

1/3/61

Memorandum No. 1 (1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article)

Attached is the Privileges Article of the Uniform Rules of Evidence as revised to date by the Law Revision Commission. Only those rules that have been tentatively acted upon by the Commission are included in the attached material -- i.e., Rules 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38 and 40. The Commission has not yet completed its preliminary work on Rules 25, 37 and 39 and these rules are not included in this memorandum.

The comment to Rule 40 should be examined to determine that it correctly states the reason why the Commission has disapproved this rule.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

UNIFORM RULES OF EVIDENCE

ARTICLE V. PRIVILEGES

Revised 12/10/59  
Revised 11/10/59  
10/14/59

Note: This is Uniform Rule 23 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 23. PRIVILEGE OF [~~ACCUSED~~] DEFENDANT IN CRIMINAL ACTION.

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

~~[(2)--An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.]~~

~~[(3)]~~ (2) [~~An accused~~] A defendant in a criminal action or proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

Revised 12/10/59  
Revised 11/10/59  
10/14/59

RULE 23 (PRIVILEGE OF DEFENDANT IN CRIMINAL  
ACTION) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 23, relating to the privilege of defendant in a criminal action, as revised by the Commission.

Paragraph (2) - Marital Privilege of Defendant in Criminal Case.

Paragraph (2) of Uniform Rule 23 has been deleted in the revised rule. This paragraph, relating to the special marital privilege of a defendant in a criminal case, becomes unnecessary because the Commission has modified Uniform Rule 28 to give the substantially same privilege as was given under Uniform Rule 23(2) to a spouse in all cases -- the right to prevent the other spouse from testifying and to provide for the existence of the privilege after the termination of the marriage. The Commission has, consequently, deleted subsection (2) of Uniform Rule 23.

Paragraph (4) - Comment on Defendant's Exercise of Privilege.

The Commission disapproves paragraph (4) of Rule 23 and instead has substituted in the revised rule the substance of the portion of Art. I, § 13 of the California Constitution relating to comment on failure of defendant to testify. The word "case" appearing in the Constitution has been changed to "action or proceeding" in order to be consistent with the rest of revised Rule 23.

Revised 12/10/59  
Revised 11/10/59  
10/14/59

Note: This is Uniform Rule 24 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 24. DEFINITION OF INCRIMINATION.

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

RULE 24 (DEFINITION OF INCRIMINATION) AS REVISED BY THE COMMISSION

The Commission approves Uniform Rule 24 with the revisions indicated.

Revised October 1, 1959  
9/15/59

Note: This is Uniform Rule 26 as revised by the Law Revision Commission. See attached explanation of this revised rule. 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 the lawyer's representative or (ii) whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent. [~~7~~]

(b) "Communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship. [~~7~~]

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

(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 of 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, if a communication [s] is found by the judge to have been between a lawyer and his client in the course of that relationship and in professional confidence, ~~[are-privileged,-and-a]~~ the client has a privilege to:

(a) ~~[if-he-is-the-witness-to]~~ Refuse to disclose ~~[any-such]~~ the communication. ~~[,-and]~~

(b) ~~[to]~~ Prevent his lawyer, or the lawyer's representative, associate or employee, from disclosing the communication. ~~[it,-and]~~

(c) ~~[to]~~ Prevent any other ~~[witness]~~ person from disclosing ~~[such]~~ the communication if it came to the knowledge of such ~~[witness]~~ person (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.

(3) Subject to rule 37 and except as otherwise provided in paragraphs (4), (5) and (6) of this rule, the privilege under paragraph (2) of this rule may be claimed for the client by:

(a) The holder of the privilege. ~~[the-client-in-person-or-by-his lawyer,-or-if-inecompetent,-by-his-guardian,-or-if-deceased,-by-his-personal representative-]~~

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

(c) The lawyer who received or made the communication if (i) the client is living, and (ii) no other person claims the privilege under subparagraph (a) or (b) of this paragraph and (iii) the privilege has not been waived under rule 37.

(4) [~~(2)~~-Such-privileges-shall] The privilege under paragraph (2) of this rule does not extend [~~(a)~~] to a communication if the judge finds that [~~sufficient evidence, aside from the communication, has been introduced to warrant a finding that~~] the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or [~~a tort~~] to perpetrate or plan to perpetrate a fraud.

