file

File: URE-Privileges Article

Memorandum 63-9

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 29-36)

Attached to this memorandum are the following materials:

Exhibit I (yellow pages)--Extract from Minutes of Southern Section of the State Bar Committee to Consider Uniform Rules of Evidence

Exhibit II (pink pages)--Extract from Minutes of Northern Section of State Bar Committee to Consider Uniform Rules of Evidence

RULE 29

We cannot find a reference to Rule 29 in the Minutes of the Southern Section of the State Bar Committee. You will note from Exhibit II that the Northern Committee approved the rule as revised by the Commission.

The privilege is discussed at pages 101-103 of the study.

Should the word "witness" be used in subdivision (2) to describe the person who may be silenced by an exercise of the privilege? This word was changed in Rule 26 because there are times when a person required to produce information is not technically a "witness". Perhaps, for the same considerations a similar change should be made here.

See the New Jersey treatment of this rule (Memo 63-2, page 7 of green pages, pages 18-19 of pink, and pages 37-38 of white.)

RULE 30

Both the Northern and the Southern Committee suggest that the rule be revised for purposes of clarification. The Northern Committee approved a revised draft and the Southern Committee has suggested that the Northern Committee's revision be further revised. The revisions are set forth below.

The changes that the Southern Committee has suggested are indicated by strikeout and underline. The original language is that of the Northern Committee.

> Every person has the privilege to refuse to disclose his theological opinion or religious belief when the same [~~might be~~] is material in determining his credibility as a witness; but he has no privilege to refuse to disclose such opinion or belief when the [same] privilege is material to any other issue in the action or proceeding.

The Southern Committee's last revision indicated above is probably a mistake. It probably meant to substitute the words "opinion or belief" for the word "same" instead of the word "privilege."

See the Minutes of the Northern Section on the attached pink pages, page 1, for an explanation of the revision.

RULE 31

Both Northern and Southern Committees approve Rule 31. It is discussed at pages 104 and 105 of the study.

RULE 32

This rule is discussed at pages 105 and 106 of the study.

The Northern Committee of the State Bar approves Rule 32 but suggests that "licensee" be added after the word "agent" in the second line of the rule.

The Southern Committee expressed serious doubts about the wisdom of making trade secrets privileged matter. It believes that the question should be left to the inherent powers of a court to make protective orders. The Committee points out that the rule is not of serious consequence because it invites the judge to deny the claim of privilege

whenever the trade secret is material. See the discussion in the Minutes of the Southern Section (yellow pages) at page 2.

RULES 33 and 34

Both sections of the State Bar Committee agree with the Commission that Rules 33 and 34 should be combined into one rule. The Northern Committee has redrafted the rule and the Southern Committee has indicated that it believes that the Northern Committee's draft is superior to that of the Commission. The Northern Committee's draft is as follows:

RULE 34. OFFICIAL INFORMATION

(1) As used in this rule:

(a) "Official information" means information not open or theretofore officially disclosed to the public, (i) acquired by a public officer or employee in the course of his duty or transmitted from one public officer or employee to another in the course of his duty, or (ii) 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.

(b) "Public officer or employee" includes a public officer or employee of this state, a public officer or employee of a county, city, district, authority, agency or other political subdivision in this State and a public officer or employee of the United States.

(2) Subject to Rule 36, a witness has a privilege to refuse to disclose matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information and that:

(a) Disclosure is forbidden by an act of Congress of the United States, or a statute of this state; or

(b) Disclosure of the information is against the public interest, after a weighing of the necessity for preserving the confidentiality of the information as compared to the necessity for disclosure in the interest to justice, except in cases where the chief officer of the department of government administering the subject matter which the information concerns has consented that it be disclosed in the action.

The Southern Section prefers this draft because (1) it gives recognition to the principle that the head of the appropriate governmental department can waive an asserted privilege in circumstances where disclosure is not specifically forbidden by statute and (2) it recognizes that a state secret can be known to persons who are not public employees.

See the discussion of this rule in the Minutes of the Northern Committee at page 4 and the Minutes of the Southern Committee at page 3. The rule is also discussed in the study at pages 106-111.

The reference to Rule 36 is to indicate that the identity of an informer is not privileged under this rule. Does the Commission mean that a judge can hold an informer's identity not privileged despite a state or U.S. law saying it is? Please note that there is a great difference between holding such a matter not privileged and holding that the government must choose between exercising the privilege and prosecuting. Literally, these rules say that a judge can compel identification of governmental secret agents in litigation between private parties notwithstanding any statutes on the subject.

