File

CALIFORNIA LAW REVISION COMMISSION

File: URE Privileges Article

1/18/63

Memorandum 63-2

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

Attached to this memorandum are three exhibits which should be of interest to the Commission as it considers the privileges article. These are:

Exhibit I (green pages) - URE privileges article as enacted in New Jersey
Exhibit II (pink pages) - Report of N. J. court committee (extract)
Exhibit III (white pages) - Report of N. J. legislative commission (extract)

So far as we know, New Jersey is the only state to enact a portion of the Uniform Rules as positive law. At the time that New Jersey enacted the privileges article it authorized the Supreme Court to promulgate rules of evidence. To date, the New Jersey Supreme Court has not published any rules pursuant to this authority.

The New Jersey legislation was enacted after a committee appointed by the New Jersey Supreme Court studied the Uniform Rules and a commission appointed by the legislature reviewed the recommendations of the court committee. On the pink pages attached to this memorandum there is an extract from the report of the court committee relating to the privileges article. The report itself is out of print so we could not obtain complete copies for your use. Following the pink pages is a multilith copy of the portion of the legislative commission's report relating to privileges.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I
EXTRACT FROM CHAPTER 52 OF THE LAWS OF 1960 (NEW JERSEY)

NEW JERSEY REVISION OF THE URE PRIVILEGE ARTICLE

2A:84A--16. Scope of the Rules

Rule 2

(1) The provisions of article II,[1] Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

(2) All other rules contained in this act,[2] or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.

(3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.

(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication. L.1960, c. 52, p. --, § 16.

1 Sections 2A:84A--17 to 2A:84A--32.
2 Sections 2A:84A--1 to 2A:84A--32.

ARTICLE II. PRIVILEGES

2A:84A--17. Privilege of accused

Rule 23.

(1) Every person has in any criminal action in which he is an

accused a right not to be called as a witness and not to testify.

(2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

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

(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts. L.1960, c. 52, p. --, § 17.

2A:84A--18. Definition of Incrimination

Rule 24.

Within the meaning of this article,[1] a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of

a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration. L.1960, c. 52, p. --, § 18.

1 Sections 2A:84A--17 to 2A:84A--32.

2A:84A--19. Self-incrimination: exceptions

Rule 25.

Subject to Rule 37,[1] every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:

(a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;

(b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;

(c) no person has a privilege to refuse to disclose any matter

which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;

(d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein. L.1960, c.52, p. __, § 19. [1] Section 2A:84A-29.

2A:84A--20. Lawyer-client privilege

Rule 26.

(1) General rule. Subject to Rule 37[1] and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer

unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which

recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege. L.1960, c. 52, p. __, § 20.

[1] Section 2A:84A-29.

2A:84A--21. Newspaperman's privilege

Rule 27.

Subject to Rule 37,[1] a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied. furnished, or delivered. L.1960, c. 52, p. __, § 21.

[1]Section 2A:84A-29.

2A:84A--22. Marital privilege--confidential communications.

Rule 28.

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding coming within Rule 23(2).[1] When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living

separate and apart under a divorce from bed and board shall not be a privileged communication. L.1960, c. 52, p.__, § 22.

[1] Section 2A:84A-17.

2A:84A-23. Priest-penitent privilege

Rule 29.

Subject to Rule 37,[1] a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes. L.1960, c. 52, p.__, § 23.

[1] Section 2A:84A--29.

2A:84A--24. Religious belief

Rule 30.

Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness. L.1960, c. 52, p.__, § 24.

2A:84A--25. Political vote

Rule 31.

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. L.1960, c. 52, p.__, § 25.

2A:84A--26. Trade secret

Rule 32.

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. L.1960, c. 52, p.__, § 26.

2A:84A--27. Official information

Rule 34.

No person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public. L.1960, c. 52, p.__, § 27.

2A:84A--28. Identity of informer

Rule 36.

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. L.1960, c. 52, p.__, § 28.

2A:84A-29. Waiver of privilege by contract or previous disclosure; limitations

Rule 37.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question. L.1960, c. 52, p. __, § 29.

2A:84A-30. Admissibility of disclosure wrongfully compelled

Rule 38.

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the disclosure was wrongfully made or erroneously required. L.1960, c. 52, p __, § 30.

2A:84A-31. Reference to exercise of privileges

Rule 39.

Subject to paragraph (4) of Rule 23,[1] if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel

may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege. L.1960, c. 52, p.___, § 31.

[1] Section 2A:84A-17.

2A:84A-32. Effect of error in overruling claim of privilege

Rule 40.

(1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38,[1] after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous. L.1960, c. 52, p.___, § 32.

[1] Sections 2A:84A-17 to 2A:84A-30.

ARTICLE III. ADOPTION OF RULES

2A:84A-33. Authority of supreme court

The Supreme Court may adopt rules dealing with the admission or rejection of evidence, in accordance with the procedures set forth in this article.[1] L.1960, c. 52, p.___, § 33.

[1] Sections 2A:84A-33 to 2A:84A-44.

* * *

2A:84A-40. Effect of rules on conflicting laws

All previous laws or parts of laws dealing with the admission or rejection of evidence which shall be expressly identified by footnote to any rule so adopted, and which shall be in conflict or inconsistent with such rule or rules, or included therein, revised or rendered obsolete thereby, shall be of no further force or effect after such rule or rules shall have taken effect. L.1960, c. 52, p.___, § 40.

2A:84A-46. Numbering of rules; reference to "rule"

The numbering of rules of evidence within various sections in this act[1] is intended to keep the designation thereof compatible with the numbering arrangement of the proposed Uniform Rules of Evidence, to the extent feasible. Reference within a section or sections of this act to a "Rule" shall be deemed to be equivalent to a reference to that section of this act containing the designated rule. Rule numbers not used are reserved for rules hereafter adopted. L.1960, c. 52, p.___, § 50.

[1] Sections 2A:84A-1 to 2A:84A-32.

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EXTRACT FROM REPORT OF THE COMMITTEE ON

REVISION OF THE LAW OF EVIDENCE TO THE

SUPREME COURT OF NEW JERSEY

May 25, 1955

PRIVILEGES

RULE 23. PRIVILEGE OF ACCUSED.

Recommendation

It is recommended that Sections (1) and (3) of this rule be adopted and that Section (2) be deleted and Section (4) combined with Rule 39.

Committee Annotation

1. It will be observed that Section (1) is not the privilege against self-incrimination; under this rule and accused has a privilege not to be called or to testify as to non-incriminating matters. In general see 1 Morgan, Basic Problems of Evidence 139 (1954); 8 Wigmore § 2268 (2). The rule is a codification of State v. Edelman, 19 N. J. Super. 350, 357 (App. Div. 1952).

The privilege extends to all stages of a criminal proceeding, including the preliminary hearing before the magistrate. 1 Morgan, supra, 139. It has been argued that there is not too much reason for the privilege. See Comment to Model Code Rule 201 (1). However the Model Code and the Uniform Rules have both adopted it. Morgan at p. 139, supra, suggests that the privilege should extend to the grand jury room. But the rule he drew for the Model Code and the present rule refer to "an accused", and there is no accused before the grand jury; hence it seems that the rule does not cover a grand jury proceeding.

As perhaps suggested in State v. Edelman, when A and B are indicted in one indictment and the trial severed, there is no reason why A should not be called as a witness in B's trial, subject of course to the privilege against self-incrimination. Cf. State v. Brien et al., 32 N. J. L. 414 (Sup. Ct. 1868) decided before L. 1871, c. 40, p. 12, N. J. S. 2A:81-8, which abrograted the disqualification of a party in a criminal case. To clarify this point the words "at his own trial" might be added to this section of the rule.

2. Section (2) does not appear in the Model Code. Its sole purpose is to give the accused a privilege where a confidential communication is made by his spouse to him. The policy supporting the marital privilege with respect to confidential communications is to secure freedom from apprehension in the mind of the one desiring to make a communication. The "communicating spouse" should be allowed the privilege; but there is no reason to extend that privilege to the spouse to whom the communication is addressed, 8 Wigmore § 2340, merely because he is accused of a crime.

