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Memorandum 63-30

Subject: Study No. 34(L) - Uniform Rules of Evidence  
(Rules 27, 27.1, 27.2, 27.5,  
27.6 and 27.7)

At the last meeting the Commission directed the staff to revise the physician-patient and psychotherapist-patient privileges to provide a privilege for a third party, a non-patient, who gives information to a physician or psychotherapist in order to enable a therapist to treat or diagnose a patient. If the communication from the third party relates solely to the third party's condition, the Commission decided that the third party alone should be the holder of the privilege. So far as any other statements from the third party are concerned, the privilege should be held jointly by the patient and the third party. In order to accomplish this, it has been necessary to create four new privileges. Two of these privileges are related to the physician-patient privilege and two are related to the psychotherapist-patient privilege. It has been necessary to create new privileges because it is impossible to accomplish the Commission's directives in any other way. The holders differ from privilege to privilege, the nature of the information communicated differs from privilege to privilege and it seems likely that the exceptions will differ from privilege to privilege--although the Commission did not consider in detail which exceptions would be applicable.

Attached to this memorandum are the following exhibits:

Exhibit I (goldenrod paper)--Proposed Rules 27.1, 27.2, 27.6 and 27.7

Exhibit II (yellow paper)--Chart Comparing Physician-Patient, Psychotherapist-Patient and Third Party Privileges, Revised Rules 27, 27.1, 27.2, 27.5, 27.6 and 27.7.

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Exhibit III (pink paper)--Excerpt from 8 Wigmore on Evidence (3d ed. 1940), pp. 64-67.

The URE proposed but four communications privileges--Rules 26 through 29. The Commission has now recommended nine communications privileges including a psychiatrist-patient privilege and four third party privileges. There are certain technical criticisms to be made of these. The details of the third party privileges are discussed later in the memo, but certain problems are inherent in the nature of the privileges that have been created. For example, how is a judge without hearing the statement itself ever going to distinguish between a statement that relates solely to the condition of the third party and a condition that does not relate solely to the condition of the third party when he is required to determine whether the privilege is being claimed by the right person or has been waived by the holder?--or does the fact that subdivision (4)(a) of these rules requires the judge to make his determination "from evidence apart from the communication itself" imply that he may require revelation of the communication to determine the applicability of a privilege or an exception mentioned in one of the other subdivisions? But there is a fundamental objection that too much privilege is being created. It appears that the Commission has been pushing the logic of the privileges to cover remote possibilities until the result is so complex that few will be able to understand it and none will be able to apply it.

There is attached to this memorandum as Exhibit III (pink paper) an excerpt from the third edition of 8 Wigmore on Evidence. It would

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be worth your while to read it. It argues that each individual's right to justice is dependent upon the duty of every member of the community to give evidence when the course of justice requires the investigation of the truth. As privileges are but exemptions from this duty to give evidence, and as justice depends upon the duty to give evidence, privileges are to be strictly construed and discountenanced.

In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not preserved in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice. [8 Wigmore (3d ed.)at 67].

This passage seems directed at the Law Revision Commission-- except that it was written in 1939. Many times in the last few meetings, the Commission has extended privileges beyond any recommendation of the Uniform Law Commissioners or anyone else reporting to the Commission that is concerned with the problem. No consideration seems to be given whether the extension being considered is really necessary to encourage the communications we are seeking to encourage or whether the encouragement being provided is more important than justice. Yet, that is the only justification for any privilege at all since the privilege inherently stifles

inquiry into truth. On principle, privileges should be extended only so far as it is absolutely necessary to do so in order to protect some relationship which is considered of greater importance than is justice. Yet we act as if "justice for all" were of little value and that privacy--or tactical devices to protect persons from the consequences of their acts--should be maintained at all costs.

So far as psychiatrists are concerned, it appears that the Commission has correctly concluded that society would be better served by recognizing a privilege. As is pointed out in the second full paragraph on page 6 of Exhibit I (yellow pages) of Memorandum 63-7, persons whose mental problems frequently give rise to serious anti-social behavior sometimes decline treatment because the psychotherapist cannot assure confidentiality. Since, then, society must suffer either from a lack of justice in a particular case or a lack of treatment in a particular case, it seems to be a justified conclusion from the information we have received a greater good will be accomplished by creating a privilege so that these persons will accept treatment.

