7/30/59

I N T R O D U C T I O N

This memo is a study of the following rules:

Rule 29. Priest-Penitent Privilege.

Rule 30. Religious Belief.

Rule 31. Political Vote.

Rule 32. Trade Secret.

Rule 33. Secret of State

Rule 34. Official Information

Rule 35. Communication to Grand Jury.

Rule 36. Identity of Informer.

RULE 29. PRIEST-PENITENT PRIVILEGE

Rule 29 provides:

> "(1) As used in this rule, (a) '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 by members of his church, denomination or organization; (b) 'penitent' means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) '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 is a member.
>
> (2) 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, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent."

The parallel California provision is C.C.P. § 1881 (3), which provides as follows:

> "A clergyman, priest or religious practitioner of an established church can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs."

We give below a comparison of Rule 29 and § 1881 (3). There is almost a total dearth of precedent construing § 1881 (3).[1] Therefore, the comparison is necessarily based upon apparent meaning rather than upon adjudicated meaning.

Denominational limitations.

Under both 29 and 1881 (3) one requisite of the privilege is a minister of a church the discipline of which recognizes penitential communications. 1881 (3) expresses this thought by requiring that the communication to the minister be "in his professional character in the course of discipline enjoined by the church to which he belongs". 29 (1) expresses the thought by defining "priest" as one "who in the course of [the] discipline or practice of [his church] is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his [church]".

Manifestly, both provisions cover priests of the Catholic and High Episcopal Church, because these churches clearly recognize the private confessional as a regular religious practice. Other faiths, however, may or may not be included, depending in each case upon the special discipline of the faith in question.

Confidentiality.

29 (1) (c) expressly requires "a confession . . . made secretly". Although 1881 (3) does not expressly mention secrecy, it does require a confession to a minister "in his professional character". Probably it would be held that this professional relationship does not exist unless the communication is secret and confidential.

Confession.

29 (1) (c) requires "a confession of culpable conduct". 1881 (3) requires simply a "confession". Probably in both provisions the term "confession" is used in the ecclesiastical sense of confession of sin, rather than in the ordinary legal sense of confession of crime.

Penitent as witness.

Under both 29 and 1881 (3) the penitent may, of course, prevent the priest from making disclosure of the privileged matter. 29 expressly provides, further, that the penitent may himself refuse to make the disclosure when he is the witness. 1881 (3) is silent on this latter aspect of the privilege, but, no doubt, this feature would be read into 1881 (3), as it has been read into 1881 (2) with reference to client as witness.[2]

Whose Privilege?

29 (2) gives the privilege to the penitent. By analogy to the rule that the client possesses the attorney-client privilege

and the patient the physician-patient privilege,[3] it would probably be held that the penitent is sole possessor of the 1881 (3) privilege.

Conclusion.

No substantive differences between Rule 29 and 1881 (3) have been discovered. It seems, therefore, that adoption of Rule 29 would not change the present California law of priest-penitent privilege.

RULE 30. RELIGIOUS BELIEF

Rule 30 provides:

> "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 other than that of his credibility as a witness."

Let us suppose a defendant charged with murder takes the stand and testifies to an alibi. The D.A. then cross-examines as follows:

Q. Do you realize that you are under oath?

A. Yes I do.

Q. Well, now, I ask you: What is your religion?

Rule 30 gives defendant the privilege to refuse to answer. Although some possible answers (such as "I am an atheist" or "I am a free-thinker" or whatnot) might be thought to impeach defendant's credibility,[4] defendant is nevertheless privileged to refuse to answer the inquiry.

McCormick eloquently states as follows the rationale for this privilege:

"The history of modern Europe whence our people come is the history of religious persecution. From this derives a strong common feeling of revulsion against interrogation of a man about his religious beliefs. Often in our history have such inquiries been the aftermath of the rack and the prelude to the flaming faggot There is a feeling also that such inquiries into faith offend against the dignity of the individual. Moreover, the disclosure of atheism or agnosticism, or of affiliation with some new strange or unpopular sect, will often in many communities be fraught with intense prejudice. For all these reasons many states recognize a privilege of the witness not to be examined about his own religious faith or beliefs, except so far as the judge in his discretion finds that the relevance of the inquiry upon some substantive issue in the case outweighs the interest of privacy and the danger of prejudice."[5]

McCormick gives the following illustration of the exception to Rule 30, whereby a person has no privilege when his religious belief is material to an issue in the case: a personal injury plaintiff required to reveal her belief in Christian Science and required to state whether such belief caused her to refuse to take prescribed medicine, such revelation and statement being relevant on the issue of damages.[6]

Wigmore supports the privilege[7] as does the A.L.I. Model Code of Evidence.[8]

No local authority recognizing this privilege has been found. However, it is believed that if we do not now have the privilege, we should have it. Approval of Rule 30 is, therefore, recommended.

RULE 31. POLITICAL VOTE

Rule 31 provides:

"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."

Rule 31 copies Model Code Rule 225. The official comment on the latter is as follows:

> "This Rule is generally accepted. It is deemed necessary to preserve the secrecy of the ballot."