Rule 23 (2) seems designed to continue the notions underlying N. J. S. 2A:81-3, a statute which under the Uniform Rules (Rule 7) would be abolished. This statute is a remnant of the common law preventing a husband or wife from testifying against his spouse in most criminal actions. See State v. Caparole, 16 N. J. 373 (1954). An attempt (8 Wigmore 2228) is sometimes made to justify the statute on the ground that there is a natural repugnance against compelling a spouse to be the means of condemning his life partner. Or as stated in State v. Caparole, supra, quoting Foley v. Loughran, 60 N. J. L. 464, 473 (E. & A. 1897), the statute is found on a "'supposed public policy' " in the maintenance of marital confidence. Such statutes as these are now pretty generally discredited.

Rule 28 (2) (d) gives the accused all the protection to which he is fairly entitled. The situation seems to boil down to this. The accused in a criminal action has no right to object if his spouse is willing to waive her privilege and testifies against him disclosing something she communicated to him; it is submitted, contrary to Rule 23 (2) that the State's case should not suffer by keeping that proof out when the policy behind the privilege is not violated. However under Rule 28 (2) (d) he can get the benefit of her testimony even though she objects; the accused thus is not required to suffer because of the policy behind the privilege.

3. The intent of Section (3) is to limit the scope of the accused's privilege in the presence of the court to "the employment of legal process to extract from the person's own lips an admission of guilt." 8 Wigmore § 2263. It is something of a corollary to exception (a) of Proposed Rule 25 (Uniform Rule 25 (b)), but the two have no logical connection and are to be carefully distinguished. Rule 23 (3) deals only with the accused in court, while Uniform Rule 25 treats a privilege which attaches to "every natural person."

4. Section (4) should be combined with proposed Rule 39, which see.

RULE 24. DEFINITION OF INCRIMINATION.

Recommendation

It is recommended that this rule be adopted.

Committee Annctation

1. The words "matters disclosed" are sufficiently general to have reference to matters disclosed in argument as well as evidence before the court. See In re Pillo, 11 N. J. 8, 19 (1952); United States v. Coffey, 198 F.2d 438, 440 (C. A. 3, 1952). Indeed the Pillo case at p. 19, quoting Hoffman v. United States, 341 U. S. 479, 487 (1951), indicates that the judge may do a little sharp guessing; he will be "governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

A matter is incriminating under the Rules if it forms a basis for a reasonable inference. This is a rejection of the rule obtaining in some Federal and other courts which enables a witness to claim the privilege if he fears the answer to a question will supply a clue from which incriminating evidence might be obtained--such as "if the witness be asked to disclose his residence, and then in his residence be found a man who discloses the whereabouts of stolen goods". 8 Wigmore § 2261. This extension of the rule is mentioned but not accepted in In re Pillo, 11 N. J. 8, 20 (1952). Wigmore strongly rejects the rule. 8 Wigmore § 2261. See too 1 Morgan, Basic Problems of Evidence p. 134.

There is some loose language of Hoffman v. United States, 341 U. S. 479, 486 (1951) which has been cited supporting the "clue" rule:

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

In re Pillo, though it does at pp. 19 and 20 rely upon the Hoffman case, does not approve this passage.

The word law might best be substituted for the word laws because it is opined that the latter word applies more aptly to statutes than to both common and statutory law.

2. The phrase in the rule "under the law of this State" is supported by In re Pillo, 11 N. J. 8, 16 (1952). The Committee has not taken a position on the question whether possible prosecutions in other jurisdictions should be embraced by the protection.

A strong statement of the opposite view is expressed in People v. Den Vye, 318 Mich. 645, 29 N. W. 2d 284, 287 (Sup. Ct. 1947):

> "It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution."

There are a number of reasons for the privilege. Primarily, the prosecution should not be permitted to trust to compulsory self-disclosure as a source of proof and to protect an individual against harassments. Certainly State Prosecutors in Grand Jury investigations and otherwise are not going to investigate Federal crimes or crimes of foreign jurisdictions. The privilege of course goes to protect a witness in other connections, but at least to some extent the argument of the Michigan decision cannot be sustained on this rationale.

The Michigan argument is most striking where a State investigation may lead to a federal prosecution in the same State, or vice versa (there is less likelihood of a State investigation leading to a prosecution in another State). But there is an impressive line of U. S. Supreme Court cases settling this very problem. See 1 Morgan, Basic Problems of Evidence p. 132.

As Morgan says at p. 131, the problem really resolves itself into a question as to whether the privilege as generally recognized should be broadened.

3. The words "permanently immune" would not seem to apply aptly to the lapse of the period of the Statute of Limitations. The matter might well be elaborated in the last sentence by redrafting the entire rule as follows:

"A matter will be deemed to expose a person to a criminal prosecution within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor. But he is not exposed to criminal prosecution if the prosecution is barred by the statute of limitations or he has been previously convicted or acquitted of the violation or has become for any reason permanently immune from punishment therefor."

4. It may be of interest to note the number of immunity statutes in this State including: N. J. S. 2A:87-2 (absolute immunity to the woman in abortion, see In re Vince, 2 N. J. 443, (1949); N. J. S. 2A:93-9 (permissive immunity in trial of indictment under N. J. S.

2A:93-7, 8--bribery of labor representatives or foremen); R.S. 4:12A-17 (milk control board proceedings); R S. 11:1-15 (Civil Service Commission proceedings); R. S. 17:29B-13 (insurance investigations by the Banking Commissioner); R. S. 18:25-11 (investigations under Anti-Discrimination Law); R. S. 19:34-58 (Election law--indictments thereunder--immunity now permissive); R. S. 23:10-12 (fish and game law prosecutions); R. S. 43:21-11 (j) (Unemployment Compensation Commission proceedings); R.S. 43:21-11 48:2-36 (Public Utility Commission proceedings); R. S. 48:1-19, 20 (Investigations under Securities Law); R. S. 50:5-11 (Proceedings under the Shellfish Act); R. S. 52:13-3 (State Legislative investigations); R. S. 58:1-29 (State Water Policy Commission proceedings). It might be noted that three of these statutes specifically exclude implied grants of immunity to corporations. R. S. 48:2-36, 49:1-19, 20, 58:1-29, supra. It may also be noted that most of these statutes explicitly exclude a grant of immunity for perjury while testifying.

R. S. 2A:81-17.1, cf. R. S. 40:69A-167, may also be mentioned as bearing on the problem of self-incrimination. This statute provides for forfeiture of the employment, tenure and pension of any state, county or municipal employee who refuses to testify or pleads self-incrimination before any grand jury, court, commission or other body of the State.

5. It will be observed that no attempt has been made to define the words "penalty" and "forfeiture of his estate" found in Rule 25 as proposed and in N. J. S. 2A:81-5. What these words have reference to is not clear. See Wigmore § 2256 and 2257; 1 Morgan, Basic Problems of Evidence p. 138. However the very dearth of cases on the matter shows that it is not a matter of major importance.

RULE 25. SELF-INCRIMINATION: EXCEPTIONS

Recommendation

It is recommended that the following rule be adopted:

"Subject to Rules 23 and 37, no witness shall be compelled to answer if the court finds it is likely that the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate, except that under this rule,

"(a) no person has the privilege to refuse to submit to an examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; and

"(b) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and

"(c) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter exposing him to a criminal prosecution, or a penalty or forfeiture of his estate, if the court finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced; and

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

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

"(f) subject to Rule 21, a defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of the facts does not have the privilege to disclose any matter relevant to any issue in the action, though by so testifying, he does not waive the privilege as to any matter affecting credibility."

Committee Annotation

1. The change proposed at the beginning of the rule--except the words "the court finds it is likely that"--is taken verbatim from N. J. S. 2A:81-5. It might be noted that Justice Brandeis, dealing with the problem covered by Uniform Rule 25 (d) (proposed Rule 25 (c), said for the Supreme Court in McCarthy v. Arndstein, 266 U. S. 34, 41 (1924);

> "To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property. Section 21a (having to do with the examination of a bankrupt as to his assets), on the other hand, deals specifically and solely with the adjective law,--with evidence and witnesses."

It could possibly be argued that the privilege against self-incrimination constitutes one of those rights referred to in Art. 1, Sec. 1 of the New Jersey Constitution. It was said in In re Vince, 2 N. J. 443, 449 (1949) that

> "Nor is a similar provision to be found in the Constitution of this State. Respondent's contentions that her constitutional rights were infringed are therefore without merit."

