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File: URE Privileges Article

Memorandum No. 63-6

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Rule 27 Physician-Patient
Privilege)

Rule 27 was considered by the Commission at its September, 1961, meeting and its present form reflects the changes made at that meeting. The following problems arise out of the rule as it is now drafted.

Subdivision (1). In Rule 26, relating to the lawyer-client privilege, the definition of "confidential communication" includes advice given by the lawyer in the course of representing the client. Should there be a comparable extension of the definition of "confidential communication" here?

Subdivision (2). You will note that the preliminary language of this subdivision gives a person a privilege to prevent a "witness" from disclosing a confidential communication. The psychotherapist-patient privilege, Rule 27.1, gives a person a privilege to prevent "another" from disclosing. Note the discussion in the study at page 63 under the caption "Amendment of Rule 26(1)(a)." The consultant there makes the point that in pretrial discovery proceedings a person who is required to produce certain documents is not technically a witness. Because of

that fact, the consultant suggested striking a reference to witness from a provision in the lawyer-client privilege rule. A similar consideration would indicate that the word "another" should be used here instead of the word "witness".

In subdivision (2)(c) this rule defines the persons who may be silenced by an exercise of the physician-patient privilege. The Commission has abandoned the eavesdropper exception to the physician-patient privilege. Therefore, there seems to be no good reason for retaining this subdivision defining those persons who may be silenced by an exercise of the privilege. If it was the purpose of this subdivision to cover the problem of waiver, it would seem that the subject ought to be covered in Rule 37 which relates to waiver. There is no comparable subdivision in Rule 27.1 relating to the psychotherapist-patient privilege.

The staff suggests that subdivision (2) be revised to read the same as the comparable subdivision in Rule 26, the lawyer-client privilege rule. Subdivision (2) would then read:

(2) Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege in a civil action or proceeding to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the judge finds that the communication was a confidential communication between physician and patient and that the claimant is:

(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 physician at the time of the confidential communication, who, except as otherwise provided in this rule, unless there is no holder of the privilege in existence, shall claim the privilege under this rule for the patient unless otherwise instructed by the holder of the privilege or his representative.

Scope of rule. You will note that subdivision (2) limits this privilege to a civil action or proceeding. Should this privilege be applicable as well in non-criminal legislative and administrative proceedings? The Administrative Procedure Act, in Government Code Section 11513, now provides: "The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded." This act, however, does not apply to all State agencies and does not apply to local agencies. Should a uniform rule of privilege be adopted for all administrative proceedings?

So far as legislative proceedings are concerned, the problem is whether the Legislature in order to enact legislation to meet public problems needs to discover the facts of the one particular transaction to which the privilege might apply. Is it more important for the Legislature to determine the precise facts of a particular transaction so that it can legislate than it is for a court to determine the precise facts of a particular transaction so that it can dispense justice? It may be argued that the Legislature's

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need for the facts of particular cases is not acute. On the other hand, it may be argued that the need for legislation based on adequate information is greater than the need for correctly settling particular controversies in court.

Of course, the Commission might decide that the privilege should not be applicable anywhere since there is an exception for almost every situation in which the protected communications are likely to be important. Hence, it is unlikely that patients are much encouraged to speak to their doctors by the existence of the privilege, and it may, in isolated cases, suppress facts essential to a proper determination of the controversy. See the attached argument of Dean Hale, which was prepared in connection with a Tentative Draft of a Partial Recodification of the California Law of Evidence for the California Code Commission.

Subdivisions (3), (4), (5), (6) and (7). The staff suggests that these subdivisions be consolidated into one subdivision which expresses all of the exceptions to the physician-patient privilege. The subdivision would read as follows:

(3) There is no privilege under this rule:

(a) In an action or proceeding to commit the patient or otherwise place him or his property, or both, under the control of another or others because of his alleged mental or physical condition.

(b) In an action or proceeding in which the patient seeks to establish his competence.

(c) In an action or proceeding to recover damages on account of conduct of the patient which constitutes a felony.

(d) As to a communication relevant to an issue as to the validity of a document as a will of the patient.

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

(f) In an action or proceeding including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which the condition of the patient is an element or factor of the claim or counter-claim, cross-complaint or affirmative defense of the patient or of any party claiming through or under the patient or claiming as the beneficiary of the patient through a contract of which the patient is or was a party.

(g) As to information which the physician or 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.

(h) If the judge finds 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.

The Commission may wish to consider whether another exception should be added to this rule to cover the situation where two persons consult a physician jointly--as, for example, where a husband and wife consult a physician in regard to fertility or impotency. See the last subdivision of Rule 26.

Respectfully submitted,

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ARGUMENT IN FAVOR OF COMPLETE ABOLITION
OF THE PHYSICIAN-PATIENT PRIVILEGE

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1. The privilege has been very thoroughly mutilated since it was first comprehensively stated in the original Practice Act in California. So little is now left of the privilege that it would seem not to be worth the litigation which still arises in its application. Moreover, if it is retained, justice would seem to call for an extension of the exceptions, so that it would remain mainly an empty shell. It has never been applied in criminal cases.

2. The privilege did not exist at common law in England, nor has England found occasion to give it statutory recognition. The privilege was claimed in the famous trial of Elizabeth in 1776 and Lord Mansfield and his associates refused to recognize it. In the United States the privilege has been established by statute in only one-half the jurisdictions, in each instance subject to exceptions. (Wigmore Sec. 2380 et seq. An Abused Privilege, VI Columbia Law Rev. 388-391.)

3. It is worthy of note that England and one-half the American States have not felt that an adequate service by physicians to their patients has been seriously impaired by the failure of the law to protect their relations as confidential; whereas justice in litigated cases has undoubtedly been facilitated by keeping an important door open to the reservoir of facts. A forceful and facile writer in a learned article in VI Columbia

Law Rev. 388, entitled "An Abused Privilege," remarks:

"It seems paradoxical that a system devised for the ascertainment of truth should embody rules expressly framed to conceal it, yet every privilege that allows a witness to stand mute is such a rule."

Since truth is a very sine qua non of justice and since there is no justification for litigation other than the attainment of justice, any rule designed to close the door on truth is entitled to recognition only if it can carry the burden of showing a countervailing social policy which is at least of equal worth and which can be realized only by establishing a cloak of secrecy. The question of balancing interests therefore reduces itself to this: Is it reasonably demonstrable that patients would refuse to consult physicians or in consulting them conceal material facts essential to proper treatment to any appreciable degree, if the physician in the event of litigation might be called upon to reveal the facts gleaned from the professional service rendered. It is submitted the physician-patient privilege cannot maintain this burden. The writer just referred to, after pointing out the general moral obligation of a physician not to gossip about his patients says:

"Under no higher assurance of secrecy than this, generations of men have confided their maladies, and their griefs as well, to medical advisers. In half of the United States they still have no higher assurance, if they have one as high. And it may well be doubted whether any appreciable number of patients, have been, or today are, deterred from consulting medical men by fear that their confidences might be disclosed in a law court."

(VI Col. Law Rev. 396; see also VI Col. Law Rev. 422.)

Moreover it may also be pointed out that most individuals themselves gossip freely about their ailments and boast of their operations ad nauseam.

they merely desire to keep out of a case, when it arises and where self-interest enters, facts which they had already peddled freely before litigation was contemplated. It is true that some types of ailment they do not discuss, but, again, the bare possibility of litigation which might call for their revelation would seldom, if ever, deter persons even in such instances from seeking and securing needed medical attention. And whether it would have such deterrent effect is the final test. The law is not concerned about confidences as such. It will protect them only when certain relationships cannot be effectively established without such protection and when the price paid for the protection is not too great.

Mr. Wigmore has been a persistent advocate of the abolition of the physician-patient privilege as entirely unjustified both on practical grounds and sound juristic theory. (Wigmore, Evidence, Sec. 2380 et seq.) An editorial in 41 Medico-Legal Journal 31, also condemns this privilege

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11/10/59
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8/22/60
1/3/61
5/25/61
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Note: This is Uniform Rule 25 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 25. SELF-INCRIMINATION; EXCEPTIONS.

Subject to Rule[s] 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~~]

(1) The matter shall be disclosed if the judge finds that the matter will not incriminate the witness. [~~;-and~~]

[~~(b)~~] (2) 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~~]

(3) 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.

[~~(c)~~] (4) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [~~;-and~~]

(Rule 25)

~~[(d)]~~ (5) 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 organization, 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 report-or-disclose;-and]~~

(6) No person has the privilege to refuse to obey an order made by a court 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 a business, calling or profession when such order is made in the aid of such supervision or regulation.

~~[(g)]~~ (7) Subject to Rule 21, a defendant in a criminal action or proceeding who ~~[voluntarily]~~ testifies in the action or 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.

(8) Except for the defendant in a criminal action or proceeding, a witness who, without having claimed the privilege under this rule, testifies in an action or proceeding before the trier of fact with respect to a transaction which incriminates him does not have the privilege under this rule to refuse to disclose in such action or proceeding any matter relevant to the transaction.

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RULE 25 (SELF-INCRIMINATION; EXCEPTIONS) AS

REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 25, relating to the privilege against self-incrimination, as revised by the Commission.

THE PRIVILEGE

The words "in an action or to a public official of this state or to any governmental agency or division thereof" have been deleted from the statement of the privilege. The Commission has deleted this language from Uniform Rule 25 because the Uniform Rules are, by Uniform Rule 2, concerned only with matters of evidence in proceedings conducted by or under the supervision of courts and do not apply to hearings or interrogations by public officials or agencies. For example, the Uniform Rules of Evidence should not be concerned with what a police officer may ask a person accused of a crime nor with what rights, duties or privileges the questioned person has at the police station.

Even if it were decided to extend the rules beyond the scope of Uniform Rule 2, it is illogical to speak of a privilege to refuse to disclose when there is no duty to disclose in the first place.

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"owns" is 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.

Paragraphs (e) and (f) of the URE are disapproved by the Commission because they would, in effect, abolish the privilege against self-incrimination for a large number of people. The cases interpreting the privilege against self-incrimination have held only that officials and persons engaging in regulated activities may be required to disclose information relating to their regulated activities, and that such persons may be disciplined for failure to make such disclosure; but the cases have not held that such persons lose their privilege against self-incrimination as a result of statutes requiring such disclosure. Subdivision (6), which has been substituted by the Commission for the provisions of paragraphs (e) and (f) of the URE, expresses the extent to which required records can be compelled to be produced under the holding of the United States Supreme Court in Shapiro v. United States, 335 U.S. 1 (1948).

The Commission has revised paragraph (g) of the Uniform Rule, now subdivision (7) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). Paragraph (g) of the Uniform Rule (in its original form) conflicted with Section 13, Article I of the California Constitution, as interpreted by the California Supreme Court.

The Commission has included a specific waiver provision in subdivision (8) of Rule 25. Rule 37 of the Uniform Rules provides a waiver provision that applies to all privileges. However, the waiver provision of Rule

37 would probably be unconstitutional if applied to Rule 25. Thus, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. Note that the waiver of the privilege against self-incrimination under subdivision (8) of revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit the waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the privilege in a subsequent case even though he waived it in a previous case. The extent of waiver of the privilege by the defendant in a criminal case is indicated by subdivision (7) of the revised rule.

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Note: This is Uniform Rule 26 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

(a) "Client" means a person, ~~[or]~~ corporation, ~~[or-ether]~~ association or other organization (including this State and any other 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 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 reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, 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 of the client when the client is incompetent, (iii) the personal representative of the client if the client is dead and [the-privilege-available-to-a-corporation-or-association-terminates-upon dissolution.] (iv) a successor, assign or trustee in dissolution of a corporation, partnership, association or other organization if dissolved.

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

(2) 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] a person, whether or not a party, has a privilege [(a)--if-he-is-the-witness] to refuse to disclose, and to prevent another from disclosing, a [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.] if he claims the privilege and

the judge finds that the communication was a confidential communication between client and lawyer and that the person claiming the privilege is:

(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 the holder of the privilege or his representative.

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

(a) he is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) [~~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~~] 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-test, or~~] to perpetrate or plan to perpetrate a fraud.

(b) As 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) As to a communication relevant to an issue of breach of duty by

the lawyer to his client [~~7~~] or by the client to his lawyer. [~~7-er~~]

(d) As to a communication relevant to an issue concerning the intention or competence of a person executing an attested document, or concerning the execution or attestation of such a document, of which the lawyer is an attesting witness. [~~7-er~~]

(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

(5) [~~to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer when they have retained in common when offered in an action between any of such clients.~~] where two or more clients have retained a lawyer to act for them in common, none of them may claim a privilege under this rule as against the others as to communications made in the course of that relationship.

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RULE 26 (LAWYER-CLIENT PRIVILEGE) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 26, relating to the lawyer-client privilege, as revised by the Commission.

ARRANGEMENT

The rule has been rearranged and rewritten to conform to the form and style of other rules. The definitions, for example, have been placed in subdivision (1) as they are in Rules 27, 29 and 34. 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.

DEFINITIONS

Definition of "client." Referring to revised Rule 26(1)(a), the definition of client has been revised to make clear that a corporation or association "or other organization (including this State and other public entities)" 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 in the case of a lawyer-client relationship. This is existing law in California. Rust v. Roberts, 171 A.C.A. 834, 838 (July 1959) (State has privilege); Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722 (1954) (city has privilege). There does not seem to be any reason why the

State or any other public entity should not be entitled to the same privilege as a private client.

The definition of client has also been expanded by adding the words "other organization". The broad language of the revised rule is intended to cover such unincorporated organizations as labor unions, social clubs and fraternal organizations in those circumstances where the particular situation is such that the organization (rather than its individual members) is the client. See Oil Workers Intl. Union v. Superior Court, 103 Cal. App.2d 512, 230 P.2d 71 (1951) (not involving a privilege question). There is no reason why in appropriate circumstances these and similar organizations should not have the same privilege as a private individual.

The reference to "lawyer's representative" has been deleted. This term was included in URE to make 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 the definition of "confidential communication" in paragraph (b). Under this definition, communications to physicians and similar 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 client includes an incompetent who himself consults the lawyer or the lawyer's representative. In this case, subdivision (3) provides that the guardian of the incompetent client can claim the

privilege for the incompetent client and that, when the incompetent client becomes competent, he may himself claim the privilege.

Definition of "confidential communication." "Confidential communication between client and lawyer" has been defined in a way that is comparable to the similar definition in Rule 27, which relates to the physician-patient privilege. This 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 of the URE.

Definition of "holder of the privilege." The substance of the sentence in Uniform 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 substantially conforms to the definition found in Uniform 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 (3) of the revised rule more concise.

Note that under subdivision (1)(c)(i) of the revised rule, the client is the holder of the privilege if he is competent. Under subdivision (1)(c)(ii) of the revised rule, a guardian of the client is the holder of the privilege if the client is incompetent. Under these two provisions, 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)(iii) is the holder of the privilege until the minor becomes 21 and then the minor is the holder of the privilege himself. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer.

Under subdivision (1)(c)(iii), the personal representative of the client is the holder of the privilege when the client is dead. He may claim the privilege on behalf of the deceased client. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the client and no one can waive it on behalf of the client. If this is the present California law, the Commission believes that the Uniform Rule provision (which in effect provides that the evidence is admissible unless the person designated in the Uniform Rule claims the privilege) is a desirable change.

Under subdivision (1)(c)(iv), the successor, assign or trustee in dissolution of a dissolved corporation, association or other organization is the holder of the privilege after dissolution. 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 minor change in form, being merely a technical dissolution, while the substance remains.

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

Definition of "lawyer." The Commission approves the provision of the Uniform Rule which 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.

The Commission has omitted the requirement of the URE that the client must reasonably believe the lawyer is licensed to practice law 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 the particular lawyer he is consulting recognizes privilege or not. He should be entitled to assume that the lawyer he is consulting will maintain his confidences to the same extent as would a lawyer in California.

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 following modifications of the Uniform Rule have been made in the revised rule:

(1) The language of the introductory portion of the rule has been revised to conform to the style of Rule 27.

(2) The words "are privileged" have been deleted in order to make it clear that the client has the privilege and if the privilege is not claimed by the client or persons authorized under paragraphs (b) and (c) of the subdivision to claim that privilege, the evidence of the communication will be admitted.

(3) The words "if he is the witness" have been deleted because these limiting words are not a desirable limitation. Note that under Uniform Rule 2, the rules "apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

(4) The word "another" has been used instead of "witness" in the preliminary language because "witness" is suggestive of testimony at a trial whereas the existence of privilege would make it possible for the client to prevent a person from disclosing the communication at a pretrial proceeding as well as at the trial.

(5) The requirement that the communication be found to be between a lawyer and his client in the course of that relationship and in professional confidence had been stated as a condition to the exercise of the privilege. This is in accordance with the existing law which requires a showing by the person invoking the privilege both of the lawyer-client relationship and of the confidential character of the communication. Sharon v. Sharon, 79 Cal. 633, 677 (1889); Collette v. Sarrasin, 184 Cal. 283 (1920). It is suggested that this requirement is more accurately and clearly stated in the revised rule.

(6) Paragraphs (a), (b) and (c) of Uniform Rule 26(1) have been

deleted. These paragraphs stated those against whom the privilege could be asserted. The Commission believes the privilege, where applicable, should be available against any witness. Hence, the limitations of these paragraphs were deleted as unnecessary and undesirable.

(7) Paragraphs (a), (b) and (c) of the revised subdivision state the substance of the last sentence of Uniform 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 the revised rule, the "holder of the privilege" may claim the privilege. The holder of the privilege is the person designated in the definition contained in paragraph (1)(c) of the revised rule.

Under paragraph (b) of the revised subdivision, specific provision is made for persons who are authorized to claim the privilege to claim it. 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 subdivision (2) states more clearly the substance of what is contained in URE Rule 26(1), which provides the privilege may be claimed by "the client in person or by his lawyer." The Commission believes that this is in substance what is intended to be provided by that part of Uniform Rule 26(1) that provides that privilege may be claimed by the client in person "or by his lawyer." Under the revised rule in subdivision (3), the lawyer must claim the privilege on behalf

of the client unless otherwise instructed by the holder of the privilege or his representative. Subdivision (3) is included to prevent any implication from arising from the authorization in subdivision (2)(c) that a lawyer may have discretion whether or not to claim the privilege for his client. Cf. Business and Professions Code Section 6068(e).

() Under a dictum in a California case a judge can, on his own motion, exclude a confidential attorney-client communication. This is probably because the California statute provides that the communication to the lawyer by the client shall not be disclosed "without the consent of his client." However, the Uniform Rule is based on a theory that the communication is to be admitted unless the privilege is claimed by a person designated in the statute. The Commission adopts the Uniform Rule with the realization that the confidential communication will be admitted as evidence unless someone entitled to claim the privilege of the client does so.

EXCEPTIONS

Crime or fraud. In subdivision (4) of the revised rule an exception is stated that the privilege does not apply where the judge finds 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 to perpetrate or plan to perpetrate a fraud. California recognizes this exception insofar as future criminal or fraudulent activity is concerned. Uniform Rule 26 extends this exception to bar the privilege in case of consultation

with a 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, the Commission believes that to extend 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 of nullification of the privilege.

The Uniform Rule requires that the judge must 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." The applicability of the privilege and the exception should not depend upon who was going to commit the crime. The privilege should not provide a sanctuary for planning crimes by anyone. The broader term is used in both the URE and the Commission version of Rule 27.

Other Exceptions. In the remainder of subdivision (4) of the revised rule, the substance of the other exceptions to Uniform Rule 26 has been retained. None of these exceptions is expressly stated in the existing California statute. Each is, however, more or less recognized to some extent by judicial decision. The exception provided in subdivision (4)(b) of the revised rule provides that the privilege does not apply on an issue between parties all of whom claim through the client. Under the existing California law, all must claim through the client by testate or intestate succession; a claim by inter vivos transaction is not within the exception. The Uniform Rule would change this to include inter vivos transactions within the exception and the

Commission approves this change. Accepting the rule of non-survivorship when all parties claim through a client by testate or intestate succession, the Commission can perceive no basis in logic or policy for refusing to have a like rule when one or both parties claim through such client by inter vivos transaction.

The Eavesdropper Exception. Let us suppose that a switchboard operator listens in on a confidential statement made by a client to his lawyer in the course of a telephone conversation. Or suppose the client mails a confidential letter and an interceptor steams the letter open and reads it. Or suppose a wrongdoer breaks into and enters the lawyer's office and steals the letter.

Under the so-called "Eavesdropper Exception," the switchboard operator, the interceptor and the wrongdoer could all testify. We may have the eavesdropper exception in California, but the Uniform Rule would abolish it. The Commission approves the Uniform Rule provision (contained in subdivision (2) of the revised rule) which would permit the client to prevent the switchboard operator, interceptor or wrongdoer from testifying as to the communication. The client who consults a lawyer is in danger of eavesdropping, bugging and other such forms of foul play. Eavesdropping is a real and proximate menace to clients. To encourage full disclosure by the client to his attorney, the Commission believes that the client should not be required to run the risk of the switchboard operator, interceptor or wrongdoer testifying

as to the confidential communication. Therefore, the Commission approves the Uniform Rule provision.

Joint Clients. Subdivision (5) of the revised rule states the existing California law and the rule proposed in URE paragraph (2)(e). The Commission believes it is stated more clearly in the revised rule because it avoids the possible contention that the exception applies only to a communication "made by any of" the joint clients, leaving privileged the communication made by the lawyer consulted. Also, it changes the theory of the exception from nonprivileged to unable to claim the privilege.