

Date of Meeting: October 23-24, 1959

Date of Memo: October 14, 1959

Memorandum No. 1

Subject: Uniform Rules of Evidence (Rules 28-35).

At the September meeting of the Commission, the Commission considered Rules 28 through 35 of the Uniform Rules of Evidence. The attached material shows these rules as revised by the Commission and indicates the reasons for the Commission's action.

At the October meeting, the Commission can review these rules to determine if the staff has revised them in accordance with the desires of the Commission. The material will then be revised to conform to any changes made by the Commission at the October meeting and sent on to the Bar Committee for its consideration.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

10/1/59

Note: This is Uniform Rule 28 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 28. MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS.

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

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

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

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

(b) [(e)-in] A criminal action in which one of them is charged with (1) a crime against the person or property of the other or of a child of either, or (11) a crime against the person or property of a third person committed in the course of committing a crime against the

other, or (iii) bigamy or adultery, or (iv) desertion of the other or of a child of either. [~~y-ex-(d)-in~~]

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

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

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

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

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

RULE 28 (MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS)

AS REVISED BY THE COMMISSION

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

THE RULE

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

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

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

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

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

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

EXCEPTIONS

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

Family crime. The Commission approves the "family crime"

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

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

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

Commission has not adopted this extension of the traditional scope of this exception. Because of the wide variety of torts and the technical nature of many, the Commission believes that to extend the exception to include all torts would make it difficult for spouses to communicate without running the risk of losing their privilege and would open up too large an area of nullification of the privilege.

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

TERMINATION OF PRIVILEGE

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

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

EFFECT OF ADOPTION OF RULE 28 AS REVISED

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

Effect on California Statutes. Under C.C.P. § 1881(1), a spouse can be prevented from giving any testimony in an action to which one or both are parties and under P.C. § 1332 (first part) neither spouse is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both. These rules of privilege whereby one spouse may prohibit the other from giving any testimony whatsoever are not provided under the Uniform Rules and the Commission approves the abolishing of these privileges and restricting the privilege to a particular and limited kind of testimony -- testimony as to confidential communications.

Note: This is Uniform Rule 29 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 29. PRIEST-PENITENT PRIVILEGE.

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

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

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

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

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

- (a) The communication was a penitential communication; [~~and~~]
- (b) The witness is the penitent or the priest; [,] and
- (c) The claimant is the penitent [,] or the priest making the claim on behalf of an absent or deceased penitent.

RULE 29 (PRIEST-PENITENT PRIVILEGE)

AS REVISED BY THE COMMISSION

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

DEFINITIONS

Arrangement. The definitions have been arranged in alphabetical order.

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

GENERAL RULE

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

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

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

innocent man has been condemned to death for the murder, the priest might under the circumstances decide not to claim the privilege for the deceased murderer and instead give the evidence that would free the innocent man.

10/1/59

RULE 30. RELIGIOUS BELIEF.

This rule was adopted without change by the Commission.

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

RULE 31. POLITICAL VOTE.

This rule was adopted without change by the Commission.

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

RULE 32. TRADE SECRET.

This rule was adopted without change by the Commission.

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

10/1/59

Note: This is Uniform Rule 33 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike-out material for deleted material.

RULE 33. SECRET OF STATE.

(1) As used in this rule, "secret of state" means information, not open or theretofore officially disclosed to the public, ~~[involving]~~ the disclosure of which would endanger the ~~[public-security-or-concerning the-military-or-naval-organisation-or-plans]~~ national security of the United States or the public security of this State or another State or Territory 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.

10/1/59

RULE 33 (SECRET OF STATE) AS REVISED BY
THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 33, relating to the privilege and inadmissibility of a secret of state, as revised by the Commission.

The Commission has revised the language of the Uniform Rule to clearly limit the scope of Uniform Rule 33 to information the disclosure of which would endanger the national security of the United States or the public security of this State or another State or Territory of the United States. The Uniform Rule definition has a broader and somewhat ambiguous scope.

Under the revised rule, information would be admissible if the judge finds that the matter is not a secret of state or, in other words, that the disclosure of the information would not endanger the national security or public security. 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. The judge could require disclosure of enough of the disputed matter as a preliminary to his decision on the question to satisfy himself that, from all the circumstances of the case, there is a reasonable danger that the compulsion of the evidence will expose matters which, in the interest of national security or public security, should not be divulged.

10/1/59

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

Section 34. OFFICIAL INFORMATION.

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

(a) "Official information" means information not open or theretofore officially disclosed to the public [~~relating to the internal affairs of this State or of the United States~~] acquired by a public officer [~~official of this State or of the United States~~] in the course of his duty [7] or transmitted from one [~~such official~~] public officer to another in the course of duty.

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

(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 [7] and that:

(a) Disclosure in a judicial proceeding is forbidden by an Act of the Congress of the United States or a statute of this State, or

(b) [~~disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity~~] The information was received in official confidence and the disclosure of the information is against the public interest in view of the necessity for secrecy on the part of the government as compared to the necessity for disclosure in the interest of justice.

10/1/59

RULE 34 (OFFICIAL INFORMATION) AS REVISED
BY THE COMMISSION

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

DEFINITIONS

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

The words "public officer" have been used instead of "public official" because "public officer" is used in the existing California statute (C.C.P. § 1881(5)) and has been given a rather broad interpretation.

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

THE RULE

The words "in a judicial proceeding" have been inserted. These words make clear the probable meaning of the Uniform Rule.

The Uniform Rule provides that evidence of official information is inadmissible if the judge finds that the disclosure of the information will

be harmful to the interests of the government of which the witness is an officer in a governmental capacity. The Commission has substituted for this provision one that more clearly indicates the intent that the judge should weigh the consequences to the government of disclosure against the consequences to the litigant of nondisclosure and should then decide which is the more serious. The Commission recognizes that we cannot by statute establish hard and fast rules to guide the judge in this process of balancing the public and private interests. At the same time, the Commission believes that the revised rule more clearly imposes upon the court the duty to weigh the public interest of secrecy against the private interest of disclosure. The Commission has retained the provision of our existing California statute (C.C.P. § 1881(5)) that the information be received in "official confidence."

10/1/59

RULE 35. COMMUNICATION TO GRAND JURY.

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

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

The Commission does recognize the need for adjustment of P.C. § 926 to provide in substance (new matter underscored):

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, or to disclose the testimony in any case where disclosure should be made in the interests of justice.