(5) The privilege under paragraph (2) of this rule does not extend to a communication relevant to:

(a) [~~(b)~~-to-a-communication-relevant-to] An issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction. [~~(c)~~]

(b) [~~(c)~~-to-a-communication-relevant-to] An issue of breach of duty by the lawyer to his client [~~(d)~~] or by the client to his lawyer. [~~(e)~~]

(c) [~~(d)~~-to-a-communication-relevant-to] An issue concerning an attested document of which the lawyer is an attesting witness. [~~(e)~~]

(d) [~~(e)~~-to-a-communication-relevant-to] A matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common, when offered in an action between any of such clients.

(6) The privilege available to a corporation, [~~(a)~~] association or other organization under this rule terminates upon dissolution of the corporation, association or other organization.

Revised October 1, 1959

9/15/59

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.

DEFINITIONS

Arrangement. The definitions contained in paragraph (3) of Uniform Rule 26 have been made the first paragraph of the revised rule to conform to the form of other rules. The definitions are contained in the first paragraph in other rules. See, for example, rules 27, 29, 33 and 34.

Definition of "client." Referring to revised rule 26(1)(a), the definition of client has been revised to make clear that a corporation, 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 C.A.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 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, paragraph (3)(a) and (b), provide 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 "lawyer." The definition of "lawyer" contained in the Uniform Rule has been modified by inserting a comma after the word "authorized." This corrects an apparent clerical error in the rules as printed by the Commission on Uniform State Laws. Compare with Rule 27 (as printed by the Commission on Uniform State Laws).

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.

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 paragraph (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 paragraph (3) of the revised rule more concise.

Note that under paragraph (1)(c)(i) of the revised rule, the client is the holder of the privilege if he is competent. Under paragraph (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 revised rule (1)(c)(ii) 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 paragraph (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.

This definition of "holder of the privilege" should be considered with reference to paragraph (3) of the revised rule 26, specifying who can claim the privilege, and rule 37, relating to waiver of the privilege.

## GENERAL RULE

The substance of the "general rule" now contained in Uniform Rule 26(1) has been set out in the revised rule as paragraph (2).

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

(1) The language of introductory exception to the rule has been revised to delete reference to a specific paragraph of the rule and is instead phrased in the general language "except as otherwise provided in this rule." This change has been made because the exceptions to the "general rule" are contained in various other parts of the revised rule.

(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 person authorized under paragraph (3) of the revised rule to claim that privilege, the evidence of the communication will be admitted.

(3) 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.

(4) Paragraphs (a), (b) and (c) of Uniform Rule 26(1) have been tabulated in paragraph form to improve readability and a number of revisions

have been made.

The words "if he is the witness" have been deleted from subparagraph (a) 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."

The words "or the lawyer's representative, associate or employee" have been inserted in subparagraph (b) to make clear the substance of the Uniform Rule that the client can prevent the stenographer or other employee or representative of the lawyer from testifying as to the communication. Thus the privilege respecting the attorney's secretary or clerk is vested in the client. Under the present California statute the privilege so far as employees of the attorney is concerned may be vested in the attorney. The basis for the privilege is to encourage full disclosure by the client and for this reason the Commission believes that in all cases the privilege should be vested in the client.

The word "person" has been substituted for "witness" in subparagraph (c) 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) In paragraph (3) of the revised rule 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" has been incorporated with some changes. An introductory clause has been inserted to make it clear

that the right to claim the privilege for the client is subject to the waiver provision (Rule 37) and to the other exceptions under which a confidential communication between a lawyer and a client is admissible. Under subparagraph (a) of paragraph (3) 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 subparagraph (b) of paragraph (3) of the revised rule, 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. Under subparagraph (c) the substance of what is now contained in Uniform Rule 26(1) is set out more clearly.

Rule 26(1) now provides the privilege may be claimed by "the client in person or by his lawyer." Under the revised rule in subparagraph (c), the lawyer is entitled to claim the privilege on behalf of the client provided certain conditions exist. Note that the conditions that are required to be satisfied are: (1) the client must be living; (2) no other person has claimed the privilege; and (3) the privilege has not been waived. 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."

