File

7/10/63

Memorandum No. 63-32

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

The tentative recommendation relating to privileges has been revised in accordance with the suggestions we received from the Commission at the last meeting and in accordance with the written suggestions we receive from individual Commissioners. We will give detailed consideration to the tentative recommendation at the next meeting so that it may be approved at that time.

The following matters should be particularly noted:

Rule 26.

Note the brief discussion that begins with the sentence that commences in the next to the last line of page 31. This discussion gives no reason for the action taken other than "it seems desirable." This is because there appears to be no reason for singling out subdivision (4)(a) as the only provision where the judge is required expressly to make his rulings on the applicability of the privilege on the basis of evidence apart from the communication itself. This matter will be discussed at greater length in another memorandum proposing an amendment to Rule 8.

Rule 27.5.

Note the discussion in the first full paragraph on page 56. There appears to be no reason for insisting that the exception in subdivision (4)(b) apply only when the patient is deceased when there is no requirement that the client be deceased in the comparable exception to the attorney-client privilege or that the patient be deceased in the comparable exception

to the physician-patient privilege.

Note too the discussion at the bottom of page 56 and the top of page 57 and compare it with the discussion in the last paragraph of page 46 and the discussion in the full paragraph in the middle of page 63. The reasoning in these paragraphs seems inconsistent. In connection with Rule 27 and Rule 28 we argue that commitment proceedings are for the benefit of the person being committed and are of such vital importance both to the society and to the subject of the proceedings that he should not have a privilege to prevent information vital to the court's determination from being presented to the court. Yet, under Rule 27.5 we seem to think it is appropriate for him to have a privilege to withhold evidence which the court needs in order to act properly for his welfare.

Rule 28.

The Commission directed the staff to revise the privilege to provide protection against surreptitious eavesdroppers. This has been done by substituting the word "another" for the words "the other spouse" in that portion of subdivision (1) which indicates the persons against whom the privilege may be exercised. This substitution would permit the privilege to be exercised against persons to whom one of the spouses had voluntarily revealed the communication; hence, an exception--subdivision (2)(g)--has been added to cover the situation where the witness was not a surreptitious eavesdropper.

The Commission deleted the words "in confidence" from subdivision (1). It seems likely that this is a modest change in the existing law; although it does not appear that the Commission intended to change the existing law.

C.C.P. Section 1881 does not require that the communication be made in confidence; but neither does it require that communications made in the course of the attorney-client relationship, the confessor-confessant relationship or the physician-patient relationship be made in confidence. Nonetheless, the courts have held that all of these privileges are available only if the protected communications were made in confidence. Wigmore has pointed out that the two situations specified in subdivisions (2)(h) and (2)(i) are the most common cases where a marital communication is held non-confidential. But he also points out that other situations do arise where marital communications are held non-confidential even though they do not fit within the exceptions specified in subdivisions (2)(h) and (2)(i). (See discussion at 8 Wigmore (third edition) 640-48.) To give an example, Wigmore quotes from an 1872 New Hampshire case as follows:

> This violation of marital confidence must be something confided from one to the other simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances. In this case the wife acted as the husband's agent and kept his money and knew how it was expended; but all the communications made to her were made to her as such agent, just as he would have made the same communications to any other agent doing the same business. There was no confidential communication between them as husband and wife, but simply the ordinary communications between principal and agent; and the communications would be no more confidential than those between any other principal and agent.

In other words, a person who employs his wife as his secretary enjoys no greater privilege in regard to their business communications than does any other person whose secretary is not married to him. Other examples of non-confidential communications are gathered in the footnotes from pages 642 through 648. Wigmore also indicates that the general rule is that marital communications are presumed to be confidential until the contrary is shown. If the Commission wishes to preserve the existing law it should delete the

specific examples of non-confidentiality given in subdivision (2)(h) and (2)(i) and substitute an exception for non-confidential communications generally. The examples given in the rule at present could be given in the comment together with an explanation of the existing law in regard to the requirement of confidentiality. The requirement of confidentiality should not be stated as a condition the judge must find before the privilege applies, but it should be stated as an exception. Thus, for a spouse to make out a prima facie claim of privilege he would need to show only that the communication was made during the marital relationship. The proponent of the evidence then would be forced to overcome the claim by showing the evidence non-confidential. This would apparently preserve the existing law.

Rule 29.

The Commission combined subdivisions (b) and (c), thus eliminating the definition of priest. In redrafting the rule it became apparent that it was impossible to work with it unless the word "priest" were defined.