RULE 35

Rule 35 is discussed at pages 111-113 of the study. The Northern Committee of the State Bar approved the rule as proposed by the Uniform Law Commissioners. The Southern Committee, however, agrees with the Commission that the rule is of little importance and is riddled with exceptions and, therefore, should not be approved.

RULE 36

This rule is discussed at pages 114-118.

The Southern Section of the State Bar Committee disagrees with the Commission's extension of the informers identity privilege to persons who report information to administrative agencies. It is the Southern Section's belief that this privilege is justified to protect law enforcement agencies' informative networks so that they may be of continued usefulness and to protect particular informers from reprisal by criminal elements. The Southern Section does not think that these dangers are particularly severe in connection with laws enforced by administrative agencies.

The Southern Section disapproves of subdivision (2) of Rule 36 as proposed by the Commission. They do not believe that the privilege should be extended to informers who inform indirectly. Recognizing that there are some logical difficulties in their position, the Committee nonetheless would limit the privilege to direct informers because of the collateral issues which the indirect communication principle would lead to.

The Northern Committee has proposed a redraft of the rule as follows:

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 law enforcement officer, and evidence thereof is inadmissible, unless the judge finds that:

(a) The identity of the person furnishing the information has already been disclosed; or

(b) Disclosure of his identity is needed to insure a fair determination of the issues.

The Southern Section approves the redraft by the Northern Section inasmuch as it expresses the conclusions reached by the Southern Section.

There is a problem in connection with this rule that is similar to that raised in connection with Rule 34. Literally, this rule says that if a judge determines that disclosure of a governmental informer is needed to insure a fair determination of the issues, the government has no privilege. Hence, the testimony can be compelled in any kind of litigation. This seems to be far different than saying that the government must choose between exercising a privilege (the continued existence of which is recognized) and prosecuting if the privileged information is needed for an accused's defense.

In People v. McShann, 50 Cal.2d 802 (1958), Justice Traynor used some broad language to the effect that there is no privilege, but what he held was that "when it appears from the evidence that the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal." (50 Cal.2d at 808.) Cited with approval was the following language of the U.S. Supreme Court: " . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ." (50 Cal.2d at 809.)

Similarly, in Priestly v. Superior Court, 50 Cal.2d 812 (1958), the court said that disclosure of an informer may be required if his identity is material on the issue of the legality of a search and seizure.

Justice Traynor, speaking for the court, said: "If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer." (50 Cal.2d at 819, emphasis added.) See also Coy v. Superior Court, 51 Cal.2d 471 (1959) to the same effect.

These cases do no more than hold that the government cannot "have its cake and eat it, too" in criminal prosecutions. They recognize the right of the government to maintain its secrets, including its secrets as to informers. They merely hold that if the government chooses to exercise its privilege as to this information, it cannot proceed against a criminal defendant if the privileged matter is material to the defense. It is suggested that this rule be modified to correspond with the holdings of these cases.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo 63-9

EXHIBIT I

EXTRACT FROM THE

MINUTES OF MEETING

OF

SOUTHERN SECTION

STATE BAR COMMITTEE TO CONSIDER UNIFORM RULES OF

EVIDENCE

[February 8, 1962]

Rule 30 [Religious Belief Privilege].

The Committee approved Rule 30 as revised by the Law Revision Commission. However, the Committee suggested (without making the adoption of its suggestion a condition to its approval of Rule 30) that the statement of the Rule would be improved and clarified if it were rephrased, as the Northern Section suggested in the minutes of its November 7, 1961, meeting, to state first the specific situation in which the privilege exists (i.e., where credibility is involved) and then go on to state that the privilege does not exist where religious belief is material to any other issue. The Committee would be happier with the Northern Section's rephrasing of the Rule, however, if the phrase "might be material" were changed to "is material" and if the words "the privilege" were substituted for words "the same" in the next to last sentence of the Northern Section's restatement of the Rule.

Rule 31 [Political Vote].

The Committee approved Rule 31 without change. The Northern Section and the Commission previously took the same action.

Rule 32 [Trade Secrets].

Mr. Barker reported on Rule 32. Note was taken of the fact that the Commission had approved Rule 32 without change and that the Northern Section, at a meeting held November 21, 1961, also approved Rule 32 except that it would add the word "licensee" immediately preceding the word "agent" as suggested in Mr. Barker's written report on this Rule.