(6) 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 paragraph (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 of 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 "sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort." The Commission has not retained this requirement that as a foundation for the admission of

such evidence there must be a prima facie showing of the criminal or tortious activities of the client. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes the foundation requirement is too stringent and prefers that the question (as to whether the legal service was sought or obtained to enable or aid the client to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud) be left to the judge for determination under the provisions of Uniform Rule 8.

Other Exceptions. In paragraph (5) 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 paragraph (5)(a) 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 deceased 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 deceased 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 all could 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 paragraph (2) (c) 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.

TERMINATION OF PRIVILEGE OF CORPORATION, ASSOCIATION OR OTHER ORGANIZATION  
UPON DISSOLUTION.

In paragraph (6) of the revised rule, the substance of the last sentence of Uniform Rule 26(1) is contained. It has been slightly restated to conform to the definition of client as stated in the revised rule.

Note: This is Uniform Rule 27 as revised by the Law Revision Commission. See attached explanation of this revised rule. 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 27. PHYSICIAN-PATIENT PRIVILEGE.

(1) As used in this rule [7] :

(a) "Confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

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

(c) "Patient" means a person who, for the sole purpose of securing preventive, palliative [7] or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician [7] or submits to an examination by a physician [7] .

(d) "Physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place [7] .

(2) Subject to rule 37 and except as otherwise provided [by paragraphs-(3),-(4),-(5)-and-(6)-of] in this rule, a person, whether or not a party, has a privilege in a civil action or proceeding [ex-in-a prosecution-for-a-misdemeanor] to refuse to disclose, and to prevent a witness from disclosing, a communication [7] if he claims the privilege and the judge finds that:

(a) The communication was a confidential communication between patient and physician [7] ; and

(b) The patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor [7] ; and

(c) The witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or [~~his-agent-or servant~~] a representative, associate or employee of the physician; and

(d) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege [for-him] by the holder of the privilege or (iii) if the patient is living and no other person claims the

privilege and the privilege has not been waived under rule 37, the person who was the physician at the time of the confidential communication.

(3) There is no privilege under this rule as to any relevant communication between the patient and his physician ~~[(a)]~~ upon an issue of the patient's condition in:

(a) An action or proceeding to commit him or otherwise place him or his property, or both, under the control of another or others because of his alleged mental ~~[incompetence]~~ or physical condition. ~~[,-ex-in]~~

(b) An action or proceeding in which the patient seeks to establish his competence. ~~[ex-in]~~

(c) An action or proceeding to recover damages on account of conduct of the patient which constitutes a felony. ~~[criminal-offense-other-than-a misdemeanor,-ex]~~

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

(a) ~~[(b)-upon]~~ An issue as to the validity of a document as a will of the patient. ~~[,-ex-(e)-upon]~~

(b) An issue between parties claiming by testate or intestate succession or intervivos transaction from a deceased patient.

~~[(4)]~~ (5) There is no privilege under this rule 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 a beneficiary of the patient through a contract to which the patient is or was a party.

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

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

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

Revised 11/10/59

9/15/59

RULE 27 (PHYSICIAN PATIENT PRIVILEGE) AS REVISED BY THE  
COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 27, relating to the physician-patient privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical order.

Definition of "holder of the privilege." The definition of "holder of the privilege" contained in the Uniform Rule has been rephrased in the revised rule to conform to the similar definition in revised rule 26. Note that under this definition, a guardian of the patient is the holder of the privilege if the patient is incompetent. This differs from the Uniform Rule which makes the guardian of the person of the patient the holder of the privilege. Under the revised definition, if the patient has a separate guardian of his estate and a separate guardian of his person, either guardian can claim the privilege.

An incompetent patient becomes the holder of the privilege when he becomes competent.

The personal representative of the patient is the holder of the privilege when the patient is dead. He may claim the privilege on behalf of

the deceased patient. This may be a change in the existing California law. Under the California law, the privilege may survive the death of the patient in some cases and no one can waive it on behalf of the patient. If this is the existing 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.

This definition of "holder of the privilege" should be considered with reference to subparagraphs (c) and (d) of paragraph (2) of the revised rule (specifying who can claim the privilege) and rule 37 (relating to waiver of the privilege).