Wigmore is of like opinion. He, too, supports the privilege as "a corrollary of the secrecy of the ballot".[9]

Although no local cases germane to this privilege have been found, it seems probable that the California courts would recognize the privilege if the occasion for doing so presented itself.

Approval of Rule 31 is recommended.

RULE 32. TRADE SECRET

Rule 32 provides:

> "The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."

A perhaps typical case involving this privilege is the Missouri case of Putney v. Du Bois Co.,[10] in which the situation was as follows:

> Plaintiff was dish-washer at the lunch counter in a Department Store. The Store purchased a Dishwashing Compound from Defendant. Plaintiff claims that the use of the Compound by her resulted in injuries to her hands. In a discovery proceeding plaintiff sought to require defendant to answer an interrogatory as to the ingredients and proportions thereof used in the Compound.

Defendant resisted answering on the ground that the information sought was a trade secret.

The nature, scope and rationale of the privilege thus asserted by defendant is expounded as follows by Wigmore:

> "In a day of prolific industrial invention and active economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense, and the like.
>
> Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as trade secrets. . . .
>
> What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, Courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can hardly be ventured."11

In the Putney case supra the Missouri court held that plaintiff's need of the information (the need to make a prima facie case of causal connection between use of the compound and her injury) prevailed over defendant's interest in keeping its formula secret. On the other hand, in Spain v. U.S. Rubber Co.,[12] the New Hampshire Court held upon facts similar to those of the Putney case that defendant need not reveal its formula.

These cases emphasize (as is suggested in the Comment on Rule 32) that the "limits of the privilege are uncertain".

A provision of our 1957 Discovery Act involves at least indirect recognition of the existence in this state of the trade-secrets privilege. C.C.P. § 2019 (b) provides in part ". . . the court . . . may make an order that . . . secret processes, developments, or research need not be discovered . . ."[13]

Approval of Rule 32 is recommended.

RULE 33. SECRET OF STATE

The text of Rule 33 is:

> "(1) As used in this Rule, 'secret of state' means information not open or theretofore 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."

According to McCormick, it "is generally conceded that a privilege and a rule of exclusion should apply in case of writings and information constituting military or diplomatic secrets of state".[14] Rule 33 is thus a codification of this consensus. Below we analyze the rule from the various points of view indicated by the italicized subtitles.

What is a "Secret of State"?

Rule 33 answers this question in these terms: "information not open or theretofore officially disclosed to the public involving the public security[15] or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations". This description in general terms seems intended to apply to such specific matters as the following: a contract to engage in espionage for the government;[16] blue-prints of armor-piercing shells;[17] drawings of a military range finder;[18] plane accident report referring to secret electronic equipment aboard the plane.[19]

Procedure in determining whether a matter is a Secret of State.

Under Rule 33 (2) (a) a matter is admissible (so far as 33 is concerned) if the judge finds that such matter is not a secret of state. Thus the judge is not bound by the conclusion of an executive officer that the matter is a secret of state but must himself make an independent finding.[20] This, according to McCormick, is in accord with the "preponderance of view among the lower federal courts and among the writers [which view supports] the judge's power and responsibility for inquiry as opposed to the conclusiveness of the claim of privilege by the executive".[21] The Supreme Court of the United States is of like opinion. Witness the statement in Reynolds v. U.S.,[22] to the effect that "the court itself must determine whether the circumstances are appropriate for the claim of privilege".

Does the judge possess power to require disclosure in camera of the disputed matter as a preliminary to his decision on whether the matter is or is not a secret of state? According to the Supreme Court, the answer seems to be "Yes", with a caveat, however, that the power is to be cautiously and sparingly exercised. As Vinson, puts it in Reynolds v. U.S.:[23]

> ". . . Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

Suppose the judge finds that the disputed matter is a secret of state but is absolutely necessary to a plaintiff to enable him to make a prima facie case. Under Rule 33 the judge must exclude the evidence, for such evidence "is inadmissible unless the judge finds thatn. . . the matter is not a secret of state". This accords with Vinson's dictum in Reynolds to the following effect: ". . . even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake".

Who may invoke Rule 33?

Part V of the U.R.E. is entitled "Privileges". Rules 23-32, being the first group of rules in Part V, are all framed solely in

terms of privilege. By way of contrast, Rule 33 is phrased in terms of both privilege and inadmissibility, (i.e., 33 (2): "A witness has a privilege . . . , and evidence of the matter is inadmissible . . .")

The comment to A.L.I. Rule 227 (on which Rule 33 is based) explains this phrasing as follows:

> "This Rule . . . is phrased in terms of privilege and of admissibility, so that either the witness or a party may object to a question calling for disclosure. If both the witness and the parties desire the disclosure, still the judge . . . may prevent it."25

To illustrate the impact of this phrasing, let us suppose as follows: Civil action of P v. D. At the trial P calls an underling in an executive department to testify to a classified matter. The witness does not object. D, however, does object. Objection overruled. D appeals from a judgment for P, assigning as error the overruling of D's objection. Now if Rule 33 were a rule of privilege only, D could not obtain a reversal of the judgment. Rule 40 provides:

> "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege."