There is apparently some problem, too, so far as communications from third parties are concerned. But no one has communicated to the Commission a sufficiently severe problem to warrant the creation of four new privileges. It seems to the staff that the solution proposed by the Special Commissions on Insanity and Criminal Offenders is adequate to solve the problem without creation of all the new privileges and the complexities inherent in them.

The Special Commissions' recommendation, based on a statute drafted with the assistance and advice of the American Psychiatric Association, includes within the definition of confidential communications communications between members of the patient's family and the psychiatrist. Their statute provides that the patient, or an authorized representative, may claim the privilege. In this respect, their statute is essentially the same as the Commission's proposal. But their proposed statute defines an authorized representative to be any person whose communications are made privileged under the statute, thus including the family members as well as the psychiatrist. And such persons are authorized under that statute to claim the privilege only "until given permission by the patient to make disclosure."

This proposal has several advantages over the Commission's proposal. There is only one holder, the patient. Therefore, it is unnecessary to frame a new privilege with many exceptions relating to guardianship proceedings for the third party, proceedings to establish the competency of the third party, proceedings between parties who claim through the third party, proceedings involving the intention of a deceased third party in respect to a dispositive instrument, etc. Moreover, there is no need for the judge to distinguish between a statement relating to the third party's condition and relating to any other subject.

The Commission's basic physician-patient and psychotherapist-patient privilege rules, with but slight modification, can be readily adjusted to include this portion of the Special Commissions' proposal.

Of course, a logical argument can be made that we are trying to encourage the communications from the third party and therefore it is necessary to assure him that he has the right to prevent further disclosure. But, until there is a demonstrated problem in this area, it seems to the staff that the interest of society is better served by not creating additional privileges. Therefore, the staff recommends that the four new privileges be scrapped and that the definition of confidential communication in Rules 27 and 27.5 be revised to include communications between members of the patient's family and the physician or psychotherapist, and that such family members be defined as authorized representatives for the purpose of claiming the privilege until given permission by the patient to make disclosure or until there is no holder in existence.

If the Commission accepts the foregoing recommendation, there is no need to consider the third party privileges in detail. If detailed consideration is to be given to these rules, you will find Exhibit II (yellow paper) to be helpful. Exhibit II is a chart comparing the provisions of Rules 27 through 27.7. The chart points out the differences between the various rules, but the following is offered as an explanation as to why these differences appear:

Confidential Communication. In subdivision (1)(a) of Rules 27 and 27.5 "confidential communication" is defined as information transmitted between the patient and the therapist. In the third party privileges, "confidential communication" is defined as information transmitted from the third party to the therapist. It was believed

that the third party privileges are concerned only with protecting communications from the third party. Protection for the communications from the therapist is provided by the addition of subdivision (4) to Rule 37.

Definitions and General Rule. The remaining differences in subdivisions (1) (definitions) and (2)(general rule) are essential in that the privileges under Rules 27.1 and 27.6 are held only by the third party, whereas the privileges under Rules 27.2 and 27.7 are jointly held. Underlying differences between the physician-patient privilege and the psychiatrist-patient privilege have also been carried forward into these third party privileges. Hence, the third party privileges apply only in civil actions insofar as the third party-physician privileges are concerned but the third party privileges apply in all judicial proceedings insofar as the third party-psychotherapist privileges are concerned.

Parties claiming under another. The differences between the various subdivisions (4)(b) also reflect a basic difference between the physician-patient privilege and the psychotherapist-patient privilege. Thus, Rules 27.1 and 27.2 refer to any third party through whom the parties are claiming whereas in Rules 27.6 and 27.7 the third party must be deceased. We were a little uncertain as to whom the parties should be claiming through before the exception applied. Inasmuch as the communications involved are from the third party, and it is the third party whom we are encouraging to communicate, it seemed logical to require that the parties be claiming through the

third party. This conclusion seemed to be clear enough insofar as Rules 27.1 and 27.6 are concerned, for the communications in those privileges relate solely to the condition of the third party and the third party himself is the sole holder. The decision is not so clear in regard to Rules 27.2 and 27.7, for there the communications do not relate solely to the condition of the third party, and the patient is also a holder of the privilege. Thus, the fact that the parties claim through the third party will have the effect of depriving the patient of his privilege. We decided to require that the parties claim only through the third party in order to avoid introducing additional complexity.