Definition of "patient." Two unnecessary commas have been deleted from the Uniform Rule.

The Commission approves the requirement of the Uniform Rule that the patient must consult the physician for the sole purpose of treatment or diagnosis preliminary to treatment in order to be within the privilege.

Definition of "physician." A necessary comma has been inserted after the words "person authorized." Compare with Uniform Rule 26(3)(c).

The Commission approves the provision of the Uniform Rule which defines "physician" to include a person "reasonably believed by the patient to be authorized" to practice medicine. If we are to recognize this privilege, we should be willing to protect patients from reasonable mistakes as to unlicensed practitioners.

#### GENERAL RULE

The substance of the "general rule" is set out in the revised rule as paragraph (2).

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

(1) The "general rule" has specifically been made subject to rule 37 (waiver) and paragraph (7) of Uniform Rule 27 has been omitted as unnecessary. Making the general rule subject to rule 37 conforms to the language of rule 26 (attorney-client privilege) and makes it clear that rule 37 is applicable.

(2) The language of the introductory exception to the Uniform Rule has been revised to delete the unnecessary references to specific paragraphs of the rule.

(3) Under the revised rule, the privilege is applicable only in civil actions and proceedings. The Commission rejects that portion of the Uniform Rule that extends the privilege to a prosecution for a misdemeanor. The existing California statute restricts the privilege to a civil action or proceeding and the Commission is unaware of any criticism of the existing statute. In addition, if the privilege is applicable in a trial on a misdemeanor charge but not applicable in a trial on a felony charge, it would be possible for the prosecutor in some instances to prosecute for a felony in order to make the physician-patient privilege not applicable. A rule of evidence should not be a significant factor in determining whether an accused is to be prosecuted for a misdemeanor or a felony.

(4) In subparagraph (c) of paragraph (2) of the revised rule, the phrase "a representative, associate or employe of the physician" has been substituted for "his agent or servant." This change makes rule 27 conform to the phrase used in rule 26.

(5) Subparagraph (d) of paragraph (2) of the Uniform Rule has been revised to conform to Uniform Rule 26 insofar as who may claim the privilege is concerned. This revision will allow the physician to claim the privilege on behalf of patient when all of the following conditions exist: (1) the patient is alive; (2) no other person claims the privilege; and (3) the privilege has not been waived. The Commission believes that in this case the Uniform Rule is not clear but that the Uniform Rule might be construed to mean that the physician is a person "authorized to claim the privilege for" the holder of the privilege.

#### EXCEPTIONS

The revised rule incorporates the substance of the exceptions provided in the Uniform Rule with the following modifications and additions:

(1) The exceptions have been rephrased and tabulated to improve readability.

(2) The exception provided in paragraph (3)(a) is broader than the Uniform Rule and will cover not only commitments of mentally ill persons, mentally deficient persons and other similar persons, but will also cover such cases as the appointment of a conservator under Probate Code § 1751. In these cases, the Commission believes the privilege should not apply.

(3) The provision of the Uniform Rule that there is no privilege in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor has been rephrased but not changed in substance. Although the revised rule denies the physician-patient privilege in a prosecution for a misdemeanor, the Commission does not believe that the patient should be denied his privilege in a civil action or proceeding against him for damages on account of conduct which it is

alleged constituted a misdemeanor.

(4) The Uniform Rule provides that there is no privilege upon an issue between parties claiming by testate or intestate succession from a deceased patient. The Commission has extended this exception to include also inter vivos transactions. This is consistent with Uniform Rule 26(2)(b).

(5) The Uniform Rule provides that there is no privilege in an action in which the claim of the patient is an element or factor of the claim "or defense" of the patient. The revised rule does not extend the patient-litigant exception this far but instead provides that the privilege does not exist in an action or proceeding 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 Commission's revised rule will protect the patient in the following case. Divorced husband (P) brings a proceeding against his ex-wife (D) to gain custody of child. The basis of P's claim is that D is a sexual deviate. D denies such deviation. In order to establish his claim P calls psychiatrist who is treating D. Under the Uniform Rule it appears that D's objection to the psychiatrist's testimony would be overruled; but the contrary is the case under the revised rule. The Commission does not believe that a plaintiff should be thus empowered to deprive a defendant of the privilege merely by virtue of bringing the action or proceeding.