Supposing Rule 33 to be only a rule of privilege and supposing further that such privilege is possessed only by the witness, the overruling of D's objection would not be error and D could not obtain reversal of the adverse judgment.

The situation changes, however, when 33 becomes (as it is) a Rule both of privilege and of inadmissibility. Now 33 operates like any other rule of inadmissibility (e.g. the hearsay rule) and D is, of course, in a position to "predicate error" on a

ruling admitting that which is inadmissible.

Making the Rule a rule of inadmissibility (as well as of privilege) thus broadens the possibilities of reversal of the trial judge for erroneous rulings and thereby motivates him to exercise special care in his ruling. Such special case is peculiarly desirable where the matter claimed to be privileged is an alleged state secret.

A further consequence of making the Rule a rule of inadmissibility is that the party is in a position to resist disclosure by a witness in unlawful possession of a state secret. Thus, suppose the civil action of P v. D. P calls a friendly witness who by unlawful means has gained knowledge of a classified matter. Of course, neither P nor the witness objects to disclosure. Now if Rule 33 were only a rule of privilege, the privilege being possessed by the witness, D's objection would go for naught. (The witness being privilege-holder, would be waiving privilege by not objecting and that would be the end of the matter.) However, since the Rule prescribes both privilege and inadmissibility, D is entitled to have the matter excluded. Again a special safeguard is afforded to protect state secrets.

Prior to the decision in U.S. v. Reynolds,[26] there seemed to be little doubt that the state-secrets rule was more than a simple rule of privilege. Writing in 1948 in the Harvard Law Review, Haydock, stated as follows respecting "the common law doctrine which has long protected secrets of state":

> "This doctrine has been expressed in terms of privilege, and it does have some of the characteristics of privilege . . . . On the other hand, it is clear that the doctrine is

> something more than a simple personal privilege. Thus, the power to object to the introduction of the evidence is not confined to the witness or the Government, but may be exercised by the court. And whereas the erroneous admission of evidence protected by an ordinary privilege is generally reversible only an appeal by the holder of the privilege, this limitation does not apply to secrets of state".27

However, in U. S. v. Reynolds,[28] decided in 1953 Vinson stated that the "privilege belongs to the Government and must be asserted by it; it can [not] be claimed by a private party . . . [t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter after actual personal consideration by that officer".

This was a prefatory statement in the opinion and was dictum. But one case was cited for the proposition and, arguably, the case does not support the proposition.[29]

It seems doubtful, therefore, that we should regard Vinson's dictum as repudiating the view that the state secrets rule is both privilege and inadmissibility.

California Law.

We have found no local precedents expressly recognizing the Secret of State privilege. However, in view of the fact that this was a common-law privilege[30] and in view of the further fact that the policy supporting the privilege is so compelling, we think it most likely that the California courts would recognize and enforce the privilege if the occasion arose.

Recommendation.

Approval of Rule 33 is recommended.

RULE 34. OFFICIAL INFORMATION

Rule 34 provides:

> "(1) As used in this Rule, 'official information' means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.
>
> (2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a government capacity."

McCormick states as follows:

> "It is generally conceded that a privilege and a rule of exclusion should apply in the case of writings and information constituting military or diplomatic secrets of state. Wigmore seems to regard it as doubtful whether the denial of disclosure should go further than this, but statutes in this country have often stated the privilege in broader terms, and the English decisions seem to have accepted the wide generalization that official documents and facts will be privileged whenever their disclosure would be injurious to the public interest. Probably this wider principle would likewise generally be accepted by the courts of this country as a matter of common law, and doubtless it is justified in point of policy. The obvious danger of oppressive administration from such a broad principle of immunity must be sought in a widened conception of the judge's controlling responsibility for the balancing of the public and the private interests involved."[31]

From this point of view Rule 34 is thus the codification of a common-law principle.

Secret of State vs. Official Information.

The Rule 33 concept of secret of state covers only security, military and diplomatic matters. On the other hand, the Rule 34 concept of official information comprehends the all-inclusive category of "information . . . relating to internal affairs . . ." However, secret of state means such secrets of the U.S. or of any State or Territory. On the other hand, official information means only such information concerning the internal affairs of this State or of the United States.

Compulsory vs. discretionary exclusion.

As we saw above (see p.10), if the judge finds that a matter is a secret of state he is required by Rule 33 to exclude evidence of the matter whatever the needs of the litigant may be. In such circumstances exclusion must automatically and necessarily result from the finding classifying the matter as secret of state. The same is true under 34 if the judge finds the matter is official information and within 34 (2) (a) namely "disclosure is forbidden by an Act of the Congress of the United States or a statute of this State". If, however, the judge finds the matter is official information and 34 (2) (a) is not applicable, then under 34 (2) (b) the judge possesses a wide discretion as to whether he should order or refuse to order disclosure. In these circumstances the evidence is inadmissible only if the judge finds that disclosure will be "harmful" to the "government". Manifestly, the intent here is that the judge should weigh the consequences to the government of

disclosure against the consequences to the litigant of non-disclosure and should then decide which is the more serious. Of course, no hard and fast rules can be laid down to guide the judge in this process of balancing the public and private interests. Nor do we here undertake to review the many cases involving this balancing operation. By way of summary we may, however, borrow the following resume from an excellent recent note in N.Y.U. L. Rev.:

> ". . . [T]he recognition or denial of [the] privilege turns upon almost innumerable factors. The relative necessity for secrecy on the part of the government, the demonstrated need of the private litigant for the information, whether the government is a party to the suit, whether the government is plaintiff or defendant and whether the suit is civil or criminal, the type of document or information involved, whether and to what extent the information can be obtained from private sources, whether the government unit is national or more localized, whether the information has been previously revealed in some way and the attitude of the particular court toward such claims are all factors which are weighed in reaching the final conclusion."[32]

California law.