However in State v. Toscano, 13 N. J. 418, 423 (1953) the matter was put this way:

> ". . .Our State constitution contains no express provision embodying the privilege . . ." (italics inserted).

Iowa has no express privilege stated in its Constitution but the Supreme Court of Iowa has held that the privilege is included in the due process clause of the Iowa Constitution. See Comment to Model Code Rule 203.

2. The Uniform Rule refers to "every natural person". It has been held in Bd. of Health, Weehawken Tp. v. N. Y. Central R. Co., 10 N. J. 284, 287 (1952) that the privilege does not extend to corporations. Indeed the word "witness" in our statute and rule confirms this; a corporation cannot be a witness.

3. It will be observed that the provision in the Uniform Rule which has reference to a disclosure "to a public official of this State or any governmental agency or division thereof", has been deleted. If this language were to be adopted, "public official of

this State" should be changed to "public official in this State." More important than that, the Supreme Court's power to make rules extends to practice and procedure in the courts; there is no authority in the Supreme Court to promulgate a rule as to administrative proceedings.

4. Professor Morgan argues with some force that the self-incrimination privilege should apply to confessions obtained or sought by the police. Morgan, 34 Minn. L. Rev. 1, 27 (1949). There is some authority for this position. See 1 Morgan, Basic Problems of Evidence p. 130. However the weight of authority is to the contrary. See Notes, 18 L. R. A. (N. S.) 768, 50 L. R. A. (N. S.) 1077, 5 A. L. R. 2d 1404, 1425. State v. Bunk, 4 N. J. 461, 469, 470 (1950) goes no further than to hold that a confession is voluntary even though the person making the confession has not been advised of the privilege.

Wigmore, § 2266, infers from the separate histories of the rule excluding involuntary confessions and the privilege of self-incrimination, that the privilege has no application to the matter of confessions. The history of the matter is not too persuasive an argument.

It seems, as Morgan has said, that a police examination has none of the safeguards of a judicial proceeding (37 Minn. L. Rev. 28). If the privilege has any real meaning, it should be made applicable there.

However if such a change in the law (that is, the overruling of State v. Bunk) is deemed advisable, it could be accomplished by including it in an amendment to Rule 63 (6) having to do with confessions. Indeed, this would be the only way the matter could be dealt with by rule of court; for as above stated, police officials cannot be controlled by rule of court, although the admission of confessions can.

5. It will be perceived that the injection of the words "the court finds it likely that" in the provision is an embodiment with some modification of Uniform Rule 25 (a). A separate paragraph (a) was set up in the Uniform Rules because the main paragraph of Rule 25 has to do not only with actions in court but also with administrative proceedings.

Uniform Rule 25 (a) and Model Code Rule 204 leave it to the judge to find whether "the matter will", or will not, "incriminate the witness". This is a stronger test than that laid down in In re Pillo, 11 N. J. 8, 20 (1952), and Hoffman v. United States, 341 U. S. 479, 487 (1951). The Pillo case quoting United States v. Weisman, 111 F.2d 260, 262 (C. C. A. 2, 1940) said:

"Obviously a witness may not be compelled to do more than to show the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects."

6. N. J. S. 2A:81-8 should be repealed or superseded. It provides:

"On the trial of an indictment, the defendant shall be admitted to testify, if he offers himself as a witness."

This matter is covered by Rule 7 (a).

7. It has been held that where the party and the witness are separate persons, the witness must be left to make the claim for himself; he has no right to be attended by personal counsel; and neither such counsel nor the party may claim the privilege for him. Furthermore that the party's counsel may not, as such, give warning of the privilege to the witness or require the judge to do so. See State v. Mohr, 99 N. J. L. 124, 129 (E. & A. 1923). It has been said further that the same applies when the party and witnesses are identical, and Wigmore supports this position. Vineland v. Maretti, 93 N. J. Eq. 513, 521 (Ch. 1922); Wigmore, § 2270. Where the witness and the party are identical, counsel should be permitted to raise the point and ask that the witness be apprised of his rights; and the judge may, and when he believes that justice requires it, should of his own motion apprise the witness (whether or not he is a party) of his rights. See 1 Morgan, Basic Problems of Evidence p. 150. See Wigmore, § 2269. A magistrate in a preliminary proceeding is under R. R. 3:2-3 (b) obliged to inform the defendant of his rights in this regard. Although the above New Jersey cases were cited, the point was not passed upon in Bd. of Health, Weekawken Tp. v. N. Y. Central R. Co., 10 N. J. 284, 288 (1952). It would seem that this is a matter that can be left to common law.

8. State v. Alexander, 7 N. J. 585, 591 (1951) is the first case squarely to pass upon the matter treated in Rule 25 (a) and (b) as proposed, and it follows Wigmore's rule that the privilege against self-incrimination does not apply to non-testimonial disclosures. It might be said, in passing, that neither this case, nor the proposed rule, disposes of the question argued by Morgan (see 1 Morgan, Basic Problems of Evidence p. 141) that the privilege "applies to non-verbal conduct used in place of words"--even though our Supreme Court in the Alexander case italicized (as Wigmore does) the words that the privilege prevents only "the employment of legal process to extract from the person's own lips an admission of guilt." A nodding of the head, as expressing yes or no, is surely within the privilege.

It will be perceived that Uniform Rule 23 (3) states that an accused has no privilege to refuse "to do any act" in the presence of the judge or the trier of fact. As has been noted above, that

rule has no logical connection with the privilege against self-incrimination.

9. No New Jersey cases have been found on the points involved in Sections (c), (d) and (e) proposed above, but these rules restate the law of the United States Supreme Court and other jurisdictions.

Proposed Rule 25 (c) is supported by a convincing line of cases in the United States Supreme Court: Wilson v. United States, 221 U. S. 361 (1911); In re Fuller, 262 U. S. 91 (1923); McCarthy v. Arndstein, 266 U. S. 34 (1924); and United States v. White, 322 U. S. 694 (1944). Further see comment to Model Code Rule 206.

Wigmore, § 2259 c and the decided weight of authority support proposed Rule 25 (d), while 25 (e) adopts the doctrine of Essgee Company v. United States, 262 U. S. 151 (1923) and United States v. Austin-Bagley Corporation, 31 F. 2d 229 (C. C. A. 2, 1929). In the latter case the principle was referred to as "well settled law."

10. In State v. Zdanowicz, 69 N. J. L. 619 (E. & A. 1903) the question dealt with in Proposed Rule 25 (f) was apparently (see People v. Tice, 131 N. Y. 651, 30 N. E. 494, [Ct. App. 1892], abstracted in the case) considered but not decided. A number of jurisdictions hold that the voluntary testimony by an accused is a waiver as to all facts, including those merely affecting credibility. Wigmore, § 2276, argues for the rule, adopted here, that the waiver extends only to matters relevant to the issue--meaning thereby that the privilege remains as to facts affecting merely credibility. It seemed advisable in drafting this rule to make it clear what is meant by "relevant to any issue in the action"; it might be said that credibility is relevant to the issue.

The words "subject to Rule 21" seem to mean simply that Rule 25 (f) cannot be used to break down the limitations set forth in Rule 21.

RULE 26. LAWYER-CLIENT PRIVILEGE.

Recommendation

It is recommended that this rule be adopted.

Committee Annotation

1. Section (1) (c) (i) and (ii), contrary to Model Code Rule 210 (c) (ii) and (iii), privileges the testimony of eavesdroppers and interlopers. It has been persuasively argued that this is not sound. The contention is that the risk that someone will overhear a privileged communication or will surreptitiously read or obtain possession of a privileged document should be borne by the client. As Wigmore says, the means of preserving the secrecy is in the hands of the client or his agent

(that is, the attorney), and since the privilege is in derogation of the general testimonial duty, it would be improper to extend the privilege. 8 Wigmore § 2326. As Morgan says, "It is not to be forgotten that the privilege is a privilege to suppress the truth." 1 Morgan, Basic Problems of Evidence 101 (1954). In this state a well-considered case in effect sustains the Model Code provision and rejects the Uniform Rule on the point. State v. Loponio, 85 N. J. L. 357 (E. & A. 1913).