(6) The revised rule provides that there is no privilege in an action brought under Section 377 of the Code of Civil Procedure (Wrongful Death Statute). The Uniform Rule does not contain this provision. Under the existing California statute, a person authorized to bring a wrongful death action may consent to the testimony by the physician. There is no logical

reason why the rules of evidence should be different as far as testimony by the physician is concerned in a case where the patient brings the action and the case where a wrongful death action is brought. Under the Uniform Rule and under the revised rule, if the patient brings the action, the condition of the patient is an element of the claim and no privilege exists. The revised rule makes the same rule applicable in wrongful death cases.

The revised rule 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 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.

(7) The provision of the Uniform Rule providing that the privilege does not apply as to information required by statute to be reported to a public officer or recorded in a public office has been extended to include information required by "charter, ordinance, administrative regulations or other provisions." The privilege should not apply where the information is public, whether it is reported or filed pursuant to a statute or an ordinance, charter, regulation or other provision.

(8) A necessary comma has been inserted and an unnecessary comma has been deleted from paragraph (6) of the Uniform Rule (paragraph (7) of the revised rule). The Commission approves the provision of the Uniform Rule which makes the privilege not applicable where the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort. The Commission does not

believe that this provision will impose any undue difficulty for a patient consulting with his physician. The Commission believes that the contrary is true, for example, in the case of the lawyer-client relationship. Consequently, the Commission has limited this exception to crime or fraud in rule 26 as far as the lawyer-client privilege is concerned but has adopted the Uniform Rule in the case of the physician-patient privilege.

The Uniform Rule requires that the judge must find that "sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to 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 has not retained this requirement that as a foundation for the admission of such evidence there must be a prima facie showing of criminal or tortious activities. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes that the foundation requirement is too stringent and prefers that the question (as to whether the services of the physician were sought or obtained to enable or aid anyone in a crime or tort) be left to the judge for determination under the provisions of Uniform Rule 8.

(9) Paragraph (7) of the Uniform Rule has been deleted. This paragraph is not necessary since the same matter is covered by rule 37. Rule 27 has been made subject to rule 37 in the revised rule by a specific provision in revised rule 27(2)

EAVESDROPPER EXCEPTION

Uniform Rule 27 does not abolish the eavesdropper exception so far as the physician-patient privilege is concerned. This exception is a traditional one and the Commission does not believe that the physician-patient privilege should be extended to provide protection against eavesdroppers.

Revised 11/9/59  
(10/1/59)

Note: This is Uniform Rule 28 as revised by the Law Revision Commission. See attached explanation of this revised rule. 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 28. MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS.

(1) Subject to rule 37 and except as otherwise provided in ~~[paragraphs-(2)-and-(3)-of]~~ this rule, [a] either spouse ~~[who-transmitted to-the-other-the-information-which-constitutes-the-communication,]~~ has a privilege during the marital relationship and afterwards which he may claim, whether or not he is a party to the action or proceeding, to refuse to disclose and to prevent the other spouse from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife.

(2) Subject to rule 37 and except as otherwise provided in paragraphs (3) and (4) of this rule, a ~~[The-other-spouse-or-the]~~ guardian of an incompetent spouse may claim the privilege on behalf of ~~[the]~~ that spouse. ~~[having-the-privilege.]~~

(3) Neither spouse may claim ~~[such]~~ the privilege under paragraph (1) of this section in:

(a) ~~[in]~~ An action or proceeding by one spouse against the other spouse. ~~[,or-(b)-in-an-action-for-damages-for-the-alienation-of-the-affections-of-the-other,or-for-criminal-conversation-with-the-other,or]~~

(b) ~~[(e)-in]~~ A criminal action or proceeding in which one of them is charged with (i) a crime against the person or property of the other or of a child of either, or (ii) a crime against the person or property of a third

person committed in the course of committing a crime against the other, or (iii) bigamy or adultery, or (iv) desertion of the other or of a child of either. [~~7-ex-(d)-in~~]

(c) A criminal action or proceeding in which the accused offers evidence of a communication between him and his spouse. [~~7-ex-(e)~~]

(d) An action or proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another or others because of his alleged mental or physical condition.

(e) An action or proceeding in which a spouse seeks to establish his competence.

