

Date of Meeting: November 27-28, 1959

Date of Memo: November 10, 1959.

Memorandum No. 6

Subject: Uniform Rules of Evidence - Rule 36 - Identity of Informer.

Attached is Uniform Rule 36 as revised to date by the Commission. This rule has not yet been approved by the Commission.

It appears that under Rule 34, relating to official information, protection against disclosure of the identity of an informer may also be provided. This possibility presents two questions for consideration:

(1) Should Rule 36 be rejected and protection against disclosure of the identity of an informer be provided under Rule 34 (official information) as revised by the Commission?

Comment: In considering this question, note that the test under Rule 34(2)(b) does not require disclosure where the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice. On the other hand, under Rule 36, the disclosure must be made whenever it is "essential to a fair determination of the issues" and the necessity for preserving the confidentiality of the information is not a factor to be taken into consideration.

(2) Since Rules 34 and 36 may overlap, should a specific provision be added to Rule 34 to provide in substance that no protection against disclosure of the identity of an informer is provided under Rule 34?

Comment: A specific provision of the type referred to in this question would resolve the ambiguity that exists so far as the application of Rule 34 to disclosure of the identity of an informer is concerned. If such a provision is added, then "law enforcement officer," as used in Rule 36, perhaps should be expanded to include not only a person we would ordinarily consider as law enforcement officer but also a representative of the agency administering or enforcing the law alleged to be violated. One way this might be accomplished is by adding after "law enforcement officer" the words "or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated."

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Note: This is Uniform Rule 36 as revised by the Law Revision Commission. The changes in the Uniform Rule are shown by underlined material for new material and bracketed and strike out material for deleted material.

RULE 36. IDENTITY OF INFORMER.

A witness has a privilege to refuse to disclose the identity of a person who has directly or indirectly furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a ~~[representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision]~~ law enforcement officer, and evidence thereof is inadmissible, unless the judge finds that:

~~[(a)]~~ (1) The identity of the person furnishing the information has already been otherwise disclosed; or

~~[(b)]~~ (2) Disclosure of his identity is essential to assure a fair determination of the issues.

RULE 36 (IDENTITY OF INFORMER) AS REVISED BY  
THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 36, relating to identity of informer, as revised by the Commission.

Protection where information furnished indirectly. The Commission has provided that the privilege applies whether the informer furnished the information "directly or indirectly." This language will protect "A" where "A" gives information to "B" with the understanding that "B" is to transmit the information to a law enforcement officer. If the circumstances are such that the identity of "B" is to be protected, the Commission believes that the identity of "A" should also be protected.

Information furnished to a "law enforcement officer." The revised rule provides that under appropriate circumstances the identity of the informer is protected if he furnishes information to a "law enforcement officer." The Commission has not accepted the requirement of the Uniform Rule that the informer must furnish the information to a governmental representative who is "charged with the duty of enforcing" the provision of law which is alleged to be violated. The Commission does not believe that the informer should be required to run the risk that the official to whom he discloses the information is one "charged with the duty of enforcing" the

law alleged to be violated. For example, under the Uniform Rule as revised by the Commission, if the informer discloses information concerning a violation of a federal law to a state law enforcement officer, the identity of the informer is protected. However, under the Uniform Rule as promulgated by the National Commissioners the identity of the informer apparently would not be protected under these circumstances.