exclude information pursuant to Section 916 could *not* amount to prejudicial error. See EVIDENCE CODE § 918.

Section 916 may be declarative of the existing law. No case in point has been found, but see the language in *People v. Atkinson*, 40 Cal. 284, 285 (1870) (attorney-client privilege).

[Legislative Committee Comment (Assembly J., Apr. 6, 1965)]

§ 957. Exception: Parties claiming through deceased client

confidential

between client and lawyer
the

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

now deceased

Comment. The lawyer-client privilege does not apply to a communication relevant to an issue between parties all of whom claim through a deceased client. Under existing law, all must claim through the client by testate or intestate succession in order for this 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, 457-460, 290 P.2d 617, 621-623 (1955). Section 957 extends this exception to include inter vivos transactions.

The traditional exception for litigation between claimants by testate or intestate succession is based on the theory that claimants in privity with the estate claim through the client, not adversely, and the deceased client presumably would want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his estate might be correctly ascertained and carried out. This rationale is equally applicable where one or more of the parties is claiming by inter vivos transaction as, for example, in an action between a party who claims under a deed (executed by a client in full possession of his faculties) and a party who claims under a will executed while the client's mental stability was dubious. See the discussion in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article V. Privileges)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 392-396 (1964).

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 958. Exception: Breach of duty arising out of lawyer-client relationship

between client
and lawyer

confidential

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

Comment. This exception has not been recognized by a holding in any California case, although dicta in several opinions indicate that it would be recognized if the question were presented in a proper case. *People v. Tucker*, 61 Cal.2d 828, 40 Cal. Rptr. 609, 395 P.2d 449 (1964); *Henshall v. Coburn*, 177 Cal. 50, 169 Pac. 1014 (1917); *Pacific Tel. & Tel. Co. v. Fink*, 141 Cal. App.2d 332, 335, 296 P.2d 843, 845 (1956); *Fleschler v. Strauss*, 15 Cal. App.2d 735, 60 P.2d 193 (1936). See generally WITKIN, CALIFORNIA EVIDENCE § 419 (1958).

It would be unjust to permit a client either 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 or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged. See *People v. Tucker*, 61 Cal.2d 828, 40 Cal. Rptr. 609, 395 P.2d 449 (1964). The duty involved must, of course, 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.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 959. Exception: Lawyer as attesting witness

between client and lawyer

the

to execute

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

confidential

of the client in executing

by the client

Comment. This exception relates to the type of communication about which an attesting witness would testify. The mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the document attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. Under existing law, the attesting witness exception is broader, having been used as a device to obtain information which the lawyer who is an attesting witness received in his capacity as a lawyer rather than as an attesting witness. See *In re Mullin*, 110 Cal. 252, 42 Pac. 645 (1895).

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 960. Exception: Intention of deceased client concerning writing affecting property interest

between client and lawyer

960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

confidential

the

Comment. Although the attesting witness exception stated in Section 959 is limited to information of the kind to which one would expect an attesting witness to testify, there is merit to having an exception that applies to all dispositive instruments. A client ordinarily 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. Likewise, the client ordinarily would desire his attorney to testify to communications relevant to the validity of such instruments after the client dies. Accordingly, two additional exceptions—Sections 960 and 961—are provided for this purpose. These exceptions have been recognized by the California decisions only in cases where the lawyer is an attesting witness. See the *Comment* to EVIDENCE CODE § 959.

[Law Revision Commission Comment (Recommendation, January 1965)]

between client
and lawyer

§ 961. Exception: Validity of writing affecting property interest

961. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

confidential

the

Comment. See the *Comment* to Section 960.

[Law Revision Commission Comment (Recommendation, January 1965)]

between patient
and physician

§ 996. Exception: Patient-litigant exception

confidential

996. There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

Comment. Section 996 provides that the physician-patient privilege does not exist in any proceeding in which an issue concerning the condition of the patient has been tendered by the patient. If the patient himself tenders the issue of his condition, he should 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 by Code of Civil Procedure Section 1881(4) (superseded by the Evidence Code) which makes the privilege inapplicable in personal injury actions. This exception is also recognized in various types of administrative proceedings where the patient tenders the issue of his condition. *E.g.*, LABOR CODE §§ 4055, 5701, 5703, 6407, 6408 (proceedings before the Industrial Accident Commission). The exception provided by Section 996 applies not only to proceedings before the Industrial Accident Commission but also to any other proceeding where the patient tenders the issue of his condition. The exception in Section 996 also states existing law in applying the exception to other situations where the patient himself has raised the issue of his condition. *In re Cathey*, 55 Cal.2d 679, 690-692, 12 Cal. Rptr. 762, 768, 361 P.2d 426, 432 (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 & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 232, 231 P.2d 26, 28 (1951) (personal injury case).

Section 996 also provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (wrongful death). Under Code of Civil Procedure Section 1881(4) (superseded by the Evidence Code), a person authorized to bring the wrongful death action may consent to the testimony by the physician. 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.

Section 996 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.

[Law Revision Commission Comment. (Recommendation, January 1965)]

as to a confidential communication
between patient and physician

§ 999. Exception: Proceeding to recover damages for criminal conduct

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.