(4) Neither spouse may claim the privilege under paragraph (1) of this section if the judge finds that [~~sufficient-evidence, aside from the communication, has been introduced to warrant a finding that~~] the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or [~~a tort~~] to perpetrate or plan to perpetrate a fraud.

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

RULE 28 (MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS)

AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 28, relating to the marital privilege for confidential communications, as revised by the Commission.

THE RULE

Who may claim privilege. Under the Uniform Rule, only the spouse who transmitted to the other the information which constitutes the communication (the communicating spouse) can claim the privilege. The Commission has not accepted this unilateral view, but prefers the bilateral view that both spouses are the holders of the privilege and that either spouse may claim it. The Commission wants to provide more substantial encouragement to the exchange of marital confidences than is afforded under the Uniform Rules of Evidence.

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

The Commission believes that one spouse should not be able to waive the privilege over the objection of the other spouse. However, this matter is not dealt with in this rule, but will be dealt with in rule 37.

Post-coverture privilege. Under the existing California law, a post-coverture privilege exists so far as the marital privilege for confidential communications is concerned. The Uniform Rule, however

would restrict the existence of the privilege to the time the marital relationship exists and no privilege would exist after the marriage is terminated by death or divorce. The Commission prefers the existing California law and rejects the portion of the Uniform Rule that would abolish the post-coverture privilege. By retaining the post-coverture rule we prevent, for example, a divorced wife forcing a husband to "buy" her silence as to business and other transactions he told her about in confidence during the marital relationship. In addition, the Commission recognizes, for example, that a husband might be unwilling to exchange marital confidences if he knew that his wife could be forced over her objections to disclose those confidences after his death.

Scope of privilege. The Commission notes that the privilege relates only to testimony by a spouse. No protection is provided against eavesdroppers. Furthermore, for example, a spouse can disclose the contents of the communication to a third person who may then appear as a witness. The Commission has accepted this portion of the Uniform Rule.

#### EXCEPTIONS

Alienation of affections; criminal conversation. An exception is stated in the Uniform Rule that the privilege does not apply in an action for damages for the alienation of the affections of the other spouse or for criminal conversation with the other spouse. This exception has been omitted from the revised rule because Civil Code § 43.5 abolishes these actions in California.

Family crime. The Commission approves the "family crime"

exception in paragraph (3)(b) of the revised rule which extends the present California law to include bigamy, adultery and desertion within this exception. The Commission agrees that the privilege should not apply in case of bigamy, adultery or desertion.

Guardianship or commitment proceedings. In paragraph (3)(d) and (3) of the revised rule, the Commission has provided an additional exception -- one that is not provided in the Uniform Rule but is recognized in the California statute. This exception provides that there is no privilege in an action or proceeding to commit either spouse or otherwise place a spouse or his property, or both, under the control of another or others because of his alleged mental or physical condition. Furthermore, there is no privilege in an action or proceeding in which a spouse seeks to establish his competence. A somewhat similar exception is recognized in our present statute and, as a matter of policy, in the case where the exception applies, the Commission believes that the evidence should not be privileged. Under the language of the revised rule, the exception will apply, for example, to commitment proceedings for mentally ill persons and mentally deficient persons. It will also apply to such proceedings as conservatorship proceedings.

Crime or fraud. In paragraph (4) of the revised rule an exception is stated that the privilege does not apply where the judge finds that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or to perpetrate or plan to perpetrate a fraud. However, the Uniform Rule would extend this exception to bar the privilege in case of any communication with a view toward the commission of any tort. The Commission has not adopted this

extension of the scope of the exception. Because of the wide variety of torts and the technical nature of many torts, the Commission believes that to extend the exception to include all torts would tend to discourage spouses from exchanging confidences and would open up too large an area of nullification of the privilege.

The Uniform Rule requires that the judge must find that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was in aid of a crime or fraud. The Commission has not retained this requirement that as a foundation for the admission of such evidence there must be a prima facie showing of criminal or fraudulent activities. There is little case or text authority in support of the foundation requirement and such authority as there is fails to make a case in support of the requirement. The Commission believes that the foundation requirement is too stringent and prefers that the question (as to whether the communication was in aid of a crime or fraud) be left to the judge for determination under the provisions of Uniform Rule 8.