To eliminate the extension of the privilege to such eavesdroppers, Section (1) (c) (i) and (ii) might be revised as follows:

"(i) as the representative of the client or of the lawyer in transmitting the communication, or (ii) as one to whom disclosure was reasonably necessary in order to secure its transmission or to accomplish the purpose for which it was transmitted."

Similarly Section (1) (c) (iii) of the rule could be tightened and clarified by revision in the following form:

"(iii) as a result of an intentional breach by the lawyer of his duty not to disclose it and to see that it is not disclosed by his agent or servant." See Model Code Rule 210 (c) (iii).

2. The Uniform Rule makes it permissive with the lawyer as to whether or not to assert the privilege on behalf of the client; it imposes no duty on the lawyer. The next to last sentence of the rule might well be redrafted to impose such a duty:

"The privilege may be claimed by the client in person, or if incompetent, by his guardian, or if deceased, by his personal representative; but the lawyer, if he is a witness, has a duty to assert it for his client, unless the client instructs him not to do so. The privilege available to a corporation or association terminates upon dissolution."

This would codify State v. Toscano, 13 N. J. 418, 424 (1953); In re Selser, 15 N. J. 393, 404 (1954); 1 Morgan, Basic Problems of Evidence 105 (1954).

3. The provision of Uniform Rule 26 (2) (e) does not seem to clearly disclose its intent, which is that no one of the clients has a privilege as against another of them; yet each still retains a privilege as against third persons. It also limits itself to communications made by a client whereas the privilege extends to communications made by the lawyer to a client which often reveal the substance of the client's communications to him. See 1 Morgan, Basic Problems of Evidence 101 (1954), Russell v. Second National Bank of Paterson, 136 N. J. L. 270, 279 (E. & A. 1947), Uniform Rule 26 (3) (b).

Striking subsection (e) and substituting the following sentence might be preferable:

"When two or more persons acting together become clients of the same lawyer as to a matter of common interest, no one of them has as against another of them any such privilege as to communications between them, or either of them, and the lawyer with respect to the matter."

This is Model Code Rule 211 adding the words "between them, or either of them, and the lawyer," which cover more explicitly the idea that Professor Morgan apparently intended to cover, namely, communications by one client to the lawyer in the absence of the other client. 1 Basic Problems of Evidence 104 (1954).

The rule comports with New Jersey law. Gulick v. Gulick, 39 N. J. Eq. 516 (E. & A. 1885).

4. There is some question as to a policy in Rule 26 (3) (c) which would protect a communication made to a New York lawyer pretending to give advice as to New Jersey law. See 1 Morgan, Basic Problems of Evidence 99 (1954).

5. That the privilege belongs to the client is recognized in New Jersey. Russell v. Second National Bank of Paterson, 136 N. J. L. 270, 279 (E. & A. 1947). It is for his protection. State v. Toscano, 13 N. J. 418, 424 (1953); In re Selser, 15 N. J. 393, 404 (1954). Even if the opposite party consents, an attorney cannot disclose a privileged communication. Rowland v. Rowland, 40 N. J. Eq. 281, 283 (E. & A. 1885).

6. Any question as to the scope of the confidence can be developed by case law. Thus it seems to be the law that the privilege does not permit the concealment of the identity of a client. State v. Toscano, 13 N. J. 418, 424 (1953). Further see Palatini v. Sarian, 15 N. J. Super. 34, 43 (App. Div. 1951), making some close distinctions between communications where attorney's acts went beyond the practice of the law. The communications there seem to have been from plaintiff's attorney to his opponent, the defendant, and if so, they were of course not privileged, and it was unnecessary for the court to go further in its decision.

7. To give rise to the privilege, there must be a lawyer-client relationship and a professional confidence, as stated in Lines 4 and 5 of the rule. This point has been made in our cases. In the Matter of Stein, 1 N. J. 228, 236 (1949); In re Selser, 15 N. J. 393, 407 (1954). There is no privilege as to communications to the lawyer after his employment has terminated. Fox v. Forty-four Cigar Co., 90 N. J. L. 483, 489 (E. & A. 1917), but consultation for the purpose of retaining the lawyer is privileged. State v. Loponio, 85 N. J. L. 357, 363 (E. & A. 1913).

8. Rule 26 (2) (a) is not the law of this State. Anderson v. Searles, 93 N. J. L. 227 (E. & A. 1919) said in effect this would be "astounding" if it were the law. The New Jersey rule seems to be that the attorney may testify as to the execution of the will, Veazey's Case, 80 N. J. Eq. 466 (E. & A. 1912), but not as to its "preparation and concoction." The rule proposed would overrule the Anderson case. Chafee, criticizing the Anderson case, deplores "such fine discriminations." 35 Harv. L. Rev. 687 (1922). It seems that if a client has his lawyer attest the document, he should be held to have waived the privilege as to "preparation and concoction" also.

In fact the testimony sought to be adduced in Anderson v. Searles, 93 N. J. L. 227 (E. & A. 1919) would have been admissible under the theory expressed in Rule 26 (2) (b), but that theory was doubtless not called to the court's attention. Parenthetically Rule 26 (2) (b) renders admissible in a will contest or a will construction suit the testimony of an attorney who acts for a testator in the drawing or making of a will, but does not attest it. This is sound.

9. The privilege extends to documents submitted an attorney as well as oral communications. Matthews v. Hoagland, 48 N. J. Eq. 455, 464 (Ch. 1891).

10. Disclosures to an agent of the attorney are protected by Rule 26 (3) (b). Wigmore § 2301. So a disclosure to a stenographer is privileged. State v. Krich, 123 N. J. L. 519, 521 (Sup. Ct. 1939). Of course a disclosure in presence of strangers is not privileged. Roper v. State, 58 N. J. L. 420 (Sup. Ct. 1896); Carr v. Weld, 19 N. J. Eq. 319 (Ch. 1868).

11. Rule 26 (2) (a) which is verbatim Model Code Rule 212, is quoted and supported by the majority and minority opinions in In re Selser, 15 N. J. 393, 409, 415 (1954).

12. Model Code Rule 105 (e), which is not adopted in the Uniform Rules, provides that if the client is neither party nor witness, the judge in his discretion may of his own motion exclude a privileged communication. This appears to be the New Jersey law. Cf. Rowland v. Rowland, 40 N. J. Eq. 281, 283 (E. & A. 1885).

RULE 27. PHYSICIAN-PATIENT PRIVILEGE.

Recommendation

It is recommended that Uniform Rule 27 be rejected. In its place the substance of N. J. S. 2A:81-10 is recommended, as follows:

"No person engaged on, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court or before any grand jury of any county or any petit jury of any court the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.

"As used in this section the word 'court' means and includes the supreme court, the superior court, the county courts, the juvenile and domestic relations courts, the county district courts, the criminal judicial district courts, the surrogate's courts, any municipal court, any inferior court of limited criminal jurisdiction and any tribunal, commission or inquest operating under any order of any of the above enumerated courts."

Committee Annotation

1. The physician-patient privilege does not represent the law in this State (notwithstanding R. S. 24:18-40). Though there are some who favor the rule (In re Selser, 15 N. J. 393, 404 (1954), quotes Lord Chancellor Brougham as urging the adoption of such a rule), it is submitted that this privilege is not needed in order to protect a confidence vital to the relationship of physician-patient; and the interests of justice override such considerations as the honor of the medical profession. 8 Wigmore § 2380a. Chafee, after some study of the point, comes to the conclusion that the privilege cannot be justified. Chafee, Is Justice Served or Obstructed by Closing the Doctor's Mouth On the Witness Stand? 52 Yale L. J. 607 (1943).

2. Wigmore strongly criticizes the newspaperman's privilege § 2286, but the proposed rule conforms with New Jersey legislation.

RULE 28. MARITAL PRIVILEGE--CONFIDENTIAL COMMUNICATIONS.