The Committee then proceeded to discuss Rule 32 at some length. The consensus view which developed during and as a result of this lengthy discussion was that although there now is, and there should continue to be, some right to prevent disclosure of trade secrets under appropriate circumstances, this right is adequately covered by the court's inherent powers under our existing statutes (particularly the discovery statutes) and there are serious doubts about the wisdom of making trade secrets privileged matter. By way of criticism of Rule 32 as contained in the URE and as revised by the Commission, and by way of general criticism of stating the right of non-disclosure of a trade secret in terms of a privilege, the following observations were made: We are not sure that there is or should be any trade-secret "privilege" in the strict sense. Even Wigmore concedes the weakness of this so-called "privilege" and admits that it is far from absolute and is more like a condition than a privilege. While we agree that a person ought not to be required to disclose a trade secret where it is not material to the issues of the lawsuit (such as, for example, where disclosure is sought for purposes of harassment), no persuasive reason exists why a so-called trade secret should be privileged where its disclosure is material and of key importance to the lawsuit. Even the present language

of Rule 32 recognizes that the essential criterion for admissibility of a trade secret is materiality, since the wording of the Rule contains an open invitation to the judge to deny the claim of privilege when the trade secret is material. There are dangers in giving trade secrets the status of privileged matter. These dangers are: (i) the meaning of "trade secrets" is vague and uncertain, and making trade secrets privileged will simply invite the contention that many different types of business records and processes, although material, nevertheless are not admissible; (ii) making trade secrets privileged tends to confuse the difference between materiality and privilege and gives trade secrets greater importance than they now have and should have. Admittedly, the trade-secret area is a difficult area. However, it seems to the members of the Southern Section that it would be unwise to raise trade-secrets to the status of privileged matter in view of the court's existing inherent powers to make protective orders concerning the discovery and admissibility of information which properly constitutes a trade secret and the disclosure of which is not necessary in the interests of justice.

Rules 33 [Secrets of State] and 34 [Official Information].

The Committee agreed with the views of the Commission and the Northern Section that Rules 33 and 34 should be combined under one Rule and that Rule 33, in its present form, should be deleted. After reviewing the two different revised versions of Rule 34 adopted, respectively, by the Commission and by the Northern Section, the Committee concluded that the revision of Rule 34 which was adopted by the Northern Section at its meeting held December 2, 1961, is a better statement than the Commission's draft. The Northern Section's version is, in the opinion of the Committee, superior in two respects: (i) it properly gives

recognition to the principle that the head of the appropriate governmental department can waive an asserted privilege in circumstances where disclosure is not specifically forbidden by statute; (ii) it properly recognizes that a state secret can be known to persons who are not public employees, as well as to those who are public employees.

* * * * *

[April 19, 1962]

Rule 36.

Mr. Christopher, the reviewing member, orally reported on Rule 36. This Rule recognizes a privilege to refuse to disclose the identity of an informer under certain circumstances. Mr. Christopher pointed out that in view of the fact that the Committee already had available to it Mr. Erskine's comprehensive written report to the Northern Section, no useful purpose would be served by submitting an additional written report which necessarily would be duplicative of much of the material contained in the Erskine report. He suggested that the most expeditious way for the Committee to study the Rule was to use the Erskine report as a foundation for discussion. The Committee agreed.

In the discussion which thereafter ensued, it became apparent that no one seriously questioned the basic policy consideration justifying the need for some privilege of the type recognized by Rule 36; that the main differences of opinion related to matters of scope and practical application of the privilege.

The changes which the Law Revision Commission had suggested as being desirable were noted. Each proposed change was discussed in detail, and decisions on each were reached as summarized below.

Mr. Christopher noted that one major change which the Commission

proposed making in Rule 36 would be to extend the privilege to include the identity of persons who furnish information regarding violation of a law to a representative of an administrative agency charged with the administration or enforcement of that law, as well as those persons who furnish information to law enforcement officers as such. Mr. Christopher stated that, in his opinion, this was an unwise extension of what logically should be a narrow privilege. Mr. Henigson pointed out, however, that the idea of extending the privilege to include persons who furnish information to administrative agencies had some logic behind it because, if the rule were otherwise, an informer could do indirectly what he supposedly could not do directly. He gave the following example: Informer "I" gives information to police officer "P". P then gives the information to the administrative agency charged with enforcement. The identity of "I" probably is going to be privileged anyway because "I" did give the information to a law enforcement officer [under the Commission's revision, it makes no difference whether the officer has the duty of enforcement]. Mr. Henigson's argument was that if the identity of an informer can be preserved simply by having him give the information to the agency through a police officer as an intermediary, no useful purpose would be served by not recognizing the privilege when the informer gives the information directly to the agency. This and other arguments were considered.