#### TERMINATION OF PRIVILEGE

Since the revised rule gives each spouse the right to claim the privilege, paragraph (3) of the Uniform Rule is no longer appropriate and has been omitted from the revised rule. Note, however, that paragraph (3)(c) of the revised rule provides a somewhat similar provision as far as criminal actions and proceedings are concerned.

The question of when the privilege under the revised rule is terminated is one that will be dealt with under Uniform Rule 37.

EFFECT OF ADOPTION OF RULE 28 AS REVISED ON RULE 23(2)

Paragraph (2) of Uniform Rule 23, relating to the special marital privilege of an accused in a criminal case, becomes unnecessary because the Commission has modified Uniform Rule 28 to give the substantially same privilege as was given under Uniform Rule 23(2) to a spouse in all cases -- the right to prevent the other spouse from testifying when the other spouse is the communicating spouse and the existence of the privilege after the termination of the marriage. The Commission has, consequently, deleted subsection (2) of Uniform Rule 23.

Note: This is Uniform Rule 29 as revised by the Law Revision Commission. See attached explanation of this revised rule. 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 29. PRIEST-PENITENT PRIVILEGE.

(1) As used in this rule [7] :

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

(b) "Penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the [~~penitent~~] priest is a member, whether or not the penitent is a member of the priest's church, denomination or organization.

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

(2) Subject to rule 37, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication if he claims the privilege and the judge finds that:

(a) The communication was a penitential communication; [~~and~~]

(b) The witness is the penitent or the priest; [7] and

(c) The claimant is the penitent [7] or is the priest making the claim on behalf of an absent or deceased or incompetent penitent.

RULE 29 (PRIEST-PENITENT PRIVILEGE)

AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 29, relating to the priest-penitent privilege, as revised by the Commission.

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical order.

Requirement that penitent be member of church. The Commission has revised the definitions so that the penitent need not be a member of the church of which the priest is a member.

GENERAL RULE

Waiver. The Uniform Rule has been made specifically subject to Rule 37 relating to waiver.

Death or incompetency of penitent. The rule has been clarified by inserting "or deceased or incompetent" before "penitent" in paragraph (2) (c) of the revised rule. A deceased or incompetent penitent might be considered to be an "absent" penitent for the purposes of the Uniform Rule, but this change has been made to resolve the ambiguity in the Uniform Rule.

Priest claiming privilege. The priest can claim the privilege for an absent or deceased or incompetent penitent. However, it is noted that the priest need not claim the privilege on behalf of the absent or deceased or incompetent penitent and might, in an appropriate case, not claim the privilege. For example, if a murderer had confessed the crime to a priest and has since

died and an innocent man has been condemned to death for the murder, the priest might under the circumstances decide not to claim the privilege for the deceased murderer and instead give the evidence on behalf of the innocent man.

Revised 11/9/59  
(10/1/59)

RULE 30. RELIGIOUS BELIEF.

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

Note: The Commission approves this rule. Although the Commission is unaware of any California cases recognizing this privilege, the Commission believes that if we do not now have the privilege we should have it.

RULE 31. POLITICAL VOTE.

Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

Note: The Commission approves this rule. Although the Commission is unaware of any California cases recognizing this privilege, it seems probable that the California courts would recognize the privilege if the occasion for doing so presented itself. The rule is considered necessary to protect the secrecy of the ballot.

RULE 32. TRADE SECRET.

The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to

prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

Note: The Commission approves this rule. In our 1957 Discovery Act (CCP § 2019(b)) we have at least an indirect recognition of the existence in this state of this privilege. The Commission approves the provision of the Uniform Rule that the privilege will be allowed only if the allowance of the privilege will not tend to "conceal fraud or otherwise work injustice." The Commission recognizes that the limits of the privilege are uncertain and will have to be worked out through judicial decisions.

RULE 33. SECRET OF STATE

Note: The Commission has disapproved the adoption of Uniform Rule 33.

Comment: The Commission believes that adequate protection for a secret of state is provided under Rule 34 (Official Information) as revised by the Commission.

Revised 12/10/59

Revised 11/9/59

10/1/59

Note: This is Uniform Rule 34 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike-out material for deleted material.