It seems reasonably clear the the Official Information privilege is presently recognized and enforced in California. This results from a congeries of statutory provisions in re public records and the citizen's right of inspection of same, qualified, however, by a rule of privilege stated in C.C.P. § 1881 (5).[33] In City and County of S.F. v. Superior Court, the court summarizes as follows the terms and the effect of these various statutory provisions:

"Section 1032 of the Political Code provides that the public records and other matters in the office of any officer are at all times during office hours open to inspection of any citizen. Section 1833 of the Code of Civil Procedure states that all written acts or records of official bodies, tribunals and public officers are public writings. Section 1892 of the same code accords every citizen the right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute; and section 1893 requires a public officer to give a certified copy thereof on demand and payment of the fee therefor.

Section 1881, subdivision 5, of the Code of Civil Procedure, provides the exception to the foregoing by the requirement that a public officer may not be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."[34]

The combination of these provisions seems to give us in substance the general principle of Rule 34; namely, official information is subject to disclosure unless such disclosure is either prohibited by law or would be contrary to the public interest. In administering this principle today it is, of course, necessary for our courts to weigh the public interest of secrecy against the private interest of disclosure -- a necessity which would in no wise be abated if we were to adopt Rule 34.[35] Thus in City & Co. of S.F. v. Superior Court, the court, drawing upon a Wisconsin case, speaks as follows as to the policy choice in administering the Official Information rule:

". . . In Gilbertson v. State, supra, 236 N.W. at 541, it was said that in all such situations a choice must be made between policies, each independently desirable; that not only are the courts faced with the necessity of making the choice, but with the extremely delicate question concerning the relation between the courts and other branches of the government; and that the

right of the state to preserve the secret may be superior to that of the litigant to compel its disclosure even though he may thereby be handicapped as an unavoidable consequence."

In the appended footnote, we give some California holdings applying the official information rule.[36] None of these holdings would (in our opinion) be affected by adopting Rule 34 since there is substantial identity of principle between that rule and the law presently in force.

Recommendation.

It is recommended that Rule 34 be approved.

RULE 35. COMMUNICATION TO GRAND JURY

This Rule provides as follows:

"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."

Two privileges in re secrecy of grand jury proceedings.

McCormick states as follows:

"To guard the independence of action of the accusatory body, to protect the reputations of those investigated but not indicted, and to prevent the forewarning and flight of those accused before publication of the

> indictment, the taking of evidence by the grand jurors and their deliberations have traditionally been shrouded in secrecy. The ancient oath administered to the jurors bound them to keep secret 'the King's counsel, your fellows' and your own.' Two privileges are incident to this system. First, the grand jurors have a privilege against the disclosure by any one of their communications to each other during their deliberations and of their individual votes.
>
> Second, the communications of complainants and other witnesses in their testimony before the grand jury are privileged against disclosure by anyone, but this privilege is temporary only."

Rule 35 deals only with the second of these two privileges. Below we examine that privilege as it exists in California and as it is set forth in Rule 35; then we say a word about the first privilege.

Testimony before Grand Jury (Second Privilege).

P.C. § 903 provides that the oath of a grand juror shall contain, inter alia, the following:

> ". . . You . . . will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you . . ."

P.C. § 926 provides in part as follows:

> "Every member of the Grand Jury . . . may . . . be required by any Court to disclose the testimony of a witness examined before the Grand Jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the Court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor."

§ 903 seems to give us the general rule that a grand juror must not reveal grand jury testimony. § 926 gives us the two exceptions to the general rule stated therein.[38]

Let us suppose that in the course of a grand jury investigation the jury receives D's evidence relating to a possible charge against D, but no indictment is returned. Later in the civil action of P v. D, P calls a grand juror and asks re relevant items of D's testimony received by the grand jury. D objects. Overruled. On appeal may D take advantage of this ruling? Under two early California cases the answer seems to be "No".[39] In People v. Young, the court states as follows:

> "If the [grand juror] violated the obligation of secrecy imposed upon [him] . . . the defendant could not take advantage of it. The obligation is due and owing to the public and not to the witness [before the grand jury], and therefore its violation cannot be an occasion of offense to him . . . Under our system it cannot be considered that the rule of secrecy has any reference to the protection of witnesses testifying before grand juries . . ."

The following from the opinion in People v. Northey,[40] is to the same effect:

> ". . . the rule of secrecy set forth in the statute is intended only for the protection of grand jurors, and not of the witnesses before them, and . . . the witnesses cannot invoke it."