On balance, the Committee's thinking about this phase of the Rule finally resolved itself as follows: As a practical matter, we don't see any particular justification for protecting the identity of some person who happens to give information, perhaps on some petty violation, to an administrative agency. The idea behind the recognition of this type of

privilege is not to give informers special privileges because they are informers, but, rather, to prevent sources of necessary information from drying up because of fear by informers that they are going to suffer reprisal by criminal elements. While there may be some instances where an extension of the privilege to include those persons who give information to administrative agencies may be justified, we believe that by and large such an extension of the privilege is unwarranted and would result in giving anonymity to a host of people in situations where anonymity cannot particularly be justified on policy grounds and where anonymity really is not needed to protect the informer against reprisals or to prevent the drying up of sources of information concerning the commission of serious crimes.

Attention next was directed to the fact that the Commission had substituted the words "law enforcement officer" for the words "representative of the State or the United States or a governmental division thereof charged with the duty of enforcing that provision." No member of the Committee had any objections to this substitution.

It further was noted, however, that the Commission also proposed to eliminate the language in the URE version of the Rule which would make it a requirement that the law enforcement officer to whom the information is given be an officer who is charged with the duty of enforcement of the law alleged to have been violated. The Commission believes that an informer to whom the privilege otherwise would extend should not be required to take the chance that the particular law enforcement officer to whom he gives the information concerning a law violation is one who has the duty of

enforcing that particular law. The Committee unanimously agreed with the Commission's position on this point.

The problem of indirect communications then was considered. The Commission, it was noted, has suggested the addition of language [a new section (2)] which would extend the privilege to include situations where information is furnished by A to B for the purpose of transmittal to P, a law enforcement officer. Mr. Christopher pointed out that extending the privilege to include informers who inform by means of "conduits" would lead to all kinds of possible abuses which would carry the privilege far beyond its reasonable scope. One serious problem, he noted, is that collateral issues necessarily would be presented: for example, when A told B, did he give the information to B "for the purpose" of transmittal to a law enforcement officer? Mr. Henigson pointed out, however, that a possible advantage of extending the privilege to include indirect communications is that such an extension would avoid the following situation: A gives information to B. B tells it to P, a law enforcement officer. As Rule 36 now reads in the URE version, P can claim the privilege as to B's identity, but he must disclose A's identity. This may be somewhat illogical, because if the identity of B is to be protected, why not the identity of A? He is the one who really needs protection. On the other hand, Mr. Henigson conceded that any attempt to extend the privilege (as the Commission does) to situations where information is furnished by A to B for the purpose of transmittal to P is going to result in introducing a difficult and totally irrelevant issue: namely, what was A's real "purpose" in giving information to B? Logically, A's "purpose in telling B should not

be a factor at all. Mr. Christopher also pointed out that not only would practical problems result from the introduction of this irrelevant and difficult collateral issue, but also that the policy behind the privilege which protects the identity of informers is such a basically weak policy to begin with that, purely on policy grounds, we are entirely justified in saying that if A wants the law's protection he must come forward and give his information directly. The Committee as a whole finally reached the conclusion that, while elimination of the recognition of the privilege in situations where information is furnished indirectly may create problems in certain cases, these problems are more than outweighed by the collateral issues which the indirect communication principle would lead to. Accordingly, the Committee voted to disapprove the Commission's proposed new section (2) of Rule 36.

Next, attention was directed to the fact that the Commission had eliminated the word "essential" in subparagraph (b) of Rule 36 and had substituted the word "needed" in lieu thereof. The Committee felt that, in practical application, there probably would be little, if any, difference between the words "essential" and "needed", but that since the Commission had decided that a useful purpose would be served in making this substitution, the change should be approved.

The Committee then reviewed the proposed revision of Rule 36 which the Northern Section had adopted at its meeting held on March 3, 1962. The Committee agreed that the decisions which it had reached with respect to Rule 36, and which are stated above in these minutes, apparently put it in complete agreement with the views of the Northern Section. The revision of Rule 36 which the Northern Section proposed and adopted

appears to state these views with reasonable clarity, and, accordingly, the Southern Section approved the Northern Section's revision of the Rule.

