

file

1/22/63

File: URE - Privileges Article

#34(L) Memo 63-1

Memorandum 63-1

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article as previously revised and approved by Commission)

Attached to this Memorandum is the article of the Uniform Rules of Evidence relating to privileges as it has been revised to date by the Commission. The changes from the Uniform Rules (other than mere shifting of language from one part of the rule to another) are shown by strike-out and underscore. The rules that have been considered by the Commission are on pink paper. Those rules that have not as yet been considered by the Commission are on yellow paper.

Appended to each rule are comments indicating the reason for changes that the Commission has directed and containing other explanatory material.

This set of the URE Privileges article should be retained, and you should bring this set of the privileges article to each meeting at which the privileges article is to be considered. As various privileges are revised from time to time, replacement pages will be sent to you so that you may keep this set current.

There is included among these rules one rule that is not contained in the URE and which has not been considered by the Commission. This is Rule 36.1 relating to the newsman's privilege. This was presented to the Commission by memorandum in 1961 but was never considered by the Commission because the Commission's attention was diverted to Sovereign Immunity. The proposed rule is included here because the newsman's privilege is an existing California privilege and will have to be considered by the Commission before it is through with the privileges article of the URE.

The present status of the Commission's study of the privileges article is as follows:

Rules 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38 and 40 have been tentatively acted upon by the Commission. Action has not been taken on Rules 37 and 39, even though these rules have been modified to a considerable extent by the Commission already. Rule 39 now contains four subdivisions. Subdivision (3) was approved by the Commission in connection with Rule 23, but it was moved to Rule 39 at the suggestion of the Commission. Subdivision (4) of Rule 39 has not been approved; it formerly appeared as subdivision (10) of Rule 25, and was moved to Rule 39 at the suggestion of the Commission. The final decision on whether to retain or omit subdivision (4) or whether it should be modified further was deferred until Rule 39 is considered.

At the May 1961 meeting, the Commission decided to reconsider all of the rules in the privileges article on the merits, but if no ~~agreement~~ is reached on alternative language, the previously approved language is to remain the recommendation of the Commission.

Accordingly, the staff proposes to take up each of the rules in the privileges article as it has been revised to date. The State Bar Committee to consider the Uniform Rules has advised us that they will have a report available for us near the end of January 1963. As the Commission considers each of the revised rules, the comments and suggestions of the State Bar Committee will also be considered. Inasmuch as we do not have their suggestions in hand at the moment, it will be necessary for us to send you supplemental memoranda in regard to each of the rules after we receive the State Bar's comments.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

Revised 10/14/59
11/10/59
12/10/59
5/25/61
10/16/61

Note: This is Uniform Rule 23 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 23. PRIVILEGE OF DEFENDANT

(1) [~~Every person has~~] A defendant in [~~any~~] a criminal action or proceeding [~~in which he is an accused~~] has 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)~~] [~~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.

~~[(4)--If-an-accused-in-a-criminal-action-does-not-testify,-counsel-may
comment-upon-accused's-failure-to-testify,-and-the-trier-of-fact-may-draw
all-reasonable-inferences-therefrom.]~~

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

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

URE Subdivision (1) - Privilege of Defendant

Under existing California statutes as construed by the courts, a defendant in a criminal case has a privilege not to testify and not to be called as a witness. The URE reference to "an accused" has been replaced with language more technically accurate in light of Penal Code Sections 683 and 685.

URE Subdivision (2) - Marital Privilege of Defendant in Criminal Case

The special marital privilege provided by this paragraph for a defendant in a criminal case becomes unnecessary, because the Commission has enlarged the privilege stated in Uniform Rule 28 so that in all cases a spouse has a privilege which is the substantial equivalent of that provided by paragraph (2) for a defendant in a criminal case, viz., the privilege--to prevent the exceptions comparable to those stated in paragraph (2) - to prevent the other spouse from testifying to confidential communications, which privilege survives the termination of the marriage. The Commission has, consequently, deleted the marital privilege in subdivision (2) of Uniform Rule 23.

URE Subdivision (4) - Comment on Defendant's Exercise of Privilege

Paragraph (4) of Uniform Rule 23 has been deleted because the matter of commenting on the exercise of the privilege provided by Rule 23 is covered by Rule 39.

Revised 10/14/59
11/10/59
12/10/59
6/4/61
10/16/61

Note: This is Uniform Rule 24 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 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~~] crime or public offense under the laws of this State or of the United States 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~~] crime or public offense.

COMMENT

The substance of the URE rule is approved by the Commission. However, the revised rule also provides protection against possible incrimination under a federal law, but not a law of another state or foreign country. The scope of the privilege as it now exists in California is not clear, for no decision has been found indicating whether or not the existing California privilege provides protection against incrimination under the laws of a sovereignty other than California. The inclusion of protection against possible incrimination under a federal law is desirable to give full meaning to this privilege.

The word "disclosed" has been deleted from the Uniform Rule. The witness may be aware of other matters which have not been "disclosed" but which, when taken in connection with the question asked, is a basis for a reasonable inference of such a crime or public offense under the laws of this State as to subject him to liability to conviction thereof.

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11/10/59
12/10/59
2/11/60
8/22/60
1/3/61
5/25/61
10/16/61

Note: This is Uniform Rule 25 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 25. SELF-INCRIMINATION; EXCEPTIONS.

Subject to Rule[s] 23 [~~and-37~~], every natural person has a privilege, which he may claim, to refuse to disclose [~~in-an-action-or-to-a-public-official-of-this-state-or-any-governmental-agency-or-division-thereof~~] any matter that will incriminate him, except that under this rule [;] :

[~~(a)~~-if-the-privilege-is-claimed-in-an-action]

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

[~~(b)~~] (2) No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics [;] or his physical or mental condition. [~~;-and~~]

(3) No person has the privilege to refuse to demonstrate his identifying characteristics such as, for example, his handwriting, the sound of his voice and manner of speaking or his manner of walking or running.