Rule 35 is built upon a different plan. In the first place, the exceptions to the general rule of non-disclosure are much broader. Thus under 35 (c) disclosure may be required whenever the judge finds that such disclosure "should be made in the interests of justice". In the second place, when

the occasion is appropriate for non-disclosure (i.e., neither condition (a) nor (b) nor (c) is met), the proposed witness to the grand jury testimony (whether he be grand juror or another) is given privilege so that he may refuse disclosure, and, furthermore, the party may resist disclosure (since the evidence is both privileged and inadmissible[41]) and, finally, if disclosure is ordered and made the party may, (non constat Rule 40) predicate error upon the wrongful receipt of the inadmissible evidence.[42]

We prefer the Rule 35 scheme to the P.C. §§ 903 and 926 scheme. It impresses us as desirable to have a broad and flexible principle of disclosure in the interests of justice. On the other hand, in those situations where non-disclosure is appropriate it seems desirable to give that full protection to the policy of secrecy which is afforded by Rule 35.

Grand juror's testimony as to votes and statements by grand jurors (First Privilege).

P.C. § 903 provides that the oath of each grand juror shall contain, inter alia, the following:

> ". . . You . . . will not, except when required in the due course of judicial proceedings, disclose . . . anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you . . ."

P.C. § 926 provides in part as follows:

> ". . . Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; . . ."

Since Rule 35 deals only with ". . . a communication made to a grand jury by a complainant or witness . . ." (italics added), this Rule does not touch upon the obligation of grand jurors to keep secret their statements and votes.

Would the P.C. §§ 903, 926 rule be repealed by the U.R.E.? Whether it be regarded as a rule of privilege or of competency, it would be repealed by Rule 7, unless there is provision in some other rule continuing it in operation.

We believe that by the provisions of Rule 44 (a) the present rule enjoining secrecy is intended to remain operative. 44 (a) provides, in part:

> "These rules shall not be construed to (a) exempt a [grand]juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the . . . indictment . . ."

This means we are to look to present law to see whether a grand juror may testify to intra-mural or extra-mural conditions or occurrences. Thereby this continues in force the permissive features of such law (if any). By implication it would also seem to continue in force the prohibitive aspects, such as P.C. §§ 903 and 926.

Recommendation.

It is recommended that Rule 35 be approved.

RULE 36. IDENTITY OF INFORMER

Rule 36 provides:

> "A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, 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 to assure a fair determination of the issues."

Rule 36 is the common-law privilege.

McCormick summarizes as follows the scope and rationale of this privilege:

> "Informers are shy and timorous folk, and if their names were subject to be readily revealed, this source of information would be almost cut off. On this ground of policy, a privilege and a rule of inadmissibility are recognized in respect to disclosure of the identity of such an informer, who has given information about supposed crimes to a prosecuting or investigating officer or to someone for the purpose of its being relayed to such officer."43

This is a common-law privilege. Moreover, Rule 36 is in essence a codification of the privilege in its common-law form. This is evident if we compare with the provisions of the Rule the following capitulation by Justice Traynor of the highlights of the common-law privilege:

> "The common-law privilege of nondisclosure is based on public policy. 'The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens

to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' . . . The informer is thus assured of some protection against reprisals. The use of informers is particularly effective in the enforcement of sumptuary laws such as those directed against gambling, prostitution, or the sale and use of liquor and narcotics. Disclosure of the informer's identity ordinarily destroys his usefulness in obtaining information thereafter. . . .

There is a divergence of opinion as to whether the common-law privilege covers only the identity of the informer or also includes the contents of the communication . . . . Since the reasons for the privilege relate primarily to the identity of the informer, some authorities take the position that the privilege does not extend to the communications unless the contents would disclose or tend to disclose the identity of the informer. . . .

At common law the privilege could not be invoked if the identity of the informer was known to those who had cause to resent the communication . . . .

There is general agreement that there is no privilege of nondisclosure if disclosure 'is relevant and helpful to the defense of the accused or essential to a fair determination of a cause . . .'"[44]."

Comparing the first part of this quotation with the main body of Rule 35 and the last part with subdivisions (a) and (b) of the Rule, it is seen that the Rule enacts the privilege in its common-law form.

The California statute.

C.C.P. § 1881 (5) provides:

"A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

This is a broader principle[45] than the informer-privilege but, at least to some extent, it includes that privilege. Under the ensuing italicized titles we compare 1881 (5) with the traditional informer-privilege as the latter is codified by Rule 36.

Disclosure by officer vs. disclosure by other witness.

Typically disclosure of the identity of the informer will be sought on cross-examination of the officer and the objection will come from the prosecution. Let us suppose, however, defendant calls a witness and asks such witness whether he was informer and the objection comes from the witness. Rule 36 expressly gives the witness a privilege under these circumstances. Although 1881 (5) expressly deals only with examination of the officer, we guess that it would be construed as covering the witness also.[46]

If the witness made no objection, would the evidence be excluded upon objection by the prosecution? Clearly so, under Rule 36 which is a rule both of witness-privilege and of inadmissibility.[47] Again our guess is that the same would be true under 1881 (5). Under that provision the court is to determine whether the public interest would suffer by disclosure.[48] This implies that the court may so find and therefore preclude disclosure even though the witness is willing to testify.