Comment. Section 999 makes the physician-patient privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. Under Sections 1290-1292 (hearsay), the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. Thus, if the exception provided by Section 999 did not exist, the evidence subject to the privilege 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.
[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1000. Exception: Parties claiming through deceased patient

between patient
and physician

1000. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

confidential

the

now deceased,

Comment. See the *Comment* to Section 957.
[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1001. Exception: Breach of duty arising out of physician-patient relationship

between patient
and physician

1001. There is no privilege under this article 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.

confidential

Comment. See the *Comment* to Section 958.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1002. Exception: Intention of deceased patient concerning writing affecting property interest

confidential

between patient
and physician
the

1002. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

Comment. Existing law provides exceptions virtually coextensive with those provided in Sections 1002 and 1003. CODE CIV. PROC. § 1881(4) (superseded by the Evidence Code). See the *Comment* to Section 960.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1003. Exception: Validity of writing affecting property interest

confidential

between patient
and physician

1003. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

the

Comment. See the *Comment* to Section 1002.

[Law Revision Commission Comment (Recommendation, January 1935)]

as to a confidential communication
between patient and physician

§ 1004. Exception: Commitment or similar proceeding

1004. There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Comment. This exception covers not only commitments of mentally ill persons but also such cases as the appointment of a conservator under Probate Code Section 1751. In these cases, the proceedings are being conducted for the benefit of the patient and 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 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.

[Law Revision Commission Comment (Recommendation, January 1965)]

as to a confidential communication
between patient and physician

§ 1005. Exception: Proceeding to establish competence

1005. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Comment. This exception is new to California law. When a patient has placed his mental condition in issue by instituting a proceeding to establish his competence, he should not be permitted to withhold the most vital evidence relating thereto.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1016. Exception: Patient-litigant exception

confidential

between patient
and psychotherapist

1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

Comment. See the Comment to Section 996.

§ 1019. Exception: Parties claiming through deceased patient

confidential

between patient
and psychotherapist

1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

the

now ~~is~~
deceased,

Comment. See the *Comment* to Section 957.
[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1020. Exception: Breach of duty arising out of psychotherapist-patient relationship

confidential

between patient
and psychotherapist

1020. There is no privilege under this article 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.

Comment. See the *Comment* to Section 958.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1021. Exception: Intention of deceased patient concerning writing effecting property interest.

Confidential

between patient and psychotherapist

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

the

Comment. See the Comment to Section 1002.

§ 1022. Exception: Validity of writing affecting property interest

confidential

between patient
and psychotherapist

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

the

Comment. See the *Comment* to Section 1002.
[Law Revision Commission Comment (Recommendation, January 1965)]

§ 1023. Exception: Proceeding to determine sanity of criminal defendant

Where the patient is now
the defendant in a
criminal action, there

1023. ~~There~~ is no privilege under this article in a proceeding, under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request ~~of the defendant in a criminal action~~ to determine his sanity.

his

Comment. Section 1023 is included to make it clear that the psychotherapist-patient privilege does not apply when the defendant raises the issue of his sanity at the time of trial. The section probably is unnecessary because the exception provided by Section 1016 is broad enough to cover this situation.

[Law Revision Commission Comment (Recommendation, January 1965)]

as to a confidential communication between
patient and psychotherapist

§ 1024. Exception: Patient dangerous to himself or others

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. *

Comment. This section provides a narrower exception to the psychotherapist-patient privilege than the comparable exceptions provided by Section 982 (privilege for confidential marital communications) and Section 1004 (physician-patient privilege). Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger.

[Law Revision Commission Comment (Recommendation, January 1965)]

as to a confidential communication between
patient and psychotherapist

§ 1025. Exception: Proceeding to establish competence

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Comment. See the *Comment* to Section 1005.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 973. Waiver of privilege

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

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

Comment. Section 973 contains special waiver provisions for the privileges provided by this article.

Subdivision (a). Under subdivision (a), a married person who testifies in a proceeding to which his spouse is a party waives both privileges provided for in this article. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege provided in Section 970 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 then 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 a married person may testify like any other witness without waiving the privilege provided under Section 970 so long as he does not testify against his spouse. However, under subdivision (a), the privilege not to testify against his spouse in that proceeding is waived as to all matters if he testifies against his spouse as to any matter.

The word "proceeding" is defined in Section 901 to include any action, civil or criminal. Hence, the privilege is waived for all purposes in an action if the spouse entitled to claim the privilege testifies at any time during the action. For example, if a civil action involves issues being separately tried, a wife whose husband is a party to the litigation may not testify for her husband at one trial and invoke the privilege in order to avoid testifying against him at a separate trial of a different issue. Nor may a wife testify against her husband at a preliminary hearing of a criminal action and refuse to testify against him at the trial.

Subdivision (b). This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section 776, which merges 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 settling up the conveyance in the answer as a defense waives the privilege. *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). Also, 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). And when both spouses joined as plaintiffs in an action to recover damages to one of them, each was 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). (It should be noted that, with respect to damages for personal injuries, Civil Code Section 163.5 (added by Cal. Stats. 1957, Ch. 2334, § 1, p. 4066) provides that all damages awarded to a married person in a civil action for personal injuries are the separate property of such married person.) This principle of waiver has seemingly been developed by the case law 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. 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). [Legislative Committee Comment (Assembly J., Apr. 6, 1965)]