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

(Rule 25)

~~[(d)]~~ (5) No person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that ~~[, -by-the applicable-rules-of-the-substantive-law,]~~ some other person or a corporation ~~[,]~~ or other association or organization, owns or has a superior right to the possession of the thing ordered to be produced. ~~[, -and]~~

~~[(e)---A-public-official-or-any-person-who-engages-in-any-activity, occupation,-profession-or-calling-does-not-have-the-privilege-to-refuse to-disclose-any-matter-which-the-statutes-or-regulations-governing-the office,-activity,-occupation,-profession-or-calling-require-him-to-record-or-report-or-disclose-concerning-it;-and~~

~~(f)--A-person-who-is-an-officer,-agent-or-employee-of-a-corporation or-other-association,-does-not-have-the-privilege-to-refuse-to-disclose any-matter-which-the-statutes-or-regulations-governing-the-corporation or-association-or-the-conduct-of-its-business-require-him-to-record-or report-or-disclose;-and~~

(6) No person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection.

~~[(g)]~~ (7) Subject to Rule 21, a defendant in a criminal action or proceeding who ~~[voluntarily]~~ testifies in the action or proceeding upon the merits before the trier of fact ~~[does-not-have-the-privilege-to refuse-to-disclose-any-matter-relevant-to-any-issue-in-the-action]~~ may be cross-examined as to all matters about which he was examined in chief.

(8) Except for the defendant in a criminal action or proceeding, a witness who, without having claimed the privilege under this rule,

testifies in an action or proceeding before the trier of fact with respect to a transaction which incriminates him does not have the privilege under this rule to refuse to disclose in such action or proceeding any matter relevant to the transaction.

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12/10/59
8/29/60
1/ 3/61
5/26/61
10/16/61

RULE 25 (SELF-INCRIMINATION; EXCEPTIONS) AS

REVISED BY THE COMMISSION

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

THE PRIVILEGE

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

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

An evidentiary privilege exists only when the person questioned would, but for the exercise of the privilege, be under a duty to speak. Thus, the person who refuses to answer a question or accusation by a police officer is not exercising an evidentiary "privilege" because the person is under no legal duty to talk to the police officer.

Whether an accusation and the defendant's response thereto are admissible in evidence is a separate problem with which Uniform Rule 25 does not purport to deal. Under the California law, silence in the face of an accusation in the police station can be shown as an implied admission. On the other hand, express or implied reliance on the constitutional provision as the reason for failure to deny an accusation has recently been held to preclude the prosecutor from proving the accusation and the conduct in response thereto although other cases taking the opposite view have not been overruled. If given conduct of a defendant in a criminal case in response to an accusation is evidence which the court feels must be excluded because of the Constitution, there is no need to attempt to define these situations in an exclusionary rule in the Uniform Rules of Evidence.

A comparable situation would be where the judge orders a specimen of bodily fluid taken from a party. The rules permit this. But the Uniform Commissioners point out that "a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional rights. . . . [Thus] if the taking is in such manner as to violate the subject's constitutional right to be secure in his person the question is then one of constitutional law on that ground."

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The effect of striking out the deleted language from Uniform Rule 25 is that the rule will then apply (under Uniform Rule 2) "in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

EXCEPTIONS

In paragraph (a) of the Uniform Rule, now subdivision (1) of the revised rule, the words "if the privilege is claimed in an action" have been omitted as superfluous because the rule as revised by the Commission applies only in actions and proceedings. The reference to Rule 37 has been omitted in view of subdivisions (7) and (8), which state the existing California law as to waiver of this privilege.

Subdivision (3) has been inserted to make it clear that the defendant in a criminal case, for example, can be required to walk so that a witness can determine if he limps like the person she observed at the scene of the crime. Under subdivision (3), the privilege against self-incrimination cannot be invoked to prevent the taking of a sample of handwriting, a demonstration of the witness speaking the same words as were spoken by a criminal as he committed a crime, etc. This matter may be covered by paragraph (b), now subdivision (2), of the Uniform Rule; but subdivision (3) will avoid any problems that might arise because of the phrasing of subdivision (2).

In paragraph (d) of the Uniform Rule, now subdivision (5) of the revised rule, the exception has been revised to indicate more clearly that a corporation or other organization would be included as a person owning or having a superior right of possession. The inclusion of

"owns" is to avoid a possible problem where, for example, articles of incorporation vest exclusive custody of books and records in a corporate officer, even though they are the property of the corporation.

Subdivision (6) of the revised rule restates the acceptable parts of paragraphs (e) and (f) of the URE. The extreme feature of each of these URE subdivisions is that testimony would be compelled, probably in violation of the California Constitution.

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

The Commission has included a specific waiver provision in subdivision (8) of Rule 25. Rule 37 of the Uniform Rules provides a waiver provision that applies to all privileges. However, the waiver provision of Rule 37 would probably be unconstitutional if applied to Rule 25. Thus, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. Note that the waiver of the privilege against self-incrimination under subdivision (8) of revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit the waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the

privilege in a subsequent case even though he waived it in a previous case. The extent of waiver of the privilege by the defendant in a criminal case is indicated by subdivision (7) of the revised rule.

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9/15/59
10/16/61

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

RULE 26. LAWYER-CLIENT PRIVILEGE.

(1) As used in this rule:

(a) "Client" means a person, ~~[or]~~ corporation, ~~[or-ether]~~ association or other organization (including this State and any other public entity) that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent (i) who himself so consults the lawyer or the lawyer's representative or (ii) whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent. ~~[;]~~

(b) "Communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to ~~[a]~~ the lawyer's representative ~~[;--asseeiate-or employee-of-the-lawyer]~~ incidental to the professional relationship. ~~[;]~~

(c) "Holder of the privilege" means (i) the client when he is competent, (ii) a guardian of the client when the client is incompetent, (iii) the personal representative of the client if the client is dead and [the-privilege-available-to-a-corporation or-association-terminates-upon-dissolution-]

(iv) a successor, assign or trustee in dissolution of a corporation, partnership, association or other organization if dissolved.

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

(e) "Lawyer's representative" includes a partner, associate or employee of the lawyer.