Dispositive instruments. The dispositive instruments exceptions in the third party privileges have been confined to dispositive instruments executed by the third party. This decision seemed fairly easy when we were considering Rules 27.1 and 27.6, which concern statements relating solely to the condition of the third party. It was not so easy in connection with Rules 27.2 and 27.7, for the statements there do not relate solely to the condition of the third party. Possibly in these latter rules, the exceptions should be for dispositive instruments executed by either a deceased third party or a deceased patient.

Competency proceedings. The proceedings to establish competency exceptions vary according to the subject matter of the protected statements. Thus, Rules 27.1 and 27.6 refer to proceedings to establish the competence of the third party inasmuch as the statements involved relate solely to the third party's condition. The exceptions



in Rules 27.2 and 27.7 refer to proceedings to establish the competency of either the patient or the third party.

Civil damages for criminal conduct. The damages actions for criminal conduct exception contained in the physician-patient privilege has been carried over into the third party-physician privileges (Rules 27.1 and 27.2), although the need for encouraging the communications in these situations might indicate a different rule.

Tender of issue of condition. The tender of condition exceptions vary from rule to rule according to the communicator involved in each rule. So far as Rules 27.2 and 27.7 are concerned, we did not think that a third party would want his privilege waived merely because the patient had placed the patient's condition in issue; for even though the statement might relate to the patient's condition it also might relate to the third party's condition.

Court-appointed consultants. The omission of the court-appointed consultant exceptions in the physician privileges merely reflects the fact that the Commission did not include such an exception in the physician-patient privilege.

Required information. The required information exceptions vary according to the communicator involved. Thus, in all of the third party privileges the exception applies as to information required to be reported by either the therapist or the third party.

Criminal cases. So far as criminal cases are concerned, the third party privileges follow the physician-patient and psychotherapist-patient privileges.

Joint patients. The joint patient exception did not seem to fit the third party privileges stated in Rules 27.1 and 27.6. Nevertheless, it seems that the third party and the patient are little different in principle than joint patients or persons consulting a physician upon a matter of common concern. Therefore, the joint patient exception appears in Rules 27.1 and 27.6 as an exception as between the patient and the third party. In Rules 27.2 and 27.7 we have both a third party communicator and a possibility of joint patients who are also holders of the privilege; therefore, we included both the joint patient exception and the comparable exception framed for Rules 27.1 and 27.6

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

EXHIBIT I

Memorandum No. 63-30

URE Privileges

RULE 27.1. COMMUNICATION TO PHYSICIAN RELATING TO CONDITION OF  
PERSON NOT A PATIENT

(1) As used in this rule:

(a) "Confidential communication between third party and physician" means information transmitted in confidence from a person, not a patient, by a means which, so far as such person is aware, discloses the information to no persons other than those with an interest in the matter or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, to a physician in order that the physician may diagnose or administer treatment for a patient.

(b) "Holder of the privilege" means the third party when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead.

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

(d) "Physician" means a person authorized, or reasonably believed by the third party to be authorized, to practice medicine in any state or nation.

(e) "Third party" means a person who makes a confidential communication between third party and physician.

(2) Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege in a civil

action or proceeding to refuse to disclose and to prevent another from disclosing a communication if he claims the privilege and the judge finds that the communication was a confidential communication between third party and physician relating solely to the condition of the third party, and that the person claiming the privilege is:

(a) The holder of the privilege, or

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

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The physician who received a communication subject to the privilege under this rule shall claim the privilege for the third party whenever (a) the physician is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe 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.

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

(c) As to a communication relevant to an issue of breach of duty by the physician to his patient or the patient to his physician.

(d) As to a communication relevant to an issue concerning the intention of a deceased third party with respect to a deed of conveyance, will or other writing, executed by the third party, purporting to affect an interest in property.

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will or other writing, executed by a deceased third party, purporting to affect an interest in property.

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

(g) In an action or proceeding brought by or on behalf of the third party in which he seeks to establish his competence.