Recommendation

Rule 28 (2) and (3) should be adopted as is, except that 28 (2) (b) should be stricken and the provisions 28 (2) (c), (d) and (e) relettered (b), (c) and (d), respectively. Rule 28 (1) should be rewritten as follows:

> "(1) General Rule. Except as provided in Rule 37 and Paragraphs 2 and 3 of this rule, if the court finds that a communication has been made in confidence by one spouse to the other while husband and wife, the spouse making the communication has a privilege not to disclose it and not to have it disclosed by the other spouse. If the spouse making

the communication is absent, the other spouse may claim the privilege on behalf, and if the spouse making the communication is incompetent or deceased, his guardian or personal representative may claim it on his behalf. For the purposes of this rule, spouses shall not be deemed to be husband and wife if they are divorced from bed and board."

Committee Annotation

1. The draftsmen of the Uniform Rule endeavored to shorten the more extended provisions in the Model Code. The proposed text seeks to clarify the Uniform Rule and eliminate inept verbiage.

For example, the Uniform Rule provides that a spouse who makes "the" communication has a privilege to prevent disclosure of communications (sic) found by the judge to be confidential communications. Again there is interlarded in this sentence the cumbersome definition found in Model Code Rule 214 (b) : "a spouse who transmitted to the other the information which constitutes the communication, has a privilege."

2. The Uniform Rule leaves out Model Code Rule 214 (d) defining a "confidential communication between spouses" as meaning "information transmitted by a voluntary act of disclosure by one spouse to the other without the intention that it be disclosed to a third person and by a means which, so far as the communicating spouse is aware, does not disclose it to a third person." This is a matter dealt with by the common law--at any event in this State. State v. Young, 97 N. J. L. 501, 505 (E. & A. 1922); State v. Laudise, 86 N. J. L. 230, 231 (E. & A. 1914); cf. Wolfie v. United States, 291 U. S. 7 (1934).

See too Wood v. Chetwood, 27 N. J. Eq. 311 (Ch 1876), holding that communications between a husband and wife who may be said to be cofiduciaries cannot be deemed to be of a confidential character. As above stated, the definition of a confidential communication can be left to be developed by the courts. Thus a "communication" includes an imparting of information via an act of one of the spouses. See 5 Vand. L. Rev. at 594 (1952); Wigmore, § 2337.

Again it is a rule of the common law and need not be codified, that marital communications are presumptively confidential. Blau v. United States, 340 U. S. 332 (1951); 8 Wigmore § 2336.

3. The Uniform Rule (unlike the Model Code) states that the communicating spouse has the privilege only "during the marital relationship." This has been eliminated. The communicating spouse should have the privilege even though the other spouse is dead.

4. The Uniform Rule and the Model Code both state that a spouse, whether or not a party, may "prevent" the other spouse from disclosing the communication. This is strange and perhaps an inadvertence. Does it mean that if the spouse is not a party, he has a right to make an objection? Again the Uniform Rule speaks of communications "had or made". What do the words "had or" add to this thought? Both of these thoughts have been eliminated from the proposed text.

5. The last sentence of Uniform Rule 28 (1) is not to be found in the Model Code. However it seems commendable to attempt to codify the last sentence in Comment b to Rule 215 of the Model Code, that "the spouse to whom the communication is made will ordinarily have authority to claim the privilege for the absent spouse." Hence the proposed rule changes this sentence of the Uniform Rule so as to make it applicable only in the case where the communicating spouse is absent.

6. Under Model Code Rule 214 (a) the privilege does not apply to communications made between spouses "legally separated" or divorced. By "legally separated" presumably reference is made to separation through the judgment of a court mensa et thoro. The draftsmen of the Uniform Rules have dropped out this idea. In other words, communications between such spouses are privileged. It is felt that the Model Code is better and the provision has been restored.

The draftsmen of the Uniform Rules also omitted any provision whereby the privilege could be claimed by the personal representative of a deceased communicating spouse. The Model Code provision in this respect has been retained. The privilege extends after death, and someone should be authorized to claim that privilege for the decedent after his death.

7. Uniform Rule 28 (a) (d), Model Code Rule 216 and the proposed rule give an accused a chance to offer evidence of a confidential communication if he thinks it will be of help to him--and this notwithstanding that his spouse has the privilege and will not waive it. The Model Code (Rule 216) comment on this provision states that it has been adopted--

> "to prevent the striking injustice which has been done in a few criminal cases where defendant spouse was not allowed to testify to a communication from the other spouse, although the mental effect produced by it might well have reduced the grade of the offense."

8. Uniform Rule 28 (2) (b) is omitted because N. J. S. 2A:23-1 abolishes a cause of action for alienation of affections or for criminal conversations.

9. The theory of Uniform Rule 28 (3) is stated in the comment to the identical provision, Rule 218, Model Code, as follows:

> "The theory of the rule is that a spouse ought not to be able to select for disclosure from among the communications upon a given subject those which he deems favorable, and to suppress the rest."

Some fuller discussion is found in 1 Morgan, Basic Problems of Evidence 97, (1954). The distinction between Uniform Rule 28 (3) (Model Code Rule 218) and Uniform Rule 37 (Model Code Rule 231) is that, first, under the latter rule the disclosure is made by the holder of the privilege with knowledge of the privilege while under the former rule there need be no such knowledge; second, the latter rule waives the privilege when there is a disclosure as to a part of "the specified matter" which is asked for in the question objected to, while the former rule waives the privilege when there is a disclosure as to the "same subject matter." While this last is not a too fortunate distinction, it has been passed. In general see Wigmore § 2340.

10. Rule 7 abolishes these statutes: N. J. S. 2A:81-3, 2A:81-7 and 2A:100-6, second sentence. If it is thought better to be explicit on the matter, Rule 28 (4) could be added reading thus:

> "A spouse may testify for or against the other in a civil or criminal action, except as provided in this Rule."

N. J. S. 2A:100-6, second sentence, which has been taken from the Uniform Desertion and Non-Support Act, § 6, second sentence, will be found embodied in Rule 28 (2) (c), the last 10 words. As to N. J. S. 2A:81-3, 2A:81-7, see comment to Rule 23, Section 2.

11. The marital privilege should be strictly confined generally speaking. Cf. In re Selser, 15 N. J. 393, 406 (1954).

RULE 29. PRIEST-PENITENT PRIVILEGE; DEFINITION; PENITENTIAL COMMUNICATIONS.

Recommendation

It is recommended that this rule not be adopted but rather that N. J. S. 2A:81-9 be adopted verbatim as a rule. The statute provides:

> "A Clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in any court, or to any public officer, a confession made to him in his professional character, or as a spiritual advisor, or as a spiritual advisor in the course of discipline enjoined by the rules or practice of the religious body to which he belongs or of the religion which he professes."

Committee Annotation

1. The statute, adopted L. 1947 c. 324, has never been cited.

2. No such privilege existed at the common law of this State. Bahrey v. Poniatishin, 95 N. J. L. 128, 129 (E. & A. 1920); State v. Morehous, 97 N. J. L. 285, 295 (E. & A. 1922).

3. Uniform Rule 29 is verbatim Rule 219, Model Code.

4. Comparison between New Jersey Statute and Uniform Rule. Under the rule the privilege belongs to the penitent, and he can waive it by a partial disclosure to any one, or waive it in other ways, thereby compelling the priest to testify. The statute seems preferable.

5. Under the rule the penitent has a privilege to refuse to disclose his confession whereas under the statute he has no privilege at all. Although the rule is better here, such disclosures almost always would be hearsay and therefore the matter is not important.

6. Under the rule the person confessing must be a member of the church. What, if technically he is not a member? There seems no reason for such a restriction.

7. Under the rule the minister must be authorized or accustomed to hear confessions and must be under a duty to keep them secret. The statute which is broader seems preferable.

8. The rule applies to officers of a religious denomination, even though not a minister; and to officers of a religious organization even though not a church.

9. Under the rule the confession must be (1) made secretly and (2) in confidence and (3) deal with culpable conduct. This appears

unimportant. Under the statute if the matter was public, someone else could testify to it, moreover, the word "confession" in N. J. S. 2A:81-9 implies a confidence.

10. The rule peculiarly provides that any person, even though not a party, has a privilege to prevent a penitent or priest from disclosing the confession. How does a person, not a party, make an objection?

11. Neither the statute nor the rule covers the advice or communication of the priest.

RULE 30. RELIGIOUS BELIEF.

Recommendation

It is recommended that the Uniform Rule be adopted.

Committee Annotation

1. No New Jersey cases have been found. See 8 Wigmore § 2213.

RULE 31. POLITICAL VOTE.