(2) Subject to Rule 37 and except as otherwise provided ~~[by-paragraph-2-ef]~~ 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 suek]~~ the communication. ~~[,-and]~~

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

(c) ~~[to]~~ Prevent any other ~~[witness]~~ person from disclosing ~~[suek]~~ 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 this rule, the privilege under this rule may be claimed for the

client by [~~the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative,~~] the holder of the privilege or a person who is authorized to claim the privilege by the holder of the privilege.

(4) Subject to Rule 37 and except as otherwise provided in this rule, unless there is no holder of the privilege in existence, the lawyer who received or made the communication shall claim the privilege under this rule for the client unless otherwise instructed by the holder of the privilege or his representative.

(5) [~~(2) -- Such privilege shall~~] The privilege under 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 a crime or [~~a tort~~] to perpetrate or plan to perpetrate a fraud.

(6) The privilege under this rule does not extend to a communication relevant to:

(a) [~~or (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. [~~or~~]

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

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

[~~(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-when-they-have-retained-in-common-when-offered-in-an-action-between-any-of-such-clients.~~]

(7) Where two or more clients have retained a lawyer to act for them in common, none of them may claim a privilege under this rule as against the others as to communications made in the course of that relationship.

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9/15/59
10/17/61

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 subdivision of the revised rule to conform to the form of other rules. The definitions are contained in the first subdivision in other Rules. See, for example, Rules 27, 29, 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 or association "or other organization (including this State and other public entities)" are considered clients for the purpose of the lawyer-client privilege. This change makes it clear that the State, cities and other public entities have a privilege in the case of a lawyer-client relationship. This is existing law in California. *Rust v. Roberts*, 171 A.C.A. 834, 838 (July 1959) (State has privilege); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722 (1954) (city has privilege). There does not seem to be any reason why the State or any other public entity should not be entitled to the same privilege as a private client.

The definition of client has also been expanded by adding the words "other organization". The broad language of the revised rule is intended to cover such unincorporated organizations as labor unions, social clubs and fraternal organizations in those circumstances where the particular situation is such that the organization (rather than its individual members) is the client. See *Oil Workers Intl. Union v. Superior Court*, 103 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, subdivision (3) provides that the guardian of the incompetent client can claim the privilege for the incompetent client and that, when the incompetent client becomes competent, he may himself claim the privilege.

Definition of "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 Lawyer's Representative. The phrase "lawyer's representative" as used in the Uniform Rules is sufficiently ambiguous to require illustrative definition because of the importance of protecting communications made by the client or the lawyer to such persons as a lawyer's partner, associate or employee.

Definition of "holder of the privilege." The substance of the sentence in Uniform Rule 26(1) reading "the privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" has been stated in the form of a definition in subdivision (1)(c) of the revised rule. This definition substantially conforms to the definition found in Uniform Rule 27, relating to the physician-patient privilege. It makes clear who can waive the privilege for the purposes of Rule 37. It also makes subdivision (3) of the revised rule more concise.

Note that under subdivision (1)(c)(i) of the revised rule, the client is the holder of the privilege if he is competent. Under subdivision (1)(c)(ii) of the revised rule, a guardian of the client is the holder of the privilege if the client is incompetent. Under these two provisions,

an incompetent client becomes the holder of the privilege when he becomes competent. For example, if the client is a minor of 20 years of age and he or his guardian consults the attorney, the guardian under subdivision (1)(c)(iii) is the holder of the privilege until the minor becomes 21 and then the minor is the holder of the privilege himself. This is true whether the guardian consulted the lawyer or the minor himself consulted the lawyer.

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

Under subdivision (1)(c)(iv), the successor, assign or trustee in dissolution of a dissolved corporation, association or other organization is the holder of the privilege after dissolution. This changes the effect of the last sentence of URE Rule 26(1), which has been omitted from the revised rule since there is no reason to deprive such entities of a privilege when there is only a minor change in form, being merely a technical dissolution, while the substance

remains.

This definition of "holder of the privilege" should be considered with reference to subdivision (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" contained in URE Rule 26(1) has been set out in the revised rule as subdivision (2).

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

(1) The language of 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 persons authorized under subdivisions (3) and (4) 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 paragraph (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" have been inserted in paragraph (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 paragraph (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) Subdivisions (3) and (4) of the revised rule state the substance of the last sentence of Uniform Rule 26(1) reading "the privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative" with some

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changes. An introductory clause has been inserted in each subdivision 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 subdivision (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.

Also under subdivision (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.

Subdivision (4) states more clearly the substance of what is contained in URE Rule 26(1), which provides the privilege may be claimed by "the client in person or by his lawyer." Under the revised rule in subdivision (4), the lawyer must claim the privilege on behalf of the client unless otherwise instructed by the holder of the privilege or his representative. The Commission believes that, except for the mandatory nature of the claim, 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 subdivision (5) 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 subdivision (6) of the revised rule, the substance of the other exceptions to Uniform Rule 26 has been retained. None of these exceptions is expressly stated in the existing California statute. Each is, however, more or less recognized to some extent by judicial decision. The exception provided in subdivision (6)(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 client by testate or intestate succession, the Commission can perceive no basis in logic or policy for refusing to have a like rule when one or both parties claim through such client by inter vivos transaction.

The Eavesdropper Exception. Let us suppose that a switchboard operator listens in on a confidential statement made by a client to his lawyer in the course of a telephone conversation. Or suppose the client

mails a confidential letter and an interceptor steams the letter open and reads it. Or suppose a wrongdoer breaks into and enters the lawyer's office and steals the letter.

Under the so-called "Eavesdropper Exception," the switchboard operator, the interceptor and the wrongdoer 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 subdivision (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.

Joint Clients. Subdivision (7) of the revised rule states the existing California law and the rule proposed in URE paragraph (2)(e). The Commission believes it is stated more clearly in the revised rule because it avoids the possible contention that the exception applies only to a communication "made by any of" the joint clients, leaving privileged the communication made by the lawyer consulted. Also, it changes the theory of the exception from nonprivileged to unable to claim the privilege.