Rule 35.

The Committee then proceeded to consider Rule 35. This Rule provides for a privilege not to reveal a communication made to a grand jury by a complainant or witness before the grand jury.

It was noted by Mr. Christopher, the reviewing member, that the Law Revision Commission had disapproved the adoption of Rule 35 for several reasons: namely, (i) the Rule establishes a privilege much broader in scope than that presently recognized in California; (ii) Rule 35 would apply only during the period that the grand jury is investigating a matter and before its findings are made public, a period which normally would be of short duration; (iii) there appears to be no demonstrated need for changing the existing California law to grant the additional privilege which Rule 35 would grant.

Mr. Christopher also noted that the Northern Section, at its meeting held on December 12, 1961, had voted to approve Rule 35, apparently agreeing with Mr. Pattee's view that there is a need for giving to a witness the privilege of refusing to disclose a communication made to a grand jury either by a complainant or by any witness. The only privilege which presently is afforded by California law is one which extends to grand jurors only: that is, a grand juror can refuse to disclose testimony given before a grand jury, the deliberations of the grand jury, and the manner in which the grand jury voted--except when required (by specific provisions of the Penal Code) to make disclosure in the course of judicial proceedings.

After some discussion, the Committee concluded as follows: (i) agreed with the Commission that the privilege which is the subject of Rule 35 is not of sufficient moment to warrant approval, and that there is no pressing need for it; (ii) the exceptions which are stated in Rule 35 to the exercise of the privilege are so broad that, as a practical matter, the privilege first is given and then is taken away (iii) the privilege which is given by Rule 35 normally would last, even if recognized, only while the grand jury still is deliberating and until its findings are made public; and this period of time normally would be relatively short.

The Committee, therefore, joined the Commission in disapproving the adoption of Rule 35.

Memo 63-9

EXHIBIT II

EXTRACT FROM

MINUTES OF MEETING

OF

NORTHERN SECTION OF
COMMITTEE TO CONSIDER
UNIFORM RULES OF EVIDENCE

[November 7, 1961]

Mr. Bates proceeded to discuss Rule 29. He called attention to the fact that as revised by the Law Revision Commission a penitent does not have to be a member of the church to whose priest he may have made a penitential communication. Mr. Bates stated that his reading of Section 1881 (3) of the Code of Civil Procedure is to the same effect. He therefore recommended that Rule 29 be adopted with all revisions thereof made by the Law Revision Commission. The Committee voted its approval of this proposal.

Mr. Erskine reported on Rule 30 stating that the only revision made by the Law Revision Commission was to add the words "or proceeding" after the word "action". Mr. Erskine recommended the approval of this section as so amended by the Law Revision Commission, except that he stated that in his opinion the rule as now worded was rather awkward and that he felt that it could be more clearly phrased. He suggested the following:

> "Every person has the privilege to refuse to disclose his theological opinion or religious belief when the same might be material in determining his credibility as a witness; but he has no privilege to refuse to disclose such opinion or belief when the same is material to any other issue in the action or proceeding."

The members of the Committee felt that Mr. Erskine's proposal set forth the intent of Rule 29 much more clearly than that presently worded. The purpose of the rule appears to be to afford the privilege of refusing to disclose religious belief only in cases where it is offered to affect the credibility of a witness. In all other respects the privilege does not exist. Mr. Erskine's proposal attacks the matter directly by first stating the situation where the privilege exists and then stating that the privilege does not exist when religious belief is material to any other issue.

Mr. Baker reported on Rule 31 and pointed out that while there appears to be no law on the subject in the State of California the rule would appear to be necessary in order to preserve the secrecy of the ballot. The rule as written has been approved by Prof. Chadbourn and the Law Revision Commission. Mr. Baker proposed that the Committee do likewise. This proposal was approved by the Committee.

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[November 21, 1961]

Mr. Pattee reported on Rule 32 Trade Secrets. He noted that both Prof. Chadbourne and the Law Revision Commission had approved the rule as adopted by the Commissioners on Uniform State Laws and stated that in his opinion the rule was acceptable as so drawn. He noted, however, that Mr. Barker of the Southern Section, in reporting on the rule, proposed to add a licensee to those who, in addition to the owner of the trade secret, may claim the privilege. He stated his belief that this was perhaps unnecessary in that the owner has the right under the rule to prevent other persons from disclosing the trade secret. Furthermore, he felt that a licensee might actually be in the position of an agent of the owner.