What if the witness is neither officer nor suspected informer but is one who knows the identity of the informer? Such witness is clearly covered by Rule 36. Again our speculation is that 1881 (5) would be construed as applicable to such witness.

If the above conjectures as to the construction of 1881 (5) are valid, it follows that there are no substantive differences between that provision and Rule 35 insofar as witnesses covered by each is concerned.

State vs. federal informers.

Conceding that the State's interest in the successful enforcement of its laws requires an informer's privilege in re violation of its laws, is there reason for the state to recognize a like privilege when the informer's information is given to an officer of another sovereignty respecting the violation of its laws? The answer of Rule 35 is "Yes" provided the other sovereignty is the United States. We cannot determine what the answer (if any) is in California today. However, the Rule 35 view seems to us a wise measure of state-federal cooperation in this area.

Rule 35 exceptions - exception (b).

(N.B. The exceptions are discussed in inverse order)

Under 35 (b) there is no privilege and evidence of the informer's identity is admissible if "disclosure of his identity is essential to assure a fair determination of the issues".

A like result is reached in California by applying the rule that "there is no privilege of nondisclosure if disclosure 'is relevant and helpful to the defense of the accused or essential to a fair determination of a cause'".[49]

At one time it was thought that this principle did not require disclosure of the identity of an eye-witness informant

who was not a participant in the crime alleged.[50] This proposition is, however, repudiated and cases supporting it are overruled by the recent decision in People v. McShann in which Justice Traynor speaks as follows for a majority of the court:

> "Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be 'relevant and helpful to the defense of the accused or essential to a fair determination of a cause' even though the informer was not a participant. For example, the testimony of an eyewitness-non-participant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant and helpful to the defense of the accused and essential to a fair determination of the cause.
>
> Disclosure is frequently a problem in such cases as the present one involving violations of the narcotics laws, when the so-called informer is also a material witness on the issue of guilt. A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged.' (People v. Lawrence, supra, 149 Cal.App.2d at 450.) . . . His identity is ordinarily not necessary to the defendant's case, and the privilege against disclosure properly applies. . . . When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Non disclosure would deprive him of a fair trial. . . . Thus, when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal. (See Roviaro v. United States, supra, 353 U.S. at 61.) Any implications to the contrary in People vl Cox, 156 Cal.App.2d 472, 477 [319 P.2d 681]; and People v. Gonzales, 136 Cal.App.2d 437, 440-441 [288 P.2d 588], are disapproved.
>
> Jencks v. United States, 353 U.S. 657, 671-672 [77 S.Ct. 1007, 1 L.Ed.2d 1103], involved a comparable situation wherein the defendant sought

the production of F.B.I. reports made by the two principal witnesses against him on a charge that he falsely swore in an affidavit that he was not a member of the communist party. The court stated: 'It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession . . . . The Attorney General has adopted regulations . . . declaring all Justice Department records confidential and that no disclosure, including disclosure in response to a subpoena, may be made without his permission.

'But this Court has noticed in United States v. Reynolds, 345 U.S. 1 [73 S.Ct. 528, 97 L.Ed. 727, 32 A.L.R.2d 382], the holdings of the Court of Appeals for the Second Circuit that, in criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . . ." 345 U.S., at 12.'"51

At one time it was thought that disclosure would not be required on the issue of reasonable cause to make arrest and search in cases where the prosecution seeks to show reasonable cause by testimony as to communications by an unnamed informer.[52] This proposition is, however, repudiated and cases supporting it are overruled by the recent decision in Priestly v. Superior Court in which Justice Traynor, again speaks as follows for the majority of the Court:

"The People contend that defendant was not entitled to the disclosure of the informers' identities invoking section 1881, subdivision 5 of the Code of Civil Procedure: 'A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.' In People v. McShann, ante, p. 802 [330 P,2d 33], the informer was a material witness on the facts relating directly to the question of guilt. The policy

conflict there involved was between the encouragement of the free flow of information to law enforcement officials and the right of the defendant to make a full and fair defense on the issue of guilt. In the present case the communications of the informers are material to the issue of reasonable cause to make the arrest and search, and the policy conflict is between the encouragement of the free flow of information to law enforcement officers and the policy to discourage lawless enforcement of the law. (See People v. Cahan, 44 Cal.2d 434, 445 [282 P.2d 905, 50 A.L.R.2d 513].)

The federal rule under such circumstanees [sic] is set forth in Roviaro v. United States, 353 U.S. 53, 61 [77 S.Ct. 623, 1 L.Ed.2d 639]: 'Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.'