Note: This is Uniform Rule 27 as revised by the Law Revision Commission. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike-out material for deleted material.

RULE 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 [seek] purpose of securing a diagnosis or preventive, palliative [7] or curative treatment [7-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] any state or [jurisdiction-in-which-the-consultation-or-examination-takes-place;] nation the law of which recognizes a privilege against disclosure of confidential communications between patient and physician.

(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 [or-in-a prosecution-for-a-misdemeanor] 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 confidential communication between patient and physician [;] ; 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 [;] ; 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] in the course of its transmittal between the patient and the physician, or in a manner not reasonably to be anticipated by the patient, or as a result

of a breach of the physician-patient relationship; and

(d) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege [fer-his] by the holder of the privilege or (iii) the physician at the time of the confidential communication, who, except as otherwise provided in this rule, unless there is no holder of the privilege in existence, shall claim the privilege under this rule for the patient unless otherwise instructed by the holder of the privilege or his representative.

(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. [r-er-in]

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

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

(a) [~~b~~]-open] An issue as to the validity of a document as a will of the patient. [r-er-(e)-open]

(b) An issue between parties claiming by testate or intestate succession or inter vivos 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 in any matter of which the physician or his agent or servant gained knowledge through the communication.]~~

Revised 9/15/59
11/10/59
10/16/61

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 subdivision (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 disapproves 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. Since treatment does not always follow diagnosis, the Commission believes the limitation of diagnosis "preliminary to treatment" is undesirable. Also, inclusion of the limitation "sole" with respect to the purpose of the consultation places undue emphasis upon a collateral matter.

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. However, the Commission favors a substantive definition similar to that in revised Rule 26(1)(d) since

this state should recognize a privilege only where similarly recognized in another jurisdiction.

GENERAL RULE

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

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

(1) The "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) Subparagraph (iii) of paragraph (c) in subdivision (2) of the revised rule abolishes the eavesdropper exception. This change makes Rule 27 conform to Rule 26 in this regard.

(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 directs the physician to claim the privilege on behalf of the patient unless otherwise instructed, unless there is no holder of the privilege in existence. 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 subdivision (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 and has deleted reference to "deceased" to conform to this change. This revision 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 (subdivision (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, particularly because of the deletion of the eavesdropper exception, 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. Although this exception is a traditional one, the Commission does not believe that it is worthy of retention. The same reasons that justify abolishing this exception in the case of the lawyer-client privilege apply here.

1/14/63

Note: This is a rule that does not appear in the Uniform Rules of Evidence as recommended by the Commissioners on Uniform State Laws. The Law Revision Commission at its October, 1961, meeting decided to include the following rule among the URE privilege rules.

RULE 27.1 PSYCHOTHERAPIST-PATIENT PRIVILEGE

(1) As used in this rule:

(a) "Confidential communication between patient and psychotherapist" means such information transmitted between psychotherapist 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.

(c) "Patient" means a person who consults a psychotherapist for the purpose of securing preventive, palliative or curative treatment, or diagnosis preliminary to such treatment, of a mental or emotional condition.

(d) "Psychotherapist" means (i) a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation takes place, (ii) when the consultation takes place in this state, a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code, or (iii) when the consultation takes place

in another state or jurisdiction, a person licensed or certified as a psychologist in such state or jurisdiction if the requirements for obtaining a license or certificate in such state or jurisdiction are substantially the same as under Article 4 (commencing with Section 2940) of Chapter 6.6 of Division 2 of the Business and Professions Code.

(2) Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the judge finds that:

(a) The communication was a confidential communication between patient and psychotherapist; and

(b) The patient or the psychotherapist reasonably believed the communication to be necessary or helpful to enable the psychotherapist to make a diagnosis of the mental or emotional condition of the patient or to prescribe or render treatment therefor; and

(c) The claimant is (i) the holder of the privilege or (ii) a person who is authorized to claim the privilege by the holder of the privilege or (iii) the psychotherapist at the time of the confidential communication, who, except as otherwise provided in this rule, unless there is no holder of the privilege in existence, shall claim the privilege under this rule for the patient unless otherwise instructed by the holder of the privilege or his representative.

(3) There is no privilege under this rule:

(a) If the psychotherapist is appointed to act as psychotherapist for the patient by order of a court.

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

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

(d) As to a communication relevant to an issue between parties claiming by testate or intestate succession or inter vivos transaction from a deceased patient.

(e) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which the mental or emotional 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.

(f) If the judge finds that the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or tort or to escape detection or apprehension after the commission of a crime or a tort.

((g) As to information which the psychotherapist 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

RULE 27.1 (PSYCHOTHERAPIST-PATIENT PRIVILEGE) COMMENTS

It is the purpose of these comments to explain Rule 27.1, relating to the psychotherapist-patient privilege, as proposed to be added to the Uniform Rules by the Commission.

Rule 27.1 is based on Uniform Rule 27, relating to the physician-patient privilege, as revised by the Commission. There are, however, some important differences between the two rules. The similarities and differences are discussed in some detail below.

DEFINITIONS

Confidential communication. As under Rule 27, the privilege under Rule 27.1 attaches only if the judge finds that the communication was a "confidential communication."

Holder of the privilege. As under Rule 27, the "holder" of the privilege is the patient or his representative. As under Rule 27, the guardian of an incompetent patient is the "holder of the privilege", and the personal representative of the patient may claim the privilege if the patient is dead. A similar provision is contained in Rule 27.

Patient. The definition of patient is drawn from the definition of "patient" that appears in Rule 27. Under revised Rule 27, however, the privilege attaches even though the patient consulted the physician for purposes of diagnosis only. To accomplish this, the Commission struck the words "or a diagnosis preliminary to such treatment" from Rule 27. The words appear in Rule 27.1 because, under the Commission's directives, this privilege will attach only where the psychotherapist is consulted for treatment or for diagnosis preliminary to treatment.

Psychotherapist. "Psychotherapist" is defined as a person licensed to practice medicine or a certified psychologist. Because of the shadowy line

between organic and psychosomatic illness, the Commission did not believe that the psychotherapist-patient privilege should be limited to communications with those medical doctors who hold themselves out as specialists in the field, i.e., psychiatrists. The privilege extends to psychotherapeutic treatment given by other physicians since it is probable that disclosure in the first instance will often be made to a family physician in order for him to determine the nature of the ailment requiring specialized treatment.

Because of the general reference to persons authorized to practice medicine, it is unnecessary to mention psychiatrists specifically for they are included in the term "person authorized . . . to practice medicine."

The definition does not require that the psychotherapist who purports to be the medical doctor actually be authorized to practice medicine; it is sufficient if the person purporting to be a medical doctor is reasonably believed by the patient to be authorized to practice medicine. This follows the definition of "physician" in Rule 27. However, reasonable belief by the patient that a psychologist is licensed or certified is not sufficient. This is a departure from the general scheme of the Uniform Rules which protect patients from reasonable mistakes as to unlicensed practitioners. However, practical considerations require this departure. There are many persons who are not licensed as psychologists--psychometrists, hypnotists, grapho-analysts, marriage counsellors, bar tenders, barbers, roommates, etc.--who purport to render psychotherapeutic aid. Extending the privilege beyond certified psychologists would create virtually insurmountable problems in attempting to draft a meaningful definition of a psychotherapist. Hence, the patient who seeks psychotherapy is fully protected against unlicensed practitioners only if he consults a person purporting to be a psychiatrist or a medical doctor. Under Rule 27.1, the

patient will run the risk that a person purporting to be a psychologist is not licensed or certified as such if he consults any person other than a medical doctor.

The definition of "psychotherapist" in Rule 27.1 extends the privilege to psychologists who are not covered by the existing California Law relating to psychologists. The existing California privilege is apparently limited to psychologists certified under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code. Under Rule 27.1, on the other hand, the privilege will exist where the psychologist is licensed or certified in another state or jurisdiction.

GENERAL RULE

Actions in Which Applicable. Rule 27.1 applies in all actions and proceedings except restoration to capacity proceedings. This is a significant departure from the scheme of Rule 27 as revised by the Commission. Rule 27 applies only to civil actions in proceedings.

The Eavesdropper Doctrine. Rule 27.1 will provide protection against the interceptor, intermeddler and eavesdropper. Rule 27 as revised by the Commission provides similar protection.

Waiver. Rule 27.1 is made subject to Rule 37, relating to waiver. Of course, many patients in psychotherapy will not have the mental competence to make an intelligent waiver of the privilege. But Rule 37 provides that the right to claim a privilege may be waived by the holder of the privilege. As Rule 27.1 defines the holder of the privilege as the patient when he is competent, a guardian of the patient when he is incompetent, and the personal representative of the patient if he is dead, assurance is provided that any waiver of privilege under this Rule will be made by a person competent to

do so. The same scheme is used in Rule 27 as revised by the Commission.

Psychotherapist Claiming Privilege. Rule 27.1 permits the psychotherapist to claim the privilege for his patient if the privilege has not been waived, the patient is living and no one else claims the privilege. Rule 27 as revised by the Commission contains a similar provision.

EXCEPTIONS

Many of the exceptions are the same as exceptions to the physician-patient privilege appearing in Rule 27 and are included in this Rule for the same reasons that they appear in Rule 27.

Court-appointed psychotherapists. The exception provided in subdivision (3)(a) has been provided so that the courts may obtain necessary information in commitment proceedings. In commitment proceedings, the privilege will apply to the patient's own doctors but will not apply to those appointed by the court. On the other hand, in an action in which the patient seeks to establish his capacity or competence, the privilege does not apply for in such a proceeding the patient himself has placed the very matter in issue to which the privilege relates. In a restoration-to-capacity proceeding, the patient should not be able to silence by use of the privilege the psychotherapists who have been treating him in the hospital to which he has been committed.

Successors. The physician-patient privilege provided by Rule 27 does not apply upon an issue between parties claiming by inter-vivos transaction from a patient. Under Rule 27 as revised by the Commission, it is not essential that the patient be deceased. On the other hand, the exception provided in subdivision (3)(d) of Rule 27.1 only extends to an issue between parties claiming by inter-vivos transaction from a deceased patient

To this extent, the privilege provided by Rule 27.1 is even broader than the lawyer-client privilege, for Rule 26 does not require that the client be deceased before the exception provided in subdivision (6)(a) to apply.

Matters required to be reported. The exception contained in subdivision (3)(g) was not approved by the Commission. It was considered and action deferred pending a further report from the staff upon the extent to which psychiatrists are required to report. A similar exception appears in Rule 27, relating to the physician-patient privilege.

EXHIBIT I

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

(b) ~~[(e)-is]~~ 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. [~~or-(d)-ia~~]

(c) A criminal action or proceeding in which the accused offers evidence of a communication between him and his spouse. [~~or-(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-act] 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 ¹

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.

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Revised 12/1/59, 8/14/61

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.

EXHIBIT I

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

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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.

EXHIBIT I

RULE 33. SECRET OF STATE

~~(1)-As-used-in-this-Rule,-"secret-of-state"-means-information not-open-or-theretsfore-officially-disclosed-to-the-public-involving the-public-security-or-concerning-the-military-or-naval-organization or-plans-of-the-United-States,-or-a-State-or-Territory,-or-concerning international-relations.~~

~~(2)--A-witness-has-a-privilege-to-refuse-to-disclose-a-matter-on-the-ground-that-it-is-a-secret-of-state,-and-evidence-of-the-matter-is inadmissible,-unless-the-judge-finds-that-(a)-the-matter-is-not-a-secret-of-state,-or-(b)-the-chief-officer-of-the-department-of-government administering-the-subject-matter-which-the-secret-concerns-has-consented that-it-be-disclosed-in-the-action.~~

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 [7] :

(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 the United States~~] in the course of his duty [7] 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 [4] and that:

(a) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State [7] ; 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

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(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.