In order to provide the priest with a privilege even after the penitent has waived it was necessary to add another subdivision. The existing subdivision (2), however, was simplified by the revision. There are now two privileges created by this rule. Subdivision (2) grants a penitent a privilege to refuse to disclose and to prevent the priest from disclosing a penitential communication. Subdivision (3) grants the priest a privilege to refuse to disclose a penitential communication.

Rule 31.

The last line has been added pursuant to the Commission's direction to include the waiver rule within Rule 31 itself.

Rule 33.

The Commission directed the staff to submit new drafts of the governmental

privileges. Rule 33, which states an absolute privilege for state secrets, has been revised so that it applies only to secrets of the national government. An absolute privilege of this sort is apparently unknown to existing California law. Under existing California law the government derives whatever privilege it has from subdivision 5 of Code of Civil Procedure Section 1881. C.C.P. Section 1881 virtually duplicates Rule 34.

Confining Rule 33 to national secrets has the added advantage of permitting reference to information which has been classified as requiring protection in the interests of national defense pursuant to the President's executive order. The Commission's reason for deleting Rule 33 originally was that the definition of secret of state was so vague. Under the URE rule information concerning the military or naval organization of the United States or "involving the public security" is absolutely privileged. For this vague standard has been substituted the requirement that the information be classifeid as top secret, secret or confidential. Superimposed on the requirement of classification is the added requirement that the disclosure of the information would endanger the security of the United States. Thus, the ultimate decision as to whether information is privileged under this rule is retained by the judiciary.

Rule 33 does not have a provision permitting orders adverse to the prosecution in criminal cases when this privilege is relied on. This omission is because the revised privilege is that of the federal government only. It seems undesirable to penalize or embarrass the people of the State of California in the prosecution of criminal actions because the federal government decides to invoke one of its privileges. There seems to be no more justification for permitting an order adverse to the people in such a case than there would be for permitting such an order when any person who has information material to the defense invokes a privilege.

Rule 34.

The state secrets privilege has been removed from, and the informer privilege has been included in, the official information privilege. This has been done because the state secret privilege is fundamentally a different privilege. The informer privilege is but a kind of official information and in California is protected by the same code section--Section 1881 of the Code of Civil Procedure, subdivision 5. The URE was basically defective in treating these privileges as separate privileges. In civil cases, the standards for the admission of official information generally and information concerning the identity of an informer are the same. The cases are gathered and discussed in Memorandum 63-25. Under the URE there was no recognition of the fact that the government in a criminal case cannot withhold "official information" any more than it can withhold information as to the identity of an informer when the information is material to the defense of the accused. The problem seems to arise more often in connection with the identity of informers; but nonetheless the applicable rules are the same. See, for example, United States v. Andolschek, 142 Federal 2d 503, 506 (second circuit 1944). The case involved the prosecution of some federal tax inspectors for bribery. The government asserted the privilege as to the reports reflecting the activities of the inspectors in respect to the persons giving the bribes. The second circuit noted prior federal cases holding such documents privileged and then said:

> However, none of these cases involved the prosecution of a crime consisting of the very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. . . . The government must choose; either it must leave

the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

The same rule was recognized by the United States Supreme Court in Jencks v. United States, 353 US 657 (1957). A rule similar to the Jencks rule and the Andolschek rule has been recognized in California cases such as People v. Riser, 47 Cal.2d 566 (1956). There seems to be an assumption in the original URE rules that the official information privilege would be applicable in civil cases, hence the interest of the government in secrecy is all that need be considered, and that the informer privilege would only arise in criminal cases, hence the materiality of the information to the case need be all that is considered in determining the applicability of the privilege. If these are the assumptions underlying the differences between the privileges as drafted in the URE, the assumptions are false. Either privilege arises in either civil or criminal litigation, and the rules applicable are the same.

The Commission wished to consider whether the government should be penalized in any way for asserting these privileges in civil litigation. The staff believes that the general balancing test to be applied under subdivision (2)(b) is adequate to take care of the problems that may arise in civil litigation. No other litigant is required to surrender his privileges as a condition of engaging in litigation and it is diffiuclt to see why the government should be in any less preferred position. Of course, it may be argued that when the government is a plaintiff it is seeking to deprive the defendant of his property or of some right which he may exercise and that to permit the government to withhold relevant information at the same time is to permit the government to deprive the man of his property without due process of law. The same argument, however, can be made in regard to all civil litigation. When a plaintiff recovers a judgment against a defendant, the defendant's property is not taken away from him by the plaintiff.

The defendant's property is taken away from him by the power of the State exercised by the court, the sheriff and various other State officials. These State officