

Mtg.

Revised 8/19/59

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

August 28-29, 1959

Friday, August 28

1. Minutes of July 1959 Meeting (sent 8/10/59).
2. Attendance at National Legislative Conference. (See Memorandum No.2, sent 8/19/59.)
3. Schedule for subsequent meetings.
4. Approval of payment of consultant, Study No. 40 - Notice of Alibi (See Memorandum No.5, sent 8/10/59.)
5. Authorization of Publication of Study No. 43 - (Separate Trial Issue Insanity) in California Law Review (See Memorandum No. 7, sent 8/10/59).
6. Argument in favor of A.C.A. No. 16. (See Memorandum No. 1, sent 8/10/59.)
7. Request for authorization of new studies by 1960 legislative session. (See Memorandum No. 3, sent 8/19/59, Memorandum No. 3-A, sent 8/10/59 and Memorandum No. 3-B, sent 8/19/59.)
8. Studies to be suggested to Biddick's Assembly Interim Judiciary Committee for possible study. (See Memorandum No. 3, sent 8/19/59.)
9. History in Legislature of measures introduced in 1959 session on recommendation of Commission. (See Memorandum No. 8, sent 8/19/59.)
10. Studies heretofore considered:
 - A. Study No. 32 - Arbitration. (See Memorandum No. 9, sent 8/19/59.)
 - B. Study No. 42 - Trespassing Improvers. (See Memorandum No. 2, dated July 8, 1959.)
 - C. Study No. 48 - Right of Juveniles to Counsel. (See Memorandum No. 6, sent 8/10/59.)

11. New Studies:

A. Study No. 51 - Alimony After Divorce. (You have this study.)

Saturday, August 29

12. Study No. 24 - Uniform Rules of Evidence

See:

- (1) Memorandum sent 7/9/59 - Lawyer-client privilege (Rule 26).
- (2) Memorandum sent 7/9/59 - Physician-patient privilege (Rule 27).
- (3) Memorandum sent 7/23/59 - Marital privilege (Rule 28) (see also revised pages 7 and 8 and supplemental memorandum, sent 8/10/59).
- (4) Memorandum sent 7/30/59 - Rules 29, 30, 31, 32, 33, 34, 35 and 36.
- (5) Memorandum sent 8/10/59 - Rules 37, 38, 39 and 40.

MINUTES OF MEETING

of

August 28 and 29, 1959

San Francisco

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on August 28 and 29, 1959, in San Francisco.

Present: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
Mr. Frank S. Balthis
Honorable Clark L. Bradley
Honorable James A. Cobey
Mr. Leonard J. Dieden
Honorable Roy A. Gustafson
Mr. Charles H. Matthews
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex officio (August 28)

Mr. John H. DeMouilly and Miss Louisa R. Lindow, members of the Commission's Staff, and Mr. Joseph B. Harvey, whose appointment as a member of the Staff becomes effective September 2, 1959, were also present.

Mr. John R. McDonough, former Executive Secretary, was present during a part of the meeting on August 28, 1959.

A motion was made by Mr. Babbage, seconded by Mr. Dieden, and unanimously adopted to approve the minutes of the meeting of July 24 and 25, 1959.

I. ADMINISTRATIVE MATTERS

A. Personnel Matters:

(1) Reappointment of Mr. Bradley: The Chairman announced that Assemblyman Clark L. Bradley was reappointed as Assembly Member of the Commission.

(2) Assistant Executive Secretary: The Executive Secretary reported that Mr. Joseph B. Harvey had accepted appointment as Assistant Executive Secretary of the Commission, effective September 2, 1959.

B. Current Status of Topics Assigned - Requests for

Authorization of New Studies: The Commission had before it Memorandum No. 3 (8/19/59), Memorandum No. 3-A (8/10/59) and Memorandum No. 3-B (8/19/59). (A copy of each of these items is attached hereto.)

The Commission first considered Memorandum No. 3-B relating to the current status of topics assigned to the Commission for study, 1955-59. After the matter was discussed it was agreed that the following studies should be introduced at the 1961 Legislative Session and should receive priority for Commission consideration as indicated:

| <u>Priority</u> | <u>Study</u> |
|-----------------|--|
| 1 | No. 32 - Arbitration |
| 2 | No. 36(L) - Condemnation |
| 3 | No. 37(L) - Claims Statutes (Claims Against Public Officers and Employees) |
| 4 | No. 34(L) - U.R.E. |
| 5 | No. 33 - Survival of Tort Actions |
| 6 | No. 38 - Inter Vivos Rights - Quasi-Community Property |
| 7 | No. 23 - Rescission of Contracts |
| 8 | No. 12 - Taking Instructions to Jury Room |
| 9 | Nos. 48 & 54 - Juvenile Court Proceedings |
| 10 | No. 44 - Suit in Common Name |
| 11 | No. 26 - Escheat - What Law Governs |

| <u>Priority</u> | <u>Study</u> |
|-----------------|------------------------------|
| 12 | No. 40 - Notice of Alibi |
| 13 | No. 42 - Good Faith Improver |

It was also agreed that the following studies recommended in Memorandum No. 3-B to be presented to the 1961 Legislature by the Commission should be put over to the 1963 Session:

Study No. 29 - Post-Conviction Sanity Hearings

Study No. 43 - Separate Trial on Issue of Insanity

Study No. 46 - Arson

Study No. 49 - Unlicensed Contractors

Study No. 51 - Right of Wife to Sue for Support After
Ex Parte Divorce

During the discussion Mr. Bradley stated that the Commission might want to consider introducing some of its non-controversial studies during the 1960 or 1962 Session. No decision was reached on this matter.

The Commission then considered Memorandum No. 3 relating to the request for authorization of new studies. After the matter was discussed a motion was made by Mr. Gustafson, seconded by Senator Cobey, and adopted that the Commission will not introduce at the 1960 Session of the Legislature a concurrent resolution requesting additional topics, but will introduce a concurrent resolution requesting authorization to continue the studies in progress. Mr. Stanton

Minutes - Regular Meeting
August 28 and 29, 1959

expressed opposition to the motion. He stated that the Commission should request three or four topics.

The Commission then considered the request of Mr. Biddick of the Assembly Interim Judiciary Committee. After the matter was discussed a motion was made by Mr. Gustafson, seconded by Mr. Babbage, and unanimously adopted to direct the Executive Secretary to send to Mr. Biddick (1) the suggestions and reports on the suggestions included in Appendices I, II and IV (holding back any suggestion that the Commission may want to undertake as a study at a future date); (2) a list of the Commission's current studies; and (3) a request that Mr. Biddick advise the Commission which of the Commission suggestions he selects for study by the Assembly Interim Judiciary Committee.

C. Argument in Favor of A.C.A. No. 16 - Claim Statute

Amendment: The Commission considered Memorandum No. 1 and proposed draft of argument in favor of Proposition No. _____ (8/10/59) submitted by Mr. Gustafson. (A copy of each of these items is attached hereto.) After the matter was discussed a motion was made by Mr. Babbage, seconded by Senator Cobey, and unanimously adopted to approve the proposed draft of the argument in favor of the constitutional amendment and send it to Mr. Bradley, the argument to be revised by Mr. Bradley as he sees fit.

During the discussion Mr. Stanton raised the question whether it would be possible for the Commission to be advised of the argument presented against the constitutional amendment. Mr. Kleps stated that the Secretary of State would be the proper source to contact.

Mr. Stanton then reported on his conversation with Mr. Garrett Elmore of the State Bar who informed him that it is not necessary for the Commission to submit a formal resolution regarding A.C.A. No. 16 to the Conference of the State Bar. A letter to the Board of Governors of the State Bar is sufficient.

Mr. Stanton then stated that he felt that it would be appropriate for the Commission to encourage the publication of an article in the State Bar Journal relating to the claims legislation enacted on recommendation of the Commission by the 1959 Session if the discussion on the claims legislation is not adequately covered by the

Minutes - Regular Meeting
August 28 and 29, 1959

Continuing Education of the Bar in its summary in the State Bar Journal on the 1959 legislation. After the matter was discussed it was agreed that Mr. McDonough should be encouraged to write the article if his time permits and if the matter is not adequately discussed in the Bar Journal.

D. Bound Volume 2 - Legislative History of Measures

Introduced in 1959 Session on Recommendation of Commission: The Commission considered Memorandum No. 8 (8/19/59) and a Summary of the Legislative History of the Commission Measures introduced in the 1959 Session prepared by Mr. McDonough. (A copy of each of these items is attached hereto.) After the matter was discussed the following was agreed upon:

(1) That a brief summary of the history, without the substance of the amendments, should be included in the Commission's 1960 Annual Report.

(2) That the sequence of bills discussed should be as follows: (a) the defeated 1957 bills which were reintroduced in the 1959 Session should precede the discussion of the new bills and (b) the discussion of the 1959 bills should be in the order in which the studies are bound in Volume 2.

(3) The Executive Secretary raised the question whether there should be references made as to the sources of changes made in the bills by the Commission. After the matter was discussed the following action was taken:

A motion was made by Mr. Thurman, seconded by Mr. Dieden and unanimously adopted that the history include a statement of the source of the amendment where the information is of significance and can be stated accurately, but otherwise to make no reference to the source.

Minutes - Regular Meeting
August 28 and 29, 1959

A motion was then made by Senator Cobey, seconded by Mr. Babbage and unanimously adopted that the history show where the amendment was made, i.e., either in the Assembly or Senate.

A motion was then made by Senator Cobey, seconded by Mr. Gustafson and unanimously adopted that the history include a statement as to where (committee or floor action) the bill was defeated.

(4) A motion was then made by Mr. Bradley, seconded by Senator Cobey, and unanimously adopted to authorize the Chairman and the Executive Secretary to put the History of the Legislative Measures Introduced in the 1959 Session in final form.

Minutes - Regular Meeting
August 28 and 29, 1959

E. Attendance at National Legislative Conference: The Commission considered Memorandum No. 2 (8/19/59) (a copy of which is attached hereto). After the matter was discussed a motion was made by Mr. Thurman, seconded by Mr. Bradley, and unanimously adopted that the Executive Secretary be authorized to attend the Twelfth Annual Meeting of the National Legislative Conference held in Denver on October 7-9, 1959, as the representative of the Commission.

F. Miscellaneous Matters:

(1) Stanford Contract. The Executive Secretary raised the question whether the Commission should make a research contract with Stanford University, using funds in the 1959-60 Budget that will otherwise remain unexpended. He reported that if the Assistant Executive Secretary is going to work substantially full time on the arbitration study, it will be necessary to have Stanford do research work for the Commission during the current fiscal year. After the matter was discussed it was agreed that the Executive Secretary should discuss the matter with the Department of Finance.

(2) Open Meeting: The Executive Secretary raised the question whether the Commission should continue its policy of holding an open meeting during the State Bar Convention for the purpose of receiving suggestions and comments from members of the bench and bar. After the matter was discussed it was agreed not to set aside time for an open meeting during this year's State Bar Convention in September.

(3) Future Meetings: It was agreed that inasmuch as the Commission has a heavy agenda it should hold a three-day meeting in September; the date for the third day (Wednesday, September 23 or Saturday, September 26) to depend on a poll of the members.

The Commission then approved the following places and dates for future meetings:

October 23 and 24 - Los Angeles

Minutes - Regular Meeting
August 28 and 29, 1959

November 27 and 28 - San Francisco
(10:00 a.m. Friday)

December 18 and 19 - Palm Springs (pending
further information re
transportation to Palm Springs)

II. CURRENT STUDIES

A. Study No. 32 - Arbitration: The Commission had before it Memorandum No. 9 (8/19/59); a memorandum, Outline - Arbitration Study, and the correspondence of the Executive Secretary (dated 8/5/59) and Mr. Sam Kagel (dated 8/12/59) relating to an earlier discussion of Mr. Kagel, the Chairman, Executive Secretary and Mr. McDonough. (A copy of each of these items is attached hereto.) The Chairman reported that he, the Executive Secretary and Mr. McDonough met with Mr. Kagel to discuss what arrangement could be made to complete the arbitration study. He stated that Mr. Kagel was still interested in undertaking the study on arbitration as outlined by the Commission and that Mr. Kagel stated that he would be able to complete it by the end of the year. The Commission again discussed generally how it should proceed to obtain adequate research on this subject in view of Mr. Kagel's desire to continue with the study and his past performance. During the discussion Mr. Babbage proposed that this could be done by letting Mr. Kagel undertake to do the study and by asking Mr. Harvey to continue the study undertaken by Mr. Stephens and to also check on the work of Mr. Kagel which would be submitted periodically. After the matter was discussed the following was agreed upon:

A motion was made by Mr. Babbage, seconded by Senator Cobey, and adopted to accept Mr. Kagel's offer to undertake to do the study as

Minutes - Regular Meeting
August 28 and 29, 1959

set out in the proposed outline but with the additional requirement that Mr. Kagel be asked to submit his study in installments, the last installment to be submitted by the end of the year. Mr. Dieden expressed opposition to the motion. Mr. Dieden stated that in view of the past performance of Mr. Kagel the Commission should continue the study without Mr. Kagel. A motion was then made by Mr. Babbage, seconded by Mr. Balthis, and unanimously adopted to direct the staff to continue the study initiated by Mr. Stephens and to review the work submitted by Mr. Kagel.

The Commission then considered what approach should be taken by the Commission in carrying forward the arbitration study. Mr. Stanton suggested that the Commission should direct its consideration toward various sections of the Uniform Arbitration Act. After the matter was discussed it was agreed that the Staff should review the whole matter and present its recommendation with regard to what it concludes would be the better approach.

B. Study No. 34(L) - Uniform Rules of Evidence: The Commission had before it the following memorandums prepared by Professor Chadbourn: Rule 26 (Lawyer-Client Privilege), Rule 27 (Physician-Patient Privilege), Rule 28 (Marital Privilege for Confidential Communications), Rules 29-36 and Rules 37-40 (All relating to privilege.).

1. Rule 26 - Lawyer-Client Privilege. The Commission first considered Uniform Rule 26 relating to the Lawyer-Client Privilege. After the matter was discussed the following action was taken:

A motion was made by Mr. Thurman and seconded by Senator Cobey to approve the adoption of the principle of that portion of Rule 26 which provides that the privilege to prevent the disclosure of a confidential communication between a client and attorney is the privilege of the client alone insofar as the attorney and the attorney's secretary and clerk are concerned. The motion carried:

Aye: Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: Babbage, Balthis.

Pass: Bradley.

A motion was made by Mr. Bradley and seconded by Mr. Dieden to approve that portion of Rule 26 which defines lawyer to mean a person authorized, or "reasonably believed by the client to be authorized" to practice law. The motion carried:

Aye: Balthis, Bradley, Dieden, Stanton, Thurman.

No: Cobey, Gustafson, Matthews.

Not Present: Babbage

Minutes - Regular Meeting
August 28 and 29, 1959

A motion was made by Mr. Thurman and seconded by Senator Cobey to approve the adoption of the language "who himself consults or" to be inserted in Rule 26(3)(a) after the words "includes an incompetent." The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Gustafson
Matthews, Stanton, Thurman.

No: None.

A motion was made by Senator Cobey and seconded by Mr. Babbage to limit exception (a) of Rule 26(2) to the commission of or plan to commit "a crime ^{or} civil fraud." The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Gustafson,
Matthews, Stanton, Thurman.

No: None.

[Comment: It was agreed that this exception should not be broadened as proposed in U.R.E. Rule 26(2)(a) to include the commission of or the plan to commit a tort, but to retain the present California law.]

Mr. Gustafson then raised the question of the provision in Rule 26(2)(a) which requires that the judge must find that sufficient evidence aside from the communication has been introduced before the introduction of evidence that legal service was sought or obtained to enable or aid the client to commit or plan to commit a crime or civil fraud. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Balthis to delete the requirement from Rule 26(2)(a) that the judge find sufficient evidence aside from the communication. Rule 26(2)(a) as revised would read as follows:

Minutes - Regular Meeting
August 28 and 29, 1959

(a) to a communication if the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or civil fraud, or . . .

The motion did not carry:

Aye: Balthis, Gustafson, Stanton.

No: Babbage, Bradley, Cobey, Dieden, Matthews.

Pass: Thurman.

A motion was then made by Mr. Bradley and seconded by Mr. Thurman to approve the adoption of Rule 26(2)(a) as revised to substitute the words "civil fraud" for the words "or a tort." The motion carried:

Aye: Balthis, Bradley, Cobey, Dieden, Matthews, Thurman.

No: Babbage, Gustafson, Stanton.

[Comment: It was agreed that there is merit to the objection raised by Mr. Gustafson with regard to the requirement in Rule 26 of additional evidence aside from the communication and perhaps this requirement should be eliminated if some safeguard could be provided, e.g., if the questions relating to the communication were asked outside the presence of the jury. Professor Chadbourn was requested to re-examine the matter and submit his ^{findings} ~~plans~~ to the Commission.]

A motion was made by Senator Cobey and seconded by Mr. Bradley to approve that portion of Rule 26(2)(b) which covers parties who claim through the client by inter vivos transaction.

The motion carried:

Minutes - Regular Meeting
August 28 and 29, 1959

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Gustafson,
Stanton, Thurman.

No: None.

Not Present: Matthews.

A motion was made by Mr. Balthis and seconded by Mr. Babbage to approve the elimination of the eavesdropper exception as proposed by Rule 26(1)(c)(i)(ii). The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Matthews,
Stanton, Thurman.

No: Gustafson.

A motion was made by Mr. Dieden and seconded by Mr. Gustafson to clarify the language of Rule 26(1)(b) to clearly provide that the client may prevent a stenographer of his lawyer from making disclosures. Rule 26(1)(b) as revised reads as follows:

(b) to prevent his lawyer or the lawyer's representative, associate, or employee from disclosing it, . . .

The motion carried:

Aye: Babbage, Balthis, Cobey, Dieden, Gustafson, Matthews,
Stanton, Thurman.

No: None.

Not Present: Bradley.

The Commission then considered the second sentence of Rule 26(1) which appears to vest the lawyer with the privilege in his own right. After the matter was discussed a motion was made by Senator

Cobey and seconded by Mr. Thurman to approve in principle the following revision of the second sentence of Rule 26(1):

The privilege may be claimed by the following persons (a) the client, when he is competent (b) a guardian of a client who is incompetent; (c) the personal representative of a deceased client; (d) any person authorized by such competent client, such guardian or such personal representative to claim the privilege.

The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Balthis.

[Comment: It was agreed that the above revision would remove the misleading implication that the attorney is vested with the right to claim the privilege on his own behalf.]

A motion was then made by Mr. Stanton and seconded by Mr. Dieden to approve the addition of the following new subsection to Rule 26(1):

(e) the lawyer to whom communication was made providing client is living and has not waived the privilege.

The motion carried:

Aye: Babbage, Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Pass: Bradley.

Not Present: Balthis.

Minutes - Regular Meeting
August 28 and 29, 1959

[Comment: It was agreed that there should be a provision giving the attorney a qualified privilege on behalf of his client.]

During the discussion of the first sentence of Rule 26(1) Mr. Gustafson pointed out that the words "are privileged" are meaningless if the privilege is to be vested in the client. After the matter was discussed a motion was made by Mr. Gustafson and seconded by Mr. Dieden to revise the first sentence of Rule 26(1) to read substantially as follows:

(1) General Rule. Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule, a client has a privilege as to a communication found by the judge to have been made between a lawyer and his client in the course of that relationship and in professional confidence:

The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Balthis.

It was agreed that final approval of Rule 26 be deferred to the next meeting.

2. Rule 27 - Physician-Patient Privilege. The Commission then considered Uniform Rule 27 relating to the Physician-Patient privilege. After the matter was discussed the following action was taken:

A motion was made by Mr. Thurman and seconded by Mr. Dieden

to approve in principle that portion of Rule 27(1)(d) which defines "physician" as a person the patient reasonably believed to be authorized to practice medicine. The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews,
Stanton, Thurman.

No: None.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Babbage to approve that portion of Rule 27 which extends the privilege to the patient to prevent a physician's nurse, stenographer or clerk from testifying. The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews,
Stanton, Thurman.

No: None.

Not Present: Balthis

A motion was made by Senator Cobey and seconded by Mr. Dieden to approve in principle that portion of Rule 27(1)(c) which provides that the posthumous privilege is vested in deceased patient's personal representative who in all cases can waive the privilege subject to the exception that in a wrongful death action any person now authorized under the California law in such cases may consent to waive the privilege. The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews,
Thurman.

Minutes - Regular Meeting
August 28 and 29, 1959

No: Stanton.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Dieden to approve in principle that portion of Rule 27(3)(a) which provides that the privilege would be inapplicable in proceedings to place the patient under guardianship or to remove him therefrom. The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Thurman to approve in principle that portion of Rule 27(3)(a) which makes the privilege inapplicable in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, i.e., the privilege is inapplicable under Rule 27(3)(a) only if the conduct amounts to a felony. The motion carried:

Aye: Babbage, Bradley, Cobey, Matthews, Stanton, Thurman.

No: Dieden, Gustafson.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Dieden to revise that portion of Rule 27(3)(c) to make the privilege inapplicable upon an issue between parties claiming by inter vivos transaction from a deceased patient. Rule 27(3)(c) as revised reads

as follows:

(c) upon an issue between parties claiming by testate or intestate succession or by inter vivos transaction from a deceased patient.

The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews, Stanton, Thurman.

No: None.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Thurman to approve Rule 27(4) as revised to read as follows:

(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 counter claim, cross-complaint or affirmative defense of the patient. . . .

The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Matthews, Stanton, Thurman.

No: Gustafson.

Not Present: Balthis.

A motion was made by Senator Cobey and seconded by Mr. Dieden to approve Rule 27(5) as revised to provide that the privilege is inapplicable as to information of which the physician is required to make an official report unless the statute, ordinance or other regulation requiring the report or record specifically provides that the information shall not be disclosed. The motion carried:

Minutes - Regular Meeting
August 28 and 29, 1959

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews
Stanton, Thurman.

No: None.

Not Present: Balthis.

A motion was made by Mr. Babbage and seconded by Mr. Bradley to approve that portion of Rule 27(6) as revised to provide that the privilege is inapplicable where 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 fraud or to escape detection or apprehension after the commission of the crime or fraud. The motion did not carry:

Aye: Babbage, Bradley, Matthews, Stanton.

No: Cobey, Dieden, Gustafson, Thurman.

Not Present: Balthis.

A motion was then made by Senator Cobey and seconded by Mr. Dieden to approve that portion of Rule 27(6) which provides that the privilege is inapplicable where 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 the crime or tort. The motion carried:

Aye: Bradley, Cobey, Dieden, Gustafson, Matthews, Thurman.

No: Babbage, Stanton.

Not Present: Balthis.

A motion was made by Mr. Matthews and seconded by Senator Cobey to approve the principle that a patient does not have the right to claim the privilege to prevent an eavesdropper's testimony of a confidential communication made between himself and his physician. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Matthews, Stanton,
Thurman.

No: Dieden.

Not Present: Balthis.

A motion was made by Mr. Dieden and seconded by Mr. Matthews to delete the words "of the person" from Rule 27(1)(c); as revised, Rule 27(1)(c) reads as follows:

(c) "holder of the privilege" means the patient while alive and not under guardianship or the guardian of an incompetent patient. . . .

The motion carried:

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews,
Thurman.

No: Stanton.

Not Present: Balthis.

A motion was made by Mr. Gustafson and seconded by Mr. Stanton to provide in Rule 27(2) that a person has the privilege in a civil action but does not have the privilege in a prosecution for a misdemeanor, i.e., the phrase "or in a prosecution for a misdemeanor" should be deleted from Rule 27(2). The motion carried:

Minutes - Regular Meeting
August 28 and 29, 1959

Aye: Babbage, Bradley, Cobey, Dieden, Gustafson, Matthews,
Stanton, Thurman.

No: None.

Not Present: Balthis.

Minutes - Regular Meeting
August 28 and 29, 1959

C. Study No. 40 - Notice of Alibi: The Commission considered Memorandum No. 5 (8/10/59) and the research study prepared by Mr. John J. Wilson. (A copy of each of these items is attached hereto.) After the matter was discussed, a motion was made by Mr. Gustafson, seconded by Mr. Balthis, and unanimously adopted to authorize the Executive Secretary to pay Mr. Wilson for his study on Notice of Alibi.

D. Study No. 42 - Trespassing Improvers: The Commission considered Memorandum No. 2 (7/8/59) and a memorandum on the Good Faith or "Trespassing" Improver (8/27/59) prepared by Mr. Stanton and distributed at the meeting. (A copy of each of these items is attached hereto.) Mr. Stanton stated that his proposed draft statute is in a form consistent with the law presently applicable to accessions to personal property and, although both the Relief-Oriented Statute and his proposed draft are interested in a just result, his draft prescribes the respective rights of the parties without the necessity of litigation to determine the relief to be granted. During the discussion the Executive Secretary reported that Professor Merryman is of the opinion that a statute designed to cover every possible situation is "fraught with danger." After the matter was discussed a motion was made by Mr. Dieden and seconded by Mr. Balthis to adopt the modified version of the "Relief-Oriented Statute" proposed in Memorandum No. 2 (7/8/59). The motion carried:

Aye: Babbage, Balthis, Bradley, Cobey, Dieden, Gustafson,
Matthews, Thurman.

No: Stanton.

The Commission then considered the following sections of the modified version of the Relief-Oriented Statute:

1. Section 2. The Commission discussed whether Section 2 of the proposed draft statute should require that the trespasser who improves the property of another should have "actual knowledge" or "constructive

knowledge" that the property is owned by another. After the matter was discussed a motion was then made by Mr. Thurman, seconded by Mr. Balthis, and adopted to approve in principle the requirement that the draft statute should provide for the trespasser who improves land without actual knowledge that the property is owned by another or without knowledge of any facts sufficient to put a reasonable man on notice before relief can be granted to him. Mr. Stanton expressed opposition to the motion, stating that the good-faith test should be used rather than the requirement of actual knowledge.

A motion was made by Mr. Gustafson, seconded by Mr. Balthis and unanimously adopted to approve in principle the requirement that the draft statute should provide that the owner must have actual knowledge of the trespasser improving his land before he is subject to any penalty.

2. Section 4. The Commission then discussed whether damages or forfeiture should be allowed against an owner who having actual knowledge that the trespasser is improving the land fails to warn him. After the matter was discussed a motion was made by Mr. Balthis, seconded by Mr. Matthews, and unanimously adopted to provide that the court shall decree only such relief to protect the trespasser against loss but otherwise, insofar as possible, avoid enriching him at the expense of the owner where the owner does have actual knowledge of the trespasser improving his land but fails to warn him.

3. Section 5. The Commission then discussed Section 5

Minutes - Regular Meeting
August 28 and 29, 1959

concerning the bad faith of both the trespasser and the owner. After the matter was discussed a motion was made by Mr. Stanton and seconded by Mr. Gustafson to delete Section 5 which prescribes the remedies where both persons act in bad faith. It was agreed that this situation would then be covered by the general section indicating the types of relief that may be granted by the court.

E. Study No. 43 - Separate Trial on Issue of Insanity: The Commission had before it Memorandum No. 7 (8/10/59) and the correspondence (dated 8/5/59 and 8/6/59) of the Executive Secretary and Professor Louisell relating to his request for the permission of the Commission to publish his study in the California Law Review. (A copy of each of these items is attached hereto.) The Commission reconsidered its policy established at the June 1 and 2, 1956, meeting that its research consultants should not be permitted to publish their work for the Commission as Law Review articles prior to publication of the reports of the Commission. After the matter was discussed a motion was made by Mr. Dieden, seconded by Mr. Balthis, and unanimously adopted to direct the Executive Secretary to write to Professor Louisell that the Commission's policy is not to permit the research consultant to publish any material prepared for the Commission until after the Commission has taken final action on the matter.

The Executive Secretary then raised the question whether the letters Professor Louisell has received in response to his inquiry relative to the bifurcated trial should be included as appendices in the printed publication of this study. After the matter was discussed it was agreed that the correspondence as such should not be printed.

F. Study No. 48 - Right to Counsel in Juvenile Court

Proceeding: The Commission had before it Memorandum No. 6 (8/10/59); Memorandum No. 7 (7/23/59); a letter (dated 8/3/59) from Professor Arthur H. Sherry; and the draft of the Recommendation of the Commission relating to the Right to Counsel in Juvenile Court Proceedings (dated 7/23/59) prepared by Mr. McDonough. (A copy of each of these items is attached hereto.)

The Commission first considered the draft recommendation relating to the right to counsel in juvenile court proceedings. During the discussion Mr. Stanton pointed out that the Recommendation should be consistent where it refers to "persons," "minors" and "juveniles" and suggests using "minor" through the Recommendation. Senator Cobey suggested that a footnote should be inserted in the Recommendation defining "juvenile" if the term "juvenile" is used. After the matter was discussed a motion was made by Mr. Babbage, seconded by Mr. Balthis, and adopted to authorize the staff to make the appropriate changes in the Recommendation using the word "juvenile" where practical. Mr. Stanton voted "No."

The Commission then agreed that the following changes should be made in the Recommendation:

1. Page 1. Reference to the "Welfare and Institutions Code" should be substituted for the reference to "the Juvenile Court Law" wherever appropriate.

The last sentence of paragraph 1 should be revised to read "such an order may, among other things, deprive the person's parents of custody over him and commit him to various persons or institutions for care."

2. Page 2. The word "rather" should be deleted from the first sentence of the first paragraph.

The third sentence of the first paragraph should be reworded by the Executive Secretary to improve its form.

It was agreed that the staff should ascertain whether the word "court" should be inserted between the phrase "juvenile proceedings" in the first sentence of the second paragraph.

3. Page 3. The phrase "otherwise adverse to his interest" should be deleted from the first sentence of the first paragraph of Page 3. During the discussion of the first paragraph of Page 3 Mr. Gustafson raised the question of the substantive accuracy of this paragraph. It was agreed that the staff should look into this matter and report its findings.

4. Page 4. It was agreed that the first paragraph following the heading "Proposed Legislation" should be revised to incorporate "a statute should be enacted," thus eliminating the need to repeat this phrase in the subsequent three subparagraphs.

It was agreed that subparagraph 1 should be revised to read as follows:

Minutes - Regular Meeting
August 28 and 29, 1959

1. A person who is the subject of a juvenile court proceeding under Section 700 of the Welfare and Institutions Code has the right to be represented by counsel. The Commission does not believe that permitting counsel to participate in juvenile court proceedings will impair their informal nature and turn what is now essentially a beneficent inquiry pursued solely in the juvenile's interest into an adversary proceeding in which much of the value of the juvenile court will be lost. There is no reason why the participation of counsel should introduce so disruptive a note. Proceedings may continue to be informal and counsel required to conduct themselves accordingly.

It was agreed to defer further consideration of the Recommendation to the next meeting.

Respectfully submitted,

John H. DeMouly
Executive Secretary