~~A witness has a privilege to refuse to disclose a communication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (a) the matter which the communication concerned was not within the function of the grand jury to investigate, or (b) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (c) disclosure should be made in the interests of justice.~~

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.

EXHIBIT I

Revised 3/1/60
12/10/59
8/14/61

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 cut 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 subdivision (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

3/11/60

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.

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Note: This proposed rule has neither been approved nor considered by the Commission. The text appearing below has been suggested for Commission consideration by the staff.

RULE 36A. NEWSMEN'S PRIVILEGE.

(1) As used in this rule:

(a) "Newsmen" means a person directly engaged in procurement or distribution of news through news media.

(b) "News media" means newspapers, press associations, wire services, and radio and television.

(2) A newsman has a privilege to refuse to disclose the source of news disseminated to the public through news media, unless the judge finds that the source has been disclosed previously or that disclosure of the source is required in the public interest.

Comments on Proposed Rule

Rule 36A is based on Rule 36 of the Uniform Rules of Evidence as revised by the Commission. This is because of the basic similarity of the proposed rule to the government informer privilege. However, there are several important differences in the two rules because of the nature of the subjects covered. These similarities and differences are discussed in some detail below.

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Purpose of rule. Like Rule 36, the primary purpose of the proposed rule is to protect the identity of informants so as to maintain confidential sources of information considered of interest to the public. The proposed rule is not definitely limited to identity of persons, however, because such language would be more restrictive than the present California statute and, strictly speaking, would exclude from coverage other means and methods of acquiring news.

Scope of rule. Just as Rule 36 is designed to include all public officers charged with the administration of laws, so the proposed rule includes most of the important channels of communication of news to the public. The arbitrary exclusion of other media reflects no logical consistency but rather parallels the coverage deemed desirable by the Legislature.

Holder of the privilege. Like Rule 36, the recipient of the information is the primary holder of the privilege. The study on the government informer privilege indicates that Rule 36 also extends the privilege to the informant and effectively protects against eavesdroppers by making evidence as to the informant's identity inadmissible. Unlike that rule, the proposed rule vests the privilege solely in the newsmen. This is because of the different considerations applicable to this rule in that the recipient is a private party not publicly charged with responsibility. Moreover, the maintenance of some difference between these two rules in this regard is thought to encourage divulging information to proper public authorities.

Moreover, a newsman's informant is very likely to be a participant or material witness in the subject activity. If other evidence points to his identity, his privilege against self incrimination is sufficient

protection if he is a participant in illegal activity. If he is a material witness, there appears to be no justifiable reason for excluding his knowledgeable testimony on the ground that he happened to communicate it to a newsman. Providing the protection for government informants may encourage disclosure to governmental authorities. No harm is perceived in such encouragement without similar aid being given newsmen.

Definition of holder. A precise definition of "newsman" other than in general terms has been purposely omitted to avoid the problems noted previously with respect to narrow distinctions. The term is broad enough to point the desirable coverage without unduly restricting the interpretation by a court. The use of the phrase "directly engaged in" is thought to eliminate incidental personages.

Application. The proposed rule is drafted in the framework of other privileges so that its specific applicability will be the same as the other privileges. If later action were taken to limit the agencies before whom a privilege could be claimed, consideration should be given to revise this coverage so that the privilege is applicable in at least the same cases as under the present statute.

Dissemination. A requirement of dissemination has been retained in the proposed statute. Despite the inherent problems engendered thereby, it is thought to be a desirable means of limiting the breadth of the statutory coverage. The use of the single word "disseminated" eliminates the specific problem created in the 1961 California amendment.

Assertion. The privilege would be available in all cases unless

the judge finds that the source has been previously disclosed or that disclosure of the source is required in the public interest.

The provision concerning previous disclosure of the source merely states the existing law with respect to waiver. Thus, if disclosure were previously made, there is no reason for permitting nondisclosure.

Similarly, if disclosure were required in the public interest, there is no justifiable reason for protecting the private interests served by nondisclosure. This provision, therefore, establishes the discretionary quality of the proposed rule. Of course, as a practical matter, newsmen's confidences would be respected the same as they are now respected, even in states without a statutory privilege. Information is gathered from other sources. But, if the only available source is the newsman himself and the activity is sufficiently serious to require public action, then the newsman should have no privilege to withhold knowledgeable testimony. Moreover, some exception is required to prevent abuse in the event a newsman is a percipient witness. For example, suppose a newsman himself observes a serious public offense and bases an expose thereon. His occupation should not shield him from bearing knowledgeable testimony on the claim that the information was supplied by an unnamed informant. An exception phrased in terms of public interest is sufficiently broad to expose this practice in any given case.

As a practical matter, the courts will be the ultimate place for determination of whether the privilege attaches. This is because the practical result of findings in contempt by other governmental

bodies is appeal to the courts for enforcement. Accordingly, it is proper to place discretionary decisional power in the hands of the judge.

In mitigation. Consideration of the problem raised with regard to a possible claim of privilege and subsequent disclosure by way of mitigation of damages demands a practical result which will preclude this possibility. Since the effect of a claim of privilege does not directly affect admissibility, it may be better to treat this problem by amending Section 461 of the CCP to the effect that disclosure of a newsman's source after a previous claim of privilege will not effectively mitigate damages.

EXHIBIT I

RULE 37 WAIVER OF PRIVILEGE.

37. A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

(1) Subject to Rule 38 and except as otherwise provided in this rule, the right of any person to claim a privilege provided by Rules 26 to 29, inclusive, is waived with respect to a specified matter protected by such privilege if any holder of the privilege, or another person with the consent of any holder, has disclosed any part of the specified matter. Consent to disclosure may be given by any words or conduct indicating a holder's assent to the disclosure, including but not limited to a failure to claim the privilege in an action or proceeding in which a holder has the legal standing and opportunity to claim the privilege.

(2) Where two or more persons are the holders of a privilege provided by Rules 26, 27, 27A or 28, the privilege with respect to a specified matter is not waived by a particular holder unless he or a person with his consent waives the privilege in a manner provided in paragraph (1) of this rule, even though another holder or another person

with the consent of another holder has waived the right to claim the privilege with respect to the same specified matter.