After discussion it was the consensus of those present that the addition of the word "licensee" might in fact actually strengthen the rule and the Committee therefore voted to approve Rule 32, as amended, in accordance with the proposal of the reporter of the Southern Section.

Mr. Martin and Mr. Liebermann jointly reported on Rules 33 and 34.

Mr. Martin stated that the touchy part of Rule 33 was how far the court could en camera in looking into the nature of the secret when privilege is claimed. He pointed out that the question was touched upon in the leading case of U.S. v. Reynolds, 345 U.S. 1 in which the court stated that it would not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.

Mr. Martin said that he agreed in principle with the privilege stated in Rule 33 and that under the modern facts of life in any conflict between the private interest and public interest in this sensitive field the latter must prevail. He agreed with Mr. Barker of the Southern Section that perhaps the rule could be made clearer with respect to the court's power to prevent disclosure of military or state secrets in the absence of the claim of privilege by a witness or objection by a party. He disagreed with Mr. Barker in his criticism that the rule fails to set out a practical way for the court to get sufficient information about the privileged matter to determine whether or not a military or state secret is involved. He felt that an effort to state by rule a procedure would necessitate the formation of formal rules concerning a matter which must be subject to wide judicial discretion.

Mr. Martin noted that Prof. Chadbourn had originally approved Rule 33 but had withdrawn such approval after the Law Revision Commission had disapproved of the rule. The Law Revision Commission disapproved of the rule upon the ground that its amendment to Rule 34 would cover everything contained in Rule 33. Mr. Martin pointed out, however, that Rule 34, as distinguished from Rule 33, applies only to public officers or employees, whereas in some situations a witness may be in possession of military or state secrets and yet not be a public officer or employee. Both Mr. Martin and Mr. Liebermann felt, however, that it would be possible to formulate a single rule which would cover all of the desirable elements and the rest of the Committee concurred with this. It was therefore agreed that Mr. Liebermann and Mr. Martin should collaborate in the drafting of a proposed new rule and report thereon at the next meeting.

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[December 12, 1961]

Messrs. Martin and Liebermann continued the discussion of Rules 33 and 34. Specifically the question was whether the two rules should be combined into one. It was the consensus of all members that the two rules should be combined but that Rule 34, as proposed by the Law Revision Commission, did not quite cover the entire field. Mr. Martin proposed that Rule 33 be eliminated and that Rule 34 should be revised to read as follows:

"RULE 34. OFFICIAL INFORMATION

(1) As used in this Rule:

(a) 'Official information' means information not open or theretofore officially disclosed to the public,,

(1) acquired by a public officer or employee in the course of his duty or transmitted from one public officer or employee to another in the course of duty, or

(2) 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.

(b) 'Public officer or employee' includes a public officer or employee of this State, a public officer or employee of any county, city, district, authority, agency or other political subdivision in this State and a public officer or employee of the United States.

(2) Subject to Rule 36, a witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information and that:

(a) Disclosure is forbidden by an Act of Congress of the United States, or a statute of this state; or

(b) Disclosure of the information is against the public interest, after a weighing of the necessity for preserving the confidentiality of the information as compared to the necessity for disclosure in the interest of justice, except in cases where the chief officer of the department of government administering the subject matter which the information concerns has consented that it be disclosed in the action."

Comparing this proposal with the revision of Rule 34 by the Law Revision Commission it appears that the Commission felt that by eliminating the URE limitation to information "relating to internal affairs of this State or of the United States", Rule 34 was broadened to such an extent that it would include everything encompassed within the meaning of Rule 33. Mr. Martin stated that the difficulty he found with this was that Rule 34 would limit secrets of state to information acquired by a public officer or employee, whereas Rule 33 of the URE is not so limited. It is readily apparent that many secrets of state may be acquired by persons

who are not public officers or employees and to whom the privilege should extend. Turning to Mr. Martin's proposed revision of Rule 34 we find that he proposes to add subparagraph (2) to paragraph (1) (a). It will further be noted that the word "or" is added after subparagraph (1) of paragraph (1) (a). The result is that official information is defined as information acquired by a public officer etc. or involving the public security etc. The matter contained in proposed subparagraph (2) is taken from Rule 33 URE. It follows from this that under the later main paragraph (2) of the rule any witness even though not a public officer or employee would have the privilege to refuse to testify as to information 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. Mr. Martin's proposed draft also adds in paragraph (2) (b) the exception of Rule 33 with respect to consents of the chief officer of the department of the government administering the subject matter with which the information is concerned.