Recommendation

It is recommended that the Uniform Rule be adopted.

Committee Annotation

1. R. S. 19:29-7 authorizes a judge in an election contest to compel a voter to disclose for whom he voted provided the judge is satisfied that the voter was not qualified to vote. This comports with the rule.

2. No New Jersey case has been found. The rule represents the law generally. 8 Wigmore § 2214.

RULE 32. TRADE SECRET.

Recommendation

It is recommended that the Uniform Rule be adopted.

Committee Annotation

1. No New Jersey case has been found, but the Rule seems to state the law in other jurisdictions. See 8 Wigmore § 2212; 70 C. J. 743.

RULE 33. SECRET OF STATE.

Recommendation

It is recommended that the rule be adopted.

Committee Annotation

1. No New Jersey case has been found. See 8 Wigmore §§ 2378, 2378a, 2379.

RULE 34. OFFICIAL INFORMATION.

Recommendation

It is recommended that the rule be adopted.

Committee Annotation

1. Rule 34 (2) (a) has reference to New Jersey statutes such as these:

R. S. 54:32A-47, which makes records of the State Tax Division relative to the administration of Chapter 32A of the Taxation Law (having to do with taxation of foreign corporations) "confidential and privileged", and they cannot be disclosed either by the head of the division or an employee.

R. S. 54:33-8, which makes inheritance tax returns and data gathered by the State Tax Division "privileged communications".

Further see Wigmore § 2378 n. 7.

2. There is a question whether this rule can be squared with Thompson v. German Valley R. Co., 22 N. J. Eq. 111 (Ch. 1871), which holds that in the case of a subpoena duces tecum served on the Governor, he will be allowed to withhold any paper or part of it, if in his opinion his official duty requires him to do so. Rule 34 should not be changed on that account. There is no more sanctity to the production of a paper than to a subpoena commanding the personal appearance of the Governor, which, as the cited case says, can always be commanded.

3. The privilege here has nothing to do with the affairs of a municipality which are not of such importance as to be entitled to be privileged. Cf. Eggers v. Kenny, 15 N. J. 107, 120 (1954).

RULE 35. COMMUNICATION TO GRAND JURY.

Recommendation

It is recommended that the rule be adopted.

Committee Annotation

1. The law in other jurisdictions justifies this rule. 8 Wigmore §§ 2362, 2363.

2. It has been said broadly in this State that a witness may testify as to what was said by and to him before the grand jury. State v. Fish, 90 N. J. L. 17, 19 (Sup. Ct. 1917), reversed on other grounds 91 N. J. L. 228 (E. & A. 1917); State v. Borg, 8 N. J. Misc. 349, 350, affirmed at p. 705 (Sup. Ct. 1930). Rule 35 seems preferable.

3. State v. Bovino, 89 N. J. L. 586 (E. & A. 1916) holds it proper to impeach a witness by self-contradictory testimony given before the grand jury. State v. Silverman, 100 N. J. L. 249 (Sup. Ct. 1924) held it was proper to ask a witness what he testified to before the grand jury. The principle behind these decisions does not conflict with the Rule.

4. The rule does not deal with the immunity of the members of the grand jury, as to which see State v. Borg, 8 N. J. Misc. 349, affirmed at p. 705 (Sup. Ct. 1930); State v. Silverman, 100 N. J. L. 249 (Sup. Ct. 1924); State v. McFeeley, 134 N. J. L. 463 (Sup. Ct. 1946); State v. Donovan, 129 N. J. L. 478 (Sup. Ct. 1943).

RULE 36. IDENTITY OF INFORMER.

Recommendation

It is recommended that the Rule be adopted.

Committee Annotation

1. There seem to be no New Jersey cases, but the law in other states supports the rule. 8 Wigmore § 2374.

RULE 37. WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE.

Recommendation

It is recommended that this rule be adopted.

Committee Annotation

1. The person who holds the privilege alone may waive it. In re Selser, 15 N. J. 393, 404 (1954), speaking of the attorney-client privilege. There are a number of cases in this State stating that the privilege against self-incrimination may be waived by the person entitled to it. State v. Auld, 2 N. J. 426, 436 (1949).

2. The words "in the same trial or in an earlier cause" could be inserted in part (b) in order to make clear the intention of the rule. In this respect the rule is contrary to the decided weight of authority in other jurisdictions. See 1 Morgan, Basic Problems of Evidence 152 (1954) stating that it is settled that a person who has testified to an incriminating matter in an earlier proceeding or in an earlier stage of the same proceeding may nevertheless claim his privilege at a later trial; see 8 Wigmore 450 et seq. stating likewise that the waiver is limited to the particular proceeding in which the testimony is involved. The rule modifies this in only a limited respect, and it seems to be justified; it is limited to a "specified matter" when part of that very matter has been previously disclosed.

It has always been recognized and does not conflict with the settled rule above stated, that the testimony itself voluntarily submitted at a prior hearing can be used at a subsequent hearing.

See in accord State v. Kummel, 3 N. J. Misc. 204, 209 (Sup. Ct. 1925), affirmed on opinion 102 N. J. L. 226 (E. & A. 1925); State v. Gregory, 93 N. J. L. 205, 209 (E. & A. 1919). But this is different from the rule proposed, namely, that a waiver as to fact X becomes a waiver as to fact Y when X is part of Y.

3. Some cases talk of waiver when in fact what is meant is that there is no privilege. See State v. Young, 97 N. J. L. 501 (E. & A. 1922) referring to the marital privilege when in fact there was no such privilege as the communication was not confidential, there being a third party present.

4. The distinction between proposed Rule 25 (f) and Rule 37 is obvious. Rule 37 constitutes a waiver as to a "specified matter" when a part of the matter has been disclosed; under proposed Rule 25 (f) a defendant in a criminal action who testifies as to any matter waives the privilege as to any other matter relevant to any issue in the case.

RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED.

Recommendation

It is recommended that this rule be adopted.

Committee Annotation

1. This rule provides that evidence of a statement or other disclosure in a previous case is inadmissible against a declarant who is a party to the present case, where there was error in compelling the admission in the prior case.

2. As in several other rules, the word "judge" could best be changed to "court."

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES.

Recommendation

The following rule, which is a combination of Model Code Rules 201 (3) and 233, is recommended.

"If a privilege to refuse to disclose a matter, or not to have it disclosed by another, is claimed and allowed, or if an

accused in a criminal action does not testify, the court and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom."

Committee Annotation

1. Three possible courses could be taken here, either to adopt the rule above stated, or to leave the matter to the common law of New Jersey, or to adopt the Uniform Rule.

2. Dealing with the last alternative first, it is to be observed that the draftsmen of the Uniform Rules, in their endeavor to put across a practical code of rules, had to recognize, as Morgan says (1 Morgan, Basic Problems of Evidence 158 (1954):

"In most jurisdictions by statute and in a few others by judicial decisions, no inference may be drawn against a person by reason of his claim of the privilege."

In most jurisdictions, then, there is a practical legislative obstacle blocking any attempt to alter this rule. The Uniform Rules under Rule 23 (4), however do go so far as to permit the Prosecutor (as distinguished from the court) to comment on the failure of an accused to testify. This is an unsatisfactory compromise of principle. If it is wrong to undercut the privilege by commenting on the failure to testify, it is wrong to have the Prosecutor make the comment.

The draftsmen of the Uniform Rules in their comment seem to indicate that the reason they did not provide for comment by the court in Rule 23 (4) was because "these rules do not cover comment by the judge." However, contrary to that last assertion, Rule 39 does cover comment by the judge where an accused or a witness invokes the self-incrimination privilege while he is on the stand, as distinguished from comment for failure to take the stand, the matter dealt with in Rule 23 (4).

New Jersey is not faced with the practical considerations that troubled the draftsmen of the Uniform Rule. Hence it is recommended that the Uniform Rule be not adopted.

3. The next alternative is to leave the matter to the common law of New Jersey. We have a recent case of the Supreme Court on the point. State v. Costa, 11 N. J. 239, 253 (1953). That case, however, lays down a rule providing that "comment is ordinarily improper." If a rule is adopted on the matter some litigation may be forestalled. As Chief Justice Case has said in State v. Anderson, 137 N. J. L. 6 (Sup. Ct. 1948), dealing with cases on this point:

"Our appellate courts have not always been entirely clear in their expressions on the subject."