(3) A disclosure that is privileged under this Article is not a disclosure for purposes of this rule.

EXPLANATION OF REVISED RULE 37 (WAIVER OF PRIVILEGE)

Rule 37 relating to waiver of privilege has been revised to incorporate previous decisions by the Commission.

Limitation of Scope of Rule 37. Rule 37 is drafted to apply only to Rules 26 through 29. The revised rule does not apply to Rules 23 through 25 nor to Rules 30 through 36A.

Rule 23, relating to the right of a defendant not to testify in a criminal action or proceeding, can be waived only when the defendant offers himself as a witness in the specific action or proceeding and then the waiver is only to cross-examination on that matter testified to on direct. Thus, as far as Rule 23 is concerned, the provisions of revised Rule 37 have no application.

Rules 24 and 25 relate to the privilege against self-incrimination. Rule 24 is definitional only so that the applicability of a waiver provision is unnecessary. The addition of paragraphs (8) and (9) to revised Rule 25 adequately covers the scope of waiver as far as the privilege against self-incrimination is concerned. Accordingly, revised Rule 37 has no application to Rule 25.

Revised Rule 37 likewise has no application to the privileges provided in Rules 30 through 36A since special considerations are

applicable to these rules. These are considered in detail as follows:

(1) The confidentiality of religious belief is ordinarily protected by rules regarding relevance and materiality. But since a witness would have to rely on objection by counsel in the absence of a privilege, the Commission has determined that the witness should have a personal privilege. The privilege has been made unavailable where the witness's religious belief is material to the case. [The consultant's study indicates that there probably should be waiver with respect to this privilege (see page 3 of the study).]

(2) The confidentiality of political vote is similarly protected by rules regarding relevance and materiality. In this case, however, the Commission has determined that the witness should have a personal privilege even if his political vote is in issue unless it was illegally cast. [Like religious belief, the consultant recommended that waiver be applicable to this privilege (see page 3 of the study).]

In both of these cases, religious belief and political vote are likely to be known by others; but hearsay evidence would be inadmissible since ordinarily no exception to the hearsay rule would make these matters admissible. In any event, the Commission has determined that casual or direct revelation to others of either of these matters should not operate as a waiver. If Rule 37 applied it is likely that the privilege would in most cases have been found to have been waived.

(3) The confidentiality of trade secret is maintained without regard for waiver. This is because the definition of trade secret protects the substance of the specific rule of privilege. Depending upon judicial interpretation, disclosure of the privileged matter would

destroy the privilege as effectively as a general waiver provision.
[The consultant recommended that this privilege should be subject to waiver (see page 3 of the study).]

(4) The confidentiality of official information is maintained inviolate unless there is public disclosure. This, in effect, states a separate waiver rule so that no general waiver provision need be applicable to this privilege. Also, the substantive privilege states a rule of inadmissibility so that satisfaction of a general waiver provision would not automatically guarantee admissibility.

(5) Like the official information privilege, the privilege with respect to the identity of a government informer states its own rule of waiver so that a general waiver provision need not be applicable. Similarly, evidence is made inadmissible so that satisfaction of a general waiver provision would not guarantee admissibility.

(6) The newsmen's privilege is based upon the government informer privilege and states its own rule of waiver by previous disclosure. It does not, however, state a rule of inadmissibility because of different interests protected by the privilege. The separate statement of waiver is sufficient for this rule.

Waiver by contract. Revised Rule 37 omits the URE provision of waiver by contract. Under revised Rule 37, the fact that a patient, for example, has in an insurance application authorized his physician to disclose privileged matter does not waive the physician-patient privilege for other purposes unless disclosure is actually made pursuant to such authorization. This differs from the Uniform Rule. The Commission

can see no valid reason why an insurance applicant should not be allowed, in such a case, to make a contract authorizing disclosure without waiving the privilege in all cases. The fact that a person has applied for insurance should not be the determining factor as to whether a privilege exists in a case having no relationship to the insurance contract. On the other hand, once a disclosure is made pursuant to such authorization the seal of secrecy is broken and the holder of the privilege should no longer be able to claim it.

Two Persons Entitled To Claim Privilege at Same Time. Generally speaking, under revised Rule 37 the right to claim a privilege as to a specified matter cannot be asserted by anyone once the right to claim that privilege with respect to that matter has been waived by a holder of the privilege. However, an exception to this general rule is stated in subdivision (2) of the revised rule: Where two persons are the holders of a privilege at the same time (two spouses, two or more patients who jointly consult a physician or psychotherapist, two clients who jointly consult a lawyer) any one of the holders of the privilege may claim it unless he or a person acting on his behalf has waived the privilege. In other words, where several persons are at the same time the holders of any of those privileges a waiver by one of them with respect to a specified matter does not waive the privilege as to the others with respect to the same matter.

Examples of Nonwaiver.

Rule 26 - several clients.

(1) One client appears as a witness and is willing to disclose a confidential communication made to his attorney; another client, a party

to the proceeding who retained the lawyer jointly with the witness client, objects. Objection sustained.

(2) One client appears as a witness and testifies as to a confidential communication made to the attorney; the other client who jointly consulted the lawyer is not a party to the proceeding. In a second proceeding the first client is called upon to repeat the same testimony or the record of the previous testimony is presented. The other client, a party to the second proceeding who retained the lawyer jointly with the witness client, objects. Objection sustained.

Rule 28 - husband and wife.

(1) Husband appears as a witness and agrees to testify as to confidential communication between husband and wife. Wife objects. Objection sustained.

(2) Husband appears as a witness and testifies as to confidential communication between husband and wife; wife is not present at the time and is not a party to action or proceeding. In a second action the husband is called upon to testify as to the same communication. Husband objects. Objection overruled; he has waived. Wife objects. Objection sustained.

Rules 27 & 27A - physician or psychotherapist and patient

Two patients jointly consult a physician or psychotherapist. (For example, a husband and wife may jointly retain a physician regarding a fertility problem or a husband and wife may jointly consult a psychotherapist.) In the course of consultation a privileged communication is made to the physician or psychotherapist.

(1) Husband appears as a witness and agrees to testify as to the privileged communication. Wife objects. Objection sustained.

(2) Husband waives physician-patient or psychotherapist-patient privilege in writing. Wife does not waive privilege. In a subsequent action, wife is called to testify. Husband objects. Objection overruled. Wife objects. Objection sustained.

Consent to disclosure. The revised rule makes it clear that failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a consent to disclosure. This is existing California law.

Knowledge of the privilege. The Uniform Rule provides that a waiver is effective only if disclosure is made by the holder of the privilege "with knowledge of his privilege." The Commission has eliminated this requirement because the existing California law apparently does not require a showing that the person knew he had a privilege at the time he made the disclosure. The privilege is lost because the seal of secrecy has in fact been broken. Furthermore, if disclosure is made it indicates that the person did not himself consider the matter confidential.

Coercion in disclosure. The Uniform Rule requires that the disclosure be made without coercion. This provision has been eliminated by the Commission because Rule 38 specifically covers admissibility of a disclosure wrongfully compelled.

Privileged disclosures. The revised rule provides in subdivision (3) that a disclosure that is privileged under this Article is not a disclosure for the purpose of waiver of a privilege. Thus, a husband who consults a physician may tell his wife what he told the physician without waiving the physician-patient privilege.

Draft -- 11/10/59

Note: This is Uniform Rule 38 as revised by the Law Revision Commission. The changes in the Uniform Rules 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 1/17/63
Revised 8/29/60
Revised 12/10/59

Note: This is Uniform Rule 39 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 39. REFERENCE TO EXERCISE OF PRIVILEGES.

Subject to paragraph (3) and (4) of this rule [~~,-Rule-23,-~~] :

(1) If a privilege is exercised not to testify or to prevent another from testifying [~~,-either-in-the-action-or-~~] with respect to [~~particular matters. any matter,~~] or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege [~~,-~~] and the trier of fact may not draw any [~~adverse~~] inference therefrom as to the credibility of the witness or as to any matter at issue in such action or proceeding. [~~in these jury cases wherein the right to exercise a privilege as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular~~]

(2) The court, at the request of [~~the~~] a party [exercising the] who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, [~~may~~] shall instruct the jury [~~in support of such privilege~~] that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in such action or proceeding.

(Rule 39)

EXPLANATION OF REVISED RULE 39 (REFERENCE TO EXERCISE OF PRIVILEGE)

General comment.

The Commission approves the principle of Rule 39 except insofar as Rule 39 applies to the privilege against self-incrimination. A recognized privilege should not be impaired by giving the judge or counsel a right to comment on the exercise of the privilege to the detriment of the one exercising the privilege. Nor should the trier of fact be permitted to draw any inference from the exercise of the privilege as to the credibility of a witness or as to any matter at issue in the case. To permit comment on or inferences to be drawn from the exercise of a privilege tends to destroy the privilege. This is the existing California law.

Instruction in support of privilege mandatory.

Upon request of a party who may be adversely affected because an unfavorable inference may be drawn because a privilege has been exercised, the court is required under revised Rule 39 to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of the privilege. The Uniform Rule permits but does not require the court to give such an instruction. The Commission is unable to see why this matter should be within the court's discretion.

Nature of instruction in support of privilege.

The Commission has revised Rule 39 to state more specifically the nature of the instruction that should be given to the jury. The language of the Uniform Rule "in support of such privilege" is somewhat ambiguous. The revised rule states that the jury should be instructed "that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in such action or proceeding."

(Rule 39)

(3) In a criminal action or proceeding, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury to the extent authorized under Section 13, Article I of the California Constitution.

(4) If a party in a civil action or proceeding claims or has previously claimed the privilege to refuse to disclose particular matters at issue in such action or proceeding on the ground that such disclosure would tend to incriminate him, such claim may be commented upon by the court and by counsel and the trier of fact may draw any reasonable inference therefrom. If a witness in an action or proceeding who is not a party to such action or proceeding claims or has previously claimed the privilege to refuse to disclose particular matters at issue in such action or proceeding on the ground that such disclosure would tend to incriminate him and if such claim tends to impeach the credibility of the testimony of the witness, such claim may be commented upon by the court and by counsel and may be considered by the trier of fact as bearing on the credibility of the testimony of the witness.

(Rule 39)

Paragraphs (3) and (4).

The Commission disapproves of paragraph (4) of Rule 23 as proposed in the URE and instead has substituted paragraph (3) in Revised Rule 39 to state the substance of the portion of Article I, §13 of the California Constitution relating to comment on the 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 the Revised Rules.

Paragraph (4) is included in Revised Rule 39 to permit court and counsel to comment on the exercise of the privilege against self-incrimination, to permit the trier of fact to consider the exercise of the privilege by a non-party witness as bearing on the credibility of the testimony of the witness and to permit the trier of fact to draw any reasonable inference from the exercise of the privilege by a party to the action or proceeding.

Reference to privilege not to testify.

Paragraph (1) of Revised Rule 39 refers to a privilege not to testify or to prevent another from testifying in the action. Rule 23 is the only privilege rule which provides a privilege not to testify and under paragraph (3) of Revised Rule 39 the rule stated in paragraph (1) does not apply to Rule 23. Thus, the reference to a privilege not to testify or to prevent another person from testifying in the action has no application because none of the privileges covered by Rule 39 (1) permit a person to refuse to testify in an action or proceeding but go to the exclusion of testimony on a matter that is privileged. Thus, the phrase ", either in the action or" has been deleted from Rule

(Rule 39)

39 and other consistent adjustments made therein.

It is noted, however, that it may be necessary to restore the deleted language if the Commission incorporates the so-called marital "for and against" testimonial privilege in the Uniform Rules. The Uniform Rules provide no such privilege. But by virtue of Section 1081(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, not to have his spouse testify either for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

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.