(h) In an action or proceeding to recover damages on account of conduct of the third party which constitutes a criminal offense.

(i) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the condition of the third party has been tendered by the third party or by any party claiming through or under the third party or claiming as his beneficiary through a contract to which the third party is or was a party.

(j) As to information which the physician or third party 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

specifically provides that the information shall not be disclosed.

(k) In an action or proceeding between the patient and the third party.

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#27.1

RULE 27.2. COMMUNICATION TO PHYSICIAN BY PERSON NOT A PATIENT

(1) As used in this rule:

(a) "Confidential communication between third party and physician" means information transmitted in confidence from a person, not a patient, by a means which, so far as such person is aware, discloses the information to no persons other than those with an interest in the matter or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, to a physician in order that the physician may diagnose or administer treatment for a patient.

(b) "Holder of the privilege" means the third party when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead, and the patient when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead.

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

(d) "Physician" means a person authorized, or reasonably believed by the third party to be authorized, to practice medicine in any state or nation.

(e) "Third party" means a person who makes a confidential communication between third party and physician.

(2) Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege in a civil



action or proceeding to refuse to disclose and to prevent another from disclosing a communication if he claims the privilege and the judge finds that the communication was a confidential communication between third party and physician, that the communication did not relate solely to the condition of the third party, and that the person claiming the privilege is:

(a) One of the holders of the privilege, or

(b) A person who is authorized to claim the privilege by one of the holders of the privilege, or

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by all existing holders of the privilege.

(3) The physician who received a communication subject to the privilege under this rule shall claim the privilege whenever (a) he is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe 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.

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

(c) As to a communication relevant to an issue of breach of duty by the physician to his patient or the patient to his physician.

(d) As to a communication relevant to an issue concerning the intention of a deceased third party with respect to a deed of conveyance, will or other writing, executed by the third party, purporting to affect an interest in property.

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will or other writing, executed by a deceased third party, purporting to affect an interest in property.

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

(g) In an action or proceeding brought by or on behalf of either the patient or the third party in which such person seeks to establish his competence.

(h) In an action or proceeding to recover damages on account of conduct of the third party which constitutes a criminal offense.

(i) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the condition of the third party has been tendered by the third party or by any party claiming through or under the third party or claiming as his beneficiary through a contract to which the third party is or was a party.

(j) As to information which the physician or the third party 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 specifically provides that the information shall not be disclosed.

(k) In an action or proceeding between patient and third party.

(5) Where two or more patients have consulted a physician upon a matter of common interest, none of them may claim a privilege under the rule as against the others as to communications made by a third party relating to that matter.

RULE 27.6. COMMUNICATION TO PSYCHOTHERAPIST RELATING TO CONDITION OF PERSON NOT A PATIENT

(1) As used in this rule:

(a) "Confidential communication between third party and psychotherapist" means information transmitted in confidence from a person, not a patient, by a means which, so far as such person is aware, discloses the information to no persons other than those with an interest in the matter or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, to a psychotherapist in order that the psychotherapist may diagnose or administer treatment for a patient.

(b) "Holder of the privilege" means the third party when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead.

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

(d) "Psychotherapist" means (i) a person authorized, or reasonably believed by the third party to be authorized, to practice medicine in any state or nation, (ii) 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) a person licensed or certified as a psychologist in another 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.

(e) "Third party" means a person who makes a confidential communication between third party and psychotherapist.

(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 the communication was a confidential communication between third party and psychotherapist relating solely to the condition of the third party, and that the person claiming the privilege is:

(a) The holder of the privilege, or

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

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the holder of the privilege or his representative.

(3) The psychotherapist who received a communication subject to the privilege under this rule shall claim the privilege for the third party whenever (a) the psychotherapist is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe the services of the psychotherapist 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.

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

(c) As to a communication relevant to an issue of breach of duty by the psychotherapist to his patient or the patient to his psychotherapist.

(d) As to a communication relevant to an issue concerning the intention of a deceased third party with respect to a deed of conveyance, will or other writing, executed by the third party purporting to affect an interest in property.

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will or other writing, executed by a deceased third party, purporting to affect an interest in property.

(f) In an action or proceeding brought by or on behalf of the third party in which he seeks to establish his competence.