The foregoing rule requiring disclosure of the identity of an informer whose communications are relied upon to establish probable cause to make a search is sound and workable. (See People v. Wasco, 153 Cal.App.2d 485, 488 [314 P.2d 558]; People v. Lundy, 151 Cal.App.2d 244, 249 [311 P.2d 601]; People v. Dewson, 150 Cal.App.2d 119, 136 [310 P.2d 162]; People v. Alaniz [dissent], 149 Cal.App.2d 560, 570 [309 P.2d 71]; Wilson v. United States, 59 F.2d 390, 392; Hill v. State, 161 Miss. 518 [118 So. 539, 540]; Smith v. State, 169 Tenn. 633 [90 S.W.2d 523, 524]; 13 N.Y.U. Intra.L.Rev. 141, 147-152; 83 L.Ed. 155, 157.) . . . If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such ah

holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. . . . Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause. When the prosecution relies instead on communications from an informer to show reasonable cause and has itself elicited testimony as to those communications on direct examination, it is essential to a fair trial that the defendant have the right to cross-examine as to the source of those communications. If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer.

. . . In sum, when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant. Any holdings or implications to the contrary in People v. Johnson, 157 Cal.App.2d 555, 559 [321 P.2d 35]; People v. Salcido, 154 Cal.App.2d 520, 522 [316 P.2d 639]; People v. Moore, 154 Cal.App.2d 43, 46-47 [315 P.2d 357]; People v. Merino, 151 Cal.App.2d 594, 597 [312 P.2d 48]; People v. Alaniz, 149 Cal.App.2d 560, 567 [309 P.2d 71]; and People v. Gonzales, 141 Cal.App.2d 604, 606-607 [297 P.2d 50], are disapproved."53

Evaluation of these more or less controversial decisions is not germane to our present purpose. It should be noted, however, that the general principle applied in deciding these cases is substantially the same as that propounded in subdivision (b) of Rule 35. Hence adoption of 35 (b) would not in and of itself have any impact on these decisions.

Rule 35 exceptions - exception (a).

Under 35 (a) there is no privilege and evidence of the informer's identity is admissible if such identity "has already been otherwise discovered". This was true at common-law and is generally true today.[54] The thought seems to be that it is idle to provide secrecy for something that is already known.

It may be, however, that 1881 (5) would operate to prevent in-court disclosure even though out-of-court disclosure has been made. In the following passage Justice Traynor makes this suggestion:

> "Under section 1881, subdivision 5 the test is whether the public interest would suffer by the disclosure. Conceivably, even when the informer may be known to persons who have cause to resent the communication, disclosure in open court might still be against the public interest."55

He adds that under such circumstances refusal to disclose in open court can scarcely prejudice defendant since, by hypothesis, defendant already knows and is not, therefore, in need of disclosure.

Assuming these are such situations as those suggested by Traynor, i.e., situations in which, though out-of-court disclosure has been made, in-court disclosure would be both needless to the accused and harmful to the public interest, our present rule would, of course, be preferable to the 36 (a) rule which declares automatic termination of the privilege in cases of prior disclosure. Furthermore, our present rule could (in effect) be preserved by striking subdivision (a) of Rule 36, thereby making previous disclosures a relevant but not a conclusive factor in applying the principle of subdivision (b). However, lacking

specific knowledge of the kind of situation Traynor envisions as "conceivable", we are not in a position to recommend elimination of subdivision (a).

Recommendation.

It is recommended that Rule 36 be approved.

Respectfully submitted,

James H. Chadbourn

FOOTNOTES

1. Only one case has been found and that makes only brief mention of § 1881 (3). Estate of Toomes, 54 Cal. 509 (1880).

2. See memo on lawyer-client privilege p. 5.

3. See memos on lawyer-client privilege (pp. 5 - 6). and physician-patient privilege (p. 6).

4. Arguably, such matters as the witness' atheism, agnostism, or unorthodoxy are irrelevant on the issue of his credibility. See McCormick, p. 105, note 12.

5. McCormick, p. 104.

6. McCormick, p. 104, note 11.

7. Wigmore, § 2213.

8. See Rule 224 and comment.

9. Wigmore, § 2214.

10. 240 Mo.App. 1075, 226 S.W.2d 737 (1950). The case is cited in the comment on Rule 32.

11. Wigmore, § 2212.

12. 94 N.H. 400, 54 A.2d 364 (1947). The case is cited in the comment on Rule 32.

13. See also C.C.P. § 2030 (b) whereby § 2019 is applicable when answers to interrogatories are sought.

14. McCormick, p. 303.

15. Rule 33 is based upon A.L.I. Model Code Rule 227 but is broader in that 33 includes information involving "public security". This was not included in Rule 227.

16. Totten v. U.S., 92 U.S. 105 (1875).

17. Firth Sterling Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa., 1912).

18. Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y., 1939).

19. U.S. v. Reynolds, 345 U.S. 1 (1953).

20. U.R.E. Rule 8 prescribes the procedure for preliminary inquiries of this type.

21. McCormick, p. 308.

22. 345 U.S. 1 (1953).

23. Ibid.

24. Ibid.

25. The comment to Rule 33 indicates that the same purpose underlies that Rule. The comment states: "Either the witness or a party may object to a question calling for disclosure. The judge may also exclude such evidence without objection."

26. 345 U.S. 1 (1953).

27. Haydock, Some Evidentiary Problems Posed by Atomic Energy Security Requirements, 61 Harv. L. Rev. 468, 472-3 (1948).

28. 345 U.S. 1 (1953).

29. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa., 1912). Bethlehem has by argeement with U.S. Navy certain secret drawings. Some undisclosed person surreptitiously gets drawings and turns them over to an employee of Firth. Firth offers the drawings in evidence. They are admitted without objection. Subsequently, Bethlehem moves to expurge the drawings from the record. At the request of the Navy an Assistant U.S. Attorney appears in behalf of Bethlehem's motion. Motion Granted. The court nowhere states that participation by the government was requisite to the ruling, but emphasizes that the court should "on grounds of public policy, strike out evidence of this nature".

30. See quotation from Haydock p. 12 , supra.

31. McCormick, pp. 303-304.

32. 29 N.Y.U.L. Rev. (1954). See also Sanford, Evidentiary Privileges Against the Production of Data within the Control of Executive Departments, 3 Vand. L. Rev. 73 (1949); Berger and Krash, Government Immunity from

Discovery, 59 Yale L. J. 1451 (1950); Haydock, Some Evidentiary Problems Posed by Atomic Energy Security Requirements, 61 Harv. L. Rev. 468 (1948). Notes: 47 Nw. U.L. Rev. 259, 519 (1952-53); 18 U. Chi. L. Rev. 122 (1950); 22 Calif. L. Rev. 667 (1934); McCormick, Chap. 15; Wigmore, Chap. LXXXV.

33. 38 C.2d 156, 161 (1951).

34. See also the similar summary in Jessup v. Superior Court, 151 C.A.2d 102, 106-7 (1957).

35. 38 C.2d 156, 163 (1951).

36. Coldwell v. Board of Public Works, 187 C. 510 (1921) (disclosure required of documents in re Hetch Hetchy Water Project); Runyon v. Board etc. of Cal., 26 C.A.2d 183 (1938) (disclosure not required of letters and documents in possession of Board of Prison Terms and Paroles); City & Co. of S.F. v. Superior Court, 38 C.2d 156 (1951) (disclosure not required of documents and data in possession of municipal civil service commission); Jessup v. Superior Court, 151 C.A.2d 102 (1957) (disclosure not required of report of drowning in city swimming pool); People v. Denne, 141 C.A.2d 499 (1956) (disclosure required of letter by parolee to parole officer).

For an instance of disclosure forbidden by statute (inadmissible, therefore, under Rule 34 (2) (a)), see

Vehicle Code § 488.

37. McCormick, p. 313.

38. See Ex parte Sontag, 64 C. 525 (1884).

Compare the requirement of P.C. § 925 that in case of indictment stenographic transcripts of the grand jury testimony be filed with the clerk and be by him delivered to the D.A. and also a copy be delivered to defendant.

39. 31 C. 563 (1867).

40. 77 C. 618 (1888).

41. See pp. 10 - 13, supra.

42. See pp. 16 - 18, supra.

43. McCormick, pp. 309-310.

44. People v. McShann, 50 C.2d 802, 806-807 (1958).

45. See pp. 16 - 18, supra.

46. See memo on lawyer-client privilege p. 4 and memo on physician-patient privilege p. 6. See also McCormick, p. 310, note 5.

47. See pp. 10 - 13, supra. In saying the objection would be sustained we are, of course, assuming that neither exception (a) nor (b) is applicable. It is, however,

probable that one of these exceptions would apply when defendant calls the witness. See, People v. Lawrence, 149 C.A.2d 435 (1957).

48. See People v. McShann, 50 C.2d 802, 807 (1958). See also McCormick, p. 310, note 7.

49. People v. McShann, 50 C.2d 802, 807 (1958). In the application of this principle the practical result is that the prosecution must elect between disclosure of the informer and having the officer's testimony struck. Hence defendant must inquire of the officer as to the informer and upon objection sustained defendant must move to strike the officer's testimony, thereby compelling the prosecution to elect. See Coy v. Superior Court, 334 P.2d 569 (1959).

A comparable situation arises under the legislation (18 U.S.C.A. § 3500 (1957 Supp)) modifying the decision in Jencks v. U.S., 353 U.S. 657 (1957). See Professor Falkner's discussion in 33 N.Y.U. L.Rev. 334, 347-348 (1958).

50. See cases cited and disapproved in People v. McShann, 50 C.2d 802, 809 (1958).

51. People v. McShann, 50 C.2d 802, 808-809 (1958). If the informer is participant disclosure is required. See People v. Castiel, 153 C.A.2d 653 (1957) and the opinion in People v. McShann at p. 806.

52. See cases cited and disapproved in Priestly v. Superior Court, 50 C.2d 812, 819 (1958).

53. Priestly v. Superior Court, 50 C.2d 812, 816-819 (1958). Cf., People v. Rodriguez, 168 A.C.A. 528 (1959). As to the necessity to move to strike the officer's testimony when disclosure of the informant is refused, see Coy v. Superior Court, 334 P.2d 569 (1959); People v. Lopez, 169 A.C.A. 352 (1959).

54. McCormick § 148; Wigmore § 2374 (2). See also Justice Traynor's statement quoted above on p. .

55. People v. McShann, 50 C.2d 802, 807 (1958).