Mr. Liebermann expressed his opinion that the term "official information" is too broad in scope and that no real protection is afforded by the provision which would give the court the power to determine whether disclosure is against the public interest since the tendency of the courts will probably be to find that the disclosure is against the public interest. However, he stated that he believed it would probably be impossible to formulate effective language of limitation.

Upon motion the Committee voted to adopt Mr. Martin's proposed revision.

Mr. Pattee then reported on Rule 35. He pointed out that the present California law only protects the grand juror by conferring upon him a privilege to refuse to disclose the testimony of a witness examined before a grand jury, the deliberations of a grand jury or the manner in which any grand juror has voted, except when required to make disclosure in due course of judicial proceedings under specific provisions of the Penal Code. If the grand juror goes further in making a disclosure than required by court under P. C. 924.2, thereby violating his duty of secrecy, the person against whom the grand juror's testimony may be used has no standing to object.

Mr. Pattee pointed out that URE 35 confers a privilege upon a witness to refuse to disclose a communication made to a grand jury by a complainant or witness, subject however, to the exceptions provided in subparagraphs (a), (b) and (c) of the rule conferring upon the court the power to require disclosure under certain conditions.

In discussion it was pointed out that the rule is both one of privilege and admissibility so that a party to an action would have standing to object even though the witness might waive his privilege.

It was noted that the Law Revision Commission has refused approval of Rule 35.

Mr. Pattee recommended adoption of Rule 35, stating his opinion that the privilege should be extended to a witness and not be confined to a grand juror and that a party should be entitled to object if the person having the privilege should waive it.

Upon motion the Committee voted to approve Rule 35 as drawn by the Commissioners on Uniform State Laws.

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[March 6, 1962]

Mr. Morse Erskine reported on Rule 36. This rule provides for a privilege to refuse to disclose the identity of a person who has been furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States. Mr. Erskine called attention to the fact that the Law Revision Commission has made several substantial changes. The most important change is one which would include information furnished to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated. Mr. Erskine stated that he disagreed with this extension of the privilege on the ground that, as shown in People v. McShann, 50 Cal. (2d) 802, the informer privilege is based upon its promotion of the enforcement of the criminal law, particularly the enforcement of sumptuary laws, such as gambling, prostitution, or the sale and use of liquor and narcotics. As pointed out by Justice Traynor, in Priestly v. Superior Court, 50 Cal. (2d) 812, the policy which justifies the creation of the privilege is opposed by another policy which is the right of a person charged with the violation of the law "to make a full and fair defense on the issue of his guilt". In this light it was Mr. Erskine's opinion that the extention of the privilege to administrative agencies is not warranted.

The Committee accepted Mr. Erskine's view in this respect.

Mr. Erskine then pointed out that the Law Revision Commission has substituted the words "law enforcement officer" for the words "representative of the State or the United States or a governmental division thereof charged with the duty of enforcing that provision". Mr. Erskine had no quarrel with the substitution of the words "law enforcement officer", but took issue

with the elimination of the qualification that the law enforcement officer must be charged with the duty of enforcing the provision in question. He noted that the Law Revision Commission's reason for eliminating this qualification was that the Commission does not believe that the informer should be required to run the risk that the official to whom he disclosed the information is one charged with the duty of enforcement. Upon discussion the Committee felt that there was some merit to the Commission's position and it was therefore decided to accept this position.

Mr. Erskine then pointed out that the Commission had added a new section (2) which would broaden the privilege to include the situation where information is furnished by one person to another for the purpose of transmittal to a law enforcement officer. It was Mr. Erskine's position that this could lead to collateral issues as to whether the information was furnished for the purpose of transmittal. For this reason he disapproved of section (2). The Committee agreed with Mr. Erskine in this respect and therefore disapproved the addition of section (2).

Mr. Erskine then stated that in subparagraph (b) the Commission has eliminated the word "essential" and substituted the word "needed". Mr. Erskine stated that in his view this change would promote the policy of giving a fair trial to a man charged with crime and it was therefore his opinion that this change should be approved. The Committee agreed. In the light of the foregoing it is the Committee's view that Rule 36 should read as follows:

> "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 law enforcement officer, 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 needed to assure a fair determination of the issues."