There have been many decisions on the point in this state (see State v. Costa) and great masses of them in other states. As Morgan comments (supra at p. 158) four columns are required to list the decisions from 1930 to 1951 supplementing the note in 68 A. L. R. 1102, 1108.

4. It is urged then that the recommended rule be adopted.

The New Jersey rule, as stated in the Costa case, is that ordinarily comment is

> "improper unless there is evidence of inculpatory acts or conduct of the accused which, if true, must be within his personal knowledge and in some degree impute his guilt or tend to prove some element of the offense, and which facts he can disprove by his own oath as a witness if the facts be not true."

Thus is was held in State v. Edelman, 19 N. J. Super. 350, 354 (App.Div. 1952), that where the evidence pointing to guilt was entirely circumstantial, there is no right to make any comment. The New Jersey limitations on the rule proposed by the Model Code Rule are not persuasive.

The whole argument in favor of no comment is that comment undercuts the privilege--the prosecutor should not rely on extracting admissions from the defendant but should seek the truth elsewhere. It can be doubted whether the mere right to make a comment on the failure to testify induces the prosecutor to refrain from seeking the truth elsewhere. Moreover, when a judge is commenting on the proofs offered, he should be able to call to the jury's attention the inference to be drawn from the defendant's failure to take the stand, whether the case is circumstantial or testimonial.

It must be borne in mind in considering the Uniform Rule that the draftsmen of that rule decided not to deal with the matter of comment by the court on the evidence (see p. 162 of the Uniform Rules, referring doubtless to Model Code Rule 8) because a majority of the jurisdictions do not allow it. As these draftsmen say in the note to Rule 39:

> "If the judge cannot comment on the evidence introduced, a fortiori he cannot comment on the failure to introduce evidence when such **failure** is in accord with a recognized privilege."

5. The Model Code separated Rules 201 (3) and 233 making a logical distinction between an accused's privilege not to testify and a privilege

not to testify as to incriminating matters. Rule 201 (3) deals with the situation where an accused is asked to testify as to non-incriminating matters. This is, however, not a familiar distinction to the practicing lawyer, and hence it is suggested that these two rules be combined as above stated.

6. It is important to distinguish between comment by reason of a party's invocation of the privilege and that by a witness other than a party. In the latter case there can be no weighty objection on the ground that the comment will lessen the value of the privilege. No rights or duties of the witness are to be adjudicated, and the comment in the action can do him no harm. Further see comment to Model Code Rule 233 and 1 Morgan, supra, p. 159.

7. Finally Rule 21 protects the accused who takes the stand from the damaging inquiry by the state as to prior convictions of crime-limited, of course, in theory to his credibility. Thus a defendant is encouraged to take the stand and fully participate in the judicial inquiry as to his guilt or innocence free of harassment from one of a prosecutor's most effective and easily abused impeaching devices.

Present New Jersey practice permitting impeachment by any prior conviction and, on the other hand, allowing in many cases comment by prosecutor and judge on a defendant's failure to testify is not unlikely to present a real dilemma to an accused. See Tyree, 5 Rutgers L. Rev. 251 (1950) discussing State v. Tansimore, 3 N. J. 516 (1949). Rule 21 should end this dilemma, and the accused who need not fear such impeachment would seem to have scant cause for complaint as to comment on his failure to take the stand.

V. PRIVILEGES

Rule 23. Privilege of Accused.

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

(2) [An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.] The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

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

(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment [upon accused's] on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts. [all reasonable inferences therefrom.]

Comment

The principal change from the Court Committee draft is to more nearly conform to existing New Jersey law.

Paragraph (2) adopts in a large measure the present New Jersey rule. This paragraph retains the general rule that a spouse may not, in most matters, be compelled or permitted, over the objection of the defendant, to

testify against her husband in a criminal action. The presently existing exceptions are embodied in paragraphs (b) and (c).

Paragraph (3) provides that an accused has no privilege to refrain from doing certain acts, such as walking, submitting himself to view for purposes of identification, etc.

Paragraph (4) embodies the present rule that an unfavorable inference may be commented on by counsel and the judge, and drawn by the jury, upon the failure of a defendant to take the stand and to disprove facts as to which direct evidence has been given.

Rule 24. Definition of Incrimination.

Within the meaning of these rules, a [A] matter will incriminate [a person within the meaning of these Rules] if it constitutes [, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.] an element of a crime against this state, or another state or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; Provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

Comment

This rule adopts a broad definition of self-incrimination. It extends to all matters which are an element in a crime against this State, or any state or the United States, and includes circumstances inferring the commission of a crime as well as matters which are a clue to the discovery of any such element or circumstance. The present New Jersey rule only applies to crimes against this State and does not extend to matters which might be considered a clue. But cf. *Marsh* v. *Marsh*, 16 N.J.Eq. 391, 397 (Ch. 1863). The definition of this Commission is limited in that the trial judge may rule that a matter is not incriminating if it clearly appears that the witness has no reasonable cause to apprehend criminal prosecution. In

determining whether or not a matter is incriminating, all relevant factors shall be considered. The definition adopted by this Commission is that enunciated by the Supreme Court of the United States in *United States* v. *Hoffman*, 341 U.S. 479, 71 S. Ct. 814, 95 L. ed. 1118 (1951).

Rule 25. Self-Incrimination: Exceptions.

Subject to Rule[s 23 and] 37, every natural person has a right [privilege, which he may claim,] to refuse to disclose in an action or to a police officer or other [public] official, [of this state or any governmental agency or division thereof] any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate,

[*Subject to Rules 23 and 37, no witness shall be compelled to answer if the court finds it is likely that the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate,*] except that under this rule,

[(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and]

(a) [(b)] no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; [and]

[*(b)* (c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and]

(b) [*(c)* (d)] no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control [constituting, containing or disclosing matter *exposing him to a criminal prosecution, or a penalty or forfeiture of his estate,* incriminating him] if [the judge *court* finds that, by the applicable rules of the substantive law,] some other person or a corporation [,] or other association has a superior right to the possession of the thing ordered to be produced; [and]

(c) [*(d)* (e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege] no person has a privilege to refuse to disclose any matter which the statutes or regulations governing [the] his office, activity, occupation, profession or calling , or governing

the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose [concerning it]; [and]

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

(d) [*(f)* (g)] subject to Rule 21, [a defendant] the accused in a criminal action or a party in a civil action, who voluntarily testifies in the action upon the merits [before the trier of *the* fact *s*] does not have the privilege to refuse to disclose in that action, any matter relevant to any issue [in the action] therein. [*though by so testifying, he does not waive the privilege as to any matter affecting credibility.*]

Comment

This rule is the corollary to the constitutional right against self-incrimination.

Paragraph (a) of the Court Committee draft is deleted as being unnecessary. The trial judge determines whether or not a matter is incriminating and his determination is subject to review by the standards of Rule 8. The Court Committee provision of paragraph (c), compelling a person to submit to the taking of body fluids, is also deleted. This Commission feels that this is not only a matter of incrimination, but also of personal privacy.

Paragraphs (b) and (c) of this Commission's draft provide that no person may refuse to produce a document or other thing under his control to which some other person or corporation has a superior right, and that a person who is an agent or employee of a corporation does not have the privilege to refuse to disclose any matter which he is required by statute or regulation to record or report or disclose.

The Court Committee's paragraphs (e) and (f) are combined with this Commission's draft of paragraph (c).

Rule 26. Lawyer-Client Privilege.

(1) **General Rule.** Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications [found by the judge to have been] between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) [if he is the witness] to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowl-

edge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated [by the client], or (iii) as a result of a breach of the lawyer-client relationship. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person [or by his lawyer], or if incompetent or deceased, by his guardian[,] or [if deceased, by his] personal representative. [The privilege available to a corporation or association terminates upon dissolution.] Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) **Exceptions.** Such privilege[s] shall not extend (a) to a communication [if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the] in the course of legal service [was] sought or obtained in [order to enable or] aid of the commission of a crime or a fraud, [the client to commit or plan to commit a crime or a tort,] or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or (d) [to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.] where two or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) **Definitions.** As used in this rule (a) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the

incompetent, (b) ["communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship, (c)] "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

Comment

This privilege is well recognized by the common law of New Jersey. The privilege is for the benefit of the client and the lawyer is under a duty to assert the privilege on behalf of the client. Paragraph (2) enumerates the exceptions to the privilege, most of which, if not all, are the present New Jersey law. The definition of communication in paragraph (3) is deleted as unnecessary. The last sentence is added to provide that a private communication between a lawyer and client is presumptively confidential.