RULE 34. OFFICIAL INFORMATION.

(1) As used in this rule [;] :

(a) "Official information" means information not open or theretofore officially disclosed to the public [~~relating to the internal affairs of this State or of the United States~~] acquired by a public officer or employee [~~official of this State or of the United States~~] in the course of his duty [;] or transmitted from one [~~such official~~] public officer or employee to another in the course of duty.

(b) "Public officer or employee" includes a public officer or employee of this State, a public officer or employee of any county, city, district, authority, agency or other political subdivision in this State and a public officer or employee of the United States.

(2) Subject to Rule 36, a witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information [;] and that:

(a) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State [;] ; or

(b) [~~disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity.~~] Disclosure of the information is against the

(Rule 34)

public interest, after a weighing of the necessity for preserving the confidentiality of the information as compared to the necessity for disclosure in the interest of justice.

Revised 12/10/59

Revised 11/9/59

10/1/59

RULE 34 (OFFICIAL INFORMATION) AS REVISED

BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 34, relating to the privilege and inadmissibility of official information, as revised by the Commission.

DEFINITIONS

The definition of the Uniform Rule has been revised to make it clear that a public officer or employee of a local governmental unit in California is a public officer or employee for the purposes of the rule. Under appropriate circumstances, the Commission believes that local as well as state officers and employees should be within the privilege.

The Commission believes that information received by a "public employee" should be within the scope of the rule to the same extent as information received by a "public officer."

The words "relating to the internal affairs of this State or of the United States" have been omitted as unnecessary in view of the revised definition.

THE RULE

The Uniform Rule provides that evidence of official information is inadmissible if the judge finds that the disclosure of the information will be harmful to the interests of the government of which the witness is an officer in a governmental capacity. The Commission has substituted for this provision one that more clearly indicates the intent that the judge

(Rule 34)

should weigh the consequences to the public of disclosure against the consequences to the litigant of nondisclosure and should then decide which is the more serious. The Commission recognizes that we cannot by statute establish hard and fast rules to guide the judge in this process of balancing the public and private interests. At the same time, the Commission believes that the revised rule more clearly imposes upon the court the duty to weigh the public interest of secrecy against the private interest of disclosure.

The rule has been revised to make it clear that the identity of an informer cannot be concealed under the official information privilege of Rule 34. This is accomplished by inserting the words "subject to Rule 36" in paragraph (2) of the revised rule. The identity of an informer privilege is stated in Rule 36.

Revised 11/9/59

10/1/59

RULE 35. COMMUNICATION TO GRAND JURY.

Note: The Commission has disapproved the adoption of Uniform Rule 35.

Comment: California does not now recognize the privilege provided in Uniform Rule 35. The rule applies only during the period the grand jury is investigating the matter and this ordinarily is accomplished with dispatch. The Commission does not believe that there is a demonstrated need for changing the existing California law to grant this additional privilege.

Revised 3/1/60  
12/10/59

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.

(1) A witness has a privilege to refuse to disclose the identity of a person who has furnished information as provided in paragraph (2) of this rule 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 or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated, and evidence thereof is inadmissible, unless the judge finds that:

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

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

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

Revised 3/1/60

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 through another.

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 can furnish the information only 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 state law to a federal 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.

When privilege not applicable. The privilege does not apply if the identity of the informer has already been disclosed or if disclosure of his

Revised 3/1/60

identity is needed to assure a fair determination of the issues.

The Commission has substituted the word "needed" for "essential" in Rule 36(1)(b) because the Commission does not believe that the defendant should have to establish that disclosure is "essential" to a fair determination of the issues; the Commission prefers to require that the defendant need establish only that disclosure is "needed" to assure a fair determination of the issues.

Draft -- 11/10/59

Note: This is Uniform Rule 38 as revised by the Law Revision Commission. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED.

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure or to prevent another from making the disclosure, but [was] nevertheless the disclosure was required to be made [make-it].

Comment:

The rule has been revised to provide protection where a person other than the holder of the privilege is required to testify.

Revised 10/1/60

RULE 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE.

~~[A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.]~~

COMMENT

The Commission declines to recommend Rule 40 inasmuch as it is not a rule of evidence and merely states the existing California law which will remain in effect if Rule 40 is not adopted.