(g) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the condition of the third party has been tendered by the third party or by any party claiming through or under the third party or claiming as his beneficiary through a contract to which the third party is or was a party.

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

(i) As to information which the psychotherapist or third party 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.

(j) As to evidence offered by the accused in a criminal action or proceeding.

(k) In an action or proceeding between the patient and the third party.

RULE 27.7. COMMUNICATION TO PSYCHOTHERAPIST BY PERSON NOT A PATIENT

(1) As used in this rule:

(a) "Confidential communication between third party and psychotherapist" means information transmitted in confidence from a person, not a patient, by a means which, so far as such person is aware, discloses the information to no persons other than those with an interest in the matter or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted, to a psychotherapist in order that the psychotherapist may diagnose or administer treatment for a patient.

(b) "Holder of the privilege" means the third party when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead, and the patient when he is competent, his guardian or conservator when he is incompetent, and his personal representative when he is dead.

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

(d) "Psychotherapist" means (i) a person authorized, or reasonably believed by the third party to be authorized, to practice medicine in any state or nation (ii) 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) a person licensed or certified as a psychologist in another 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.

(e) "Third party" means a person who makes a confidential communication between third party and psychotherapist.

(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 the communication was a confidential communication between third party and psychotherapist, that the communication did not relate solely to the condition of the third party, and that the person claiming the privilege is:

(a) One of the holders of the privilege, or

(b) A person who is authorized to claim the privilege by one of the holders of the privilege, or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by all existing holders of the privilege.

(3) The psychotherapist who received a communication subject to the privilege under this rule shall claim the privilege whenever (a) he is authorized to claim the privilege under paragraph (c) of subdivision (2) of this rule and (b) he is present when the communication is sought to be disclosed.

(4) There is no privilege under this rule:

(a) If the judge finds from evidence apart from the communication itself that there is reasonable grounds to believe the services of the

psychotherapist 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.

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

(c) As to a communication relevant to an issue of breach of duty by the psychotherapist to his patient or the patient to his psychotherapist.

(d) As to a communication relevant to an issue concerning the intention of a deceased third party with respect to a deed of conveyance, will or other writing, executed by the third party, purporting to affect an interest in property.

(e) As to a communication relevant to an issue concerning the validity of a deed of conveyance, will or other writing, executed by a deceased third party, purporting to affect an interest in property.

(f) In an action or proceeding brought by or on behalf of either the patient or the third party in which such person seeks to establish his competence.

(g) In an action or proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the mental or emotional condition of the third party has been tendered by the third party or by any party claiming through or under the third party or claiming as his beneficiary through a contract to which the third party is or was a party.

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

(i) As to information which the psychotherapist or third party 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.

(j) As to evidence offered by the accused in a criminal action or proceeding.

(k) In an action or proceeding between the patient and the third party.

(5) Where two or more patients have consulted a psychotherapist upon a matter of common interest, none of them may claim a privilege under this rule as against the others as to communications made by a third party relating to that matter.

EXHIBIT II

Memorandum 63-30

COMPARISON OF RULES 27, 27.1, 27.2, 27.5, 27.6 and 27.7, THE THERAPIST PRIVILEGES  
 ("TP" means third party)

27	27.1	27.2	27.5	27.6	27.7
(1) DEFINITIONS					
(a) "Confidential communication" means information transmitted between patient and consultant may be made in presence of interested persons and incl. advice from consultant	(a) "Confidential communication" means information transmitted from TP to consultant, does not include advice from consultant	(a) Same as 27.1	(a) Same as 27	(a) Same as 27.1	(a) Same as 27.1
(b) "Holder" is patient or representative	(b) "Holder" is TP or representative	(b) "Holder" is both TP or representative and patient or representative	(b) Same as 27	(b) Same as 27.1	(b) Same as 27.2
_____	(c) "TP" means non-patient communicator	(c) Same as 27.1	_____	(c) Same as 27.1	(c) Same as 27.1

27	27.1	27.2	27.5	27.6	27.7
<b>(2) GENERAL RULE</b>					
(2) Applies in civil actions only	(2) Applies in civil actions only, communication must relate solely to TP	(2) Applies in civil actions only, communication must not relate solely to TP	(2) Applies to all judicial proceedings	(2) Applies to all judicial proceedings, communication must relate solely to TP	(2) Applies to all judicial proceedings, communication must not relate solely to TP
(a) May be claimed by holder	(a) Same as 27	(a) May be claimed by either holder	(a) Same as 27	(a) Same as 27	(a) Same as 27.2
(b) May be claimed by person authorized by holder	(b) Same as 27	(b) May be claimed by person authorized by one of holders	(b) Same as 27	(b) Same as 27	(b) Same as 27.2
(c) Consultant may claim unless otherwise instructed by holder	(c) Same as 27	(c) Consultant may claim unless otherwise instructed by all holders	(c) Same as 27	(c) Same as 27	(c) Same as 27.2
<b>CONSULTANT'S DUTY TO CLAIM</b>					
(3) Consultant must claim when authorized and present	(3) Same as 27	(3) Same as 27	(3) Same as 27	(3) Same as 27	(3) Same as 27

27	27.1	27.2	27.5	27.6	27.7
<b>(4) EXCEPTIONS</b>					
(a) Plan to commit crime or tort	(a) Same as 27	(a) Same as 27	(a) Same as 27	(a) Same as 27	(a) Same as 27
(b) Between parties who claim through patient	(b) Between parties who claim through TP	(b) Same as 27.1	(b) Between parties who claim through deceased patient	(b) Between parties who claim through deceased TP	(b) Same as 27.6
(c) Breach of duty by patient to consultant or consultant to patient	(c) Same as 27	(c) Same as 27	(c) Same as 27	(c) Same as 27	(c) Same as 27
(d)(e) Intention of deceased patient in re, or validity of, dispositive instrument	(d)(e) Intention of deceased TP in re, or validity of, dispositive instrument	(d)(e) Same as 27.1	(d)(e) Same as 27	(d)(e) Same as 27.1	(d)(e) Same as 27.1
(f) Commitment or guardianship proceedings for patient	(f) Commitment or guardianship proceedings for TP	(f) Commitment or guardianship proceedings for either TP or patient	No provision	No provision	No provision
(g) Proceedings to establish competence of patient	(g) Proceedings to establish competence of TP	(g) Proceedings to establish competence of either patient or TP	(f) Same as 27	(f) Same as 27.1	(f) Same as 27.2

27	27.1	27.2	27.5	27.6	27.7
(h) Actions for damages on account of patient's criminal conduct	(h) Actions for damages on account of TP's criminal conduct	(h) Same as 27.1	No provision	No provision	No provision
(i) Where issue of patient's condition has been tendered by patient	(i) Where issue of TP's condition has been tendered by TP	(i) Same as 27.1	(g) Same as 27	(g) Same as 27.1	(g) Same as 27.1
No provision	No provision	No provision	(h) Where consultant appointed by court	(h) Same as 27.5	(h) Same as 27.5
(j) Information required to be reported by consultant or patient	(j) Information required to be reported by consultant or TP	(j) Same as 27.1	(i) Same as 27	(i) Same as 27.1	(i) Same as 27.1
No provision. Not applicable in criminal cases	No provision. Not applicable in criminal cases	No provision. Not applicable in criminal cases	(j) Evidence offered by accused in criminal case	(j) Same as 27.5	(j) Same as 27.5
(5) Not applicable between patients consulting on matter of common interest	(k) Not applicable between patient and TP	(k) Not applicable between patient and TP; (5) not applicable between joint patients	(5) Same as 27	(k) Same as 27.1	(k), (5) Same as 27.2

EXCERPT FROM 8 WIGMORE ON EVIDENCE (3d. ed. 1940), PP. 64-67

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule:

[Quotations on right of every man to have every other person testify.]

1. From the point of view of the duty here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may . . . be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon.

2. From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole,--from justice as an institution, and from law and order as indispensable elements of civilized life. The dramatic features of the daily court-room tend to obscure this; the matter seems to be between neighbor Doe and neighbor Roe; we are prone to shape our own course by the merits of the one or the other of their causes. But the right merely happens to be exemplified in the case of Doe v. Roe; that is all. The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue



without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal; but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.

3. It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.