[Rule 27. Physician-Patient Privilege.]

[(1) As used in this rule, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.]

[(2) Except as provided by paragraphs (3), (4), (5) and (6) of this rule, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.]

[(3) There is no privilege under this rule as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offence other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.]

[(4) There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.]

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

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

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

Rule 27. Newspaperman's Privilege.

Subject to Rule 37, a person connected with, or employed by, a newspaper has a privilege to refuse to disclose in a court or before a grand jury the source of any information procured or obtained by him and published in such newspaper.

*[No person engaged on, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court or before any grand jury of any county or any petit jury of any court the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.]

[As used in this section the word "court" means and includes the supreme court, the superior court, the county courts, the juvenile and domestic relations courts, the county district courts, the criminal judicial district courts, the surrogate's courts, any municipal court, any inferior court of limited criminal jurisdiction and any tribunal, commission or inquest operating under any order of any of the above enumerated courts.]*

Comment

This rule is deleted, following the suggestion of the Court Committee draft and several bar associations. New Jersey at present has no physician-patient privilege and this Commission does not consider it desirable to adopt such a privilege at this time. This Commission has adopted the recommendation of the Court Committee that the newspaperman's privilege, presently embodied in N.J.S. 2A:81-10, be incorporated in this rule.

Rule 28. Marital Privilege—Confidential Communications.

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding coming within Rule 23(2). When a spouse is incompetent, consent to the disclosure may be given for such spouse by the guardian. The requirement for consent shall not terminate with divorce or separation but shall terminate with the death of either spouse. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

[(1) **General Rule.** Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.]

[*(1) **General Rule.** Except as provided in Rule 37 and Paragraphs 2 and 3 of this rule, if the court finds that a communication has been made in confidence by one spouse to the other while husband and wife, the spouse making the communication has a privilege not to disclose it and not to have it disclosed by the other spouse. If the spouse making the communication is absent, the other spouse may claim the privilege on his behalf, and if the spouse making the communication is incompetent or deceased, his guardian or personal representative may claim it on his behalf. For the purposes of this rule, spouses shall not be deemed to be husband and wife if they are divorced from bed and board.*]

[(2) **Exceptions.** Neither spouse may claim such privilege (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 (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child

of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.]

[(3) **Termination.** 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.]

Comment

This Commission has changed the Court Committee draft so as to more nearly conform to existing New Jersey law. The privilege against disclosing confidential communications between spouses is restored. The Court Committee draft limited the privilege to the one who originated the confidential communication. Furthermore, the privilege as to such communication extends beyond termination of the marital relationship. The privilege does not extend to actions between spouses nor to criminal actions within the scope of Rule 23(2).

Rule 29. Priest-Penitent Privilege [; Definition; Penitential Communications].

[(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 com-

munication 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.]

Subject to Rule 37,* [A] a clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in court, or to a public officer, a confession or other confidential communication made to him in his professional character, or as a spiritual advisor [, or as a spiritual advisor] in the course of the discipline or practice [enjoined by the rules or practice] of the religious body to which he belongs or of the religion which he professes.*

Comment

This Commission has adopted the Court Committee Draft to a large extent. The Court Committee recommended adoption of N.J.S. 2A:81-9 verbatim. This Commission had added confidential communications, which might not qualify as confessions but which should be privileged.

Rule 30. Religious Belief.

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

Comment

This Commission feels that unless religious belief is material to an issue other than that of credibility, it is a personal matter which a witness should be entitled to refuse to disclose.

Rule 31. Political Vote.

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

Comment

This privilege extends to the tenor of a person's vote and not to the fact of voting. The case of an illegal vote is excepted from the rule. See the comparable present statute, R.S. 19:29-7.

Rule 32. Trade Secret.

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

Comment

Although a trade secret might be relevant or material, its disclosure might not be of too great importance. The burden is on the owner to show that failure to disclose will not tend to conceal fraud or otherwise work injustice. The purpose is to protect a secret that might be of commercial value from unnecessary disclosure.

[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 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.**]**

Comment

This rule has been combined with Rule 34.

Rule 34. Official Information.

[(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**]** No person shall disclose **[**a matter on the ground that it is**]** official information of this State or of the United States**[**, and evidence of the matter

is inadmissible, if the judge finds that the matter is official information, and [(a) if disclosure is forbidden by [an] or pursuant to any Act of [the] Congress [of the United States] or [a statute] of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public. [government of which the witness is an officer in a governmental capacity.]

Comment

This rule prohibits disclosure of official information if disclosure is forbidden by statute or harmful to the interests of the public, thus leaving to other statutes the identification of such matter.

[Rule 35. Communication to Grand Jury.]

[A witness has a privilege to refuse to disclose a comunication 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.]

Comment

This Commission recommends that this rule not be adopted. The privilege contained in the Court Committee Draft only extends to the period during which the grand jury is making its investigation and prior to the time it has made its findings, if any, and does not prohibit the witness from disclosing what his communication to the grand jury was.

Rule 36. Identity of Informer.

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.

Comment

This privilege is for the purpose of inducing persons to furnish information disclosing violation of the law. The identity of such person may, by this rule, be kept secret unless such identity has already been disclosed or disclosure is essential to assure a fair determination of the issues. The privilege belongs to the representative of the government and not the informant.

Rule 37. Waiver of Privilege by Contract or Previous Disclosure. Limitations.

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

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this state, or by lawful contract, shall not constitute a waiver under this rule. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

Comment

This Rule provides that a person waives his right or privilege if, while the holder thereof, he has contracted not to claim the right or privilege or has made disclosure of any part of the matter. The additional paragraph is added to insure that a disclosure which is itself privileged does not constitute a waiver hereunder. The failure of a witness to claim a right or privilege with respect to one question shall not operate with respect to any other question.

Rule 38. Admissibility of Disclosure Wrongfully Compelled.

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if [the judge finds that he had and claimed a privilege to refuse to make] the disclosure [but was nevertheless required to make it.] was wrongfully made or erroneously required.

Comment

If disclosure is wrongfully made or erroneously required, such disclosure is not a waiver of the privilege.

Rule 39. Reference to Exercise of Privileges

Subject to Paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

[*If a privilege to refuse to disclose a matter, or not to have it disclosed by another, is claimed and allowed, or if an accused in a criminal action does not testify, the court and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom.*]

Comment

Subject to the exceptions in Rule 23(4), the judge and counsel may not comment on the exercise of any privilege and no presumptions or adverse inferences shall be drawn therefrom. The exception is as to the right to comment upon the failure of the accused in a criminal action to deny facts which he could disprove if they were false, and the adverse inference which may be drawn therefrom.

Rule 40. Effect of Error in Overruling Claim of Privilege.

(1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous.

Comment

Since privileges are designed, because of matters of policy, to protect the holder thereof, the disclosure of privileged matter cannot be error as to any person other than the holder. If a witness refuses to answer a question under color of privilege after being directed to do so by the judge, the court hearing the subsequent contempt proceeding shall dismiss the proceeding if the order was erroneous.

VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

Rule 41. Evidence to Test a Verdict or Indictment.

Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

Comment

This rule is substantially the present New Jersey rule. *State* v. *Kociolek*, 20 N.J. 92 (1955).

Rule 42. Testimony by the Judge. Mistrial.

Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness. If the judge finds that his testimony would be of importance, he shall declare a mistrial.

Comment

If the judge finds that his testimony would be of importance, he shall declare a mistrial and the case shall be heard by another judge. This Commission feels that if the judge is a witness, the possible prejudicial effect upon the jury is such that he should not preside at the trial.

Rule 43. Testimony by a Juror. Mistrial.

A member of a jury [sworn and empanelled] in the trial of an action, may not testify in that trial as a witness. If the judge finds that the juror's testimony would be of sufficient importance, he shall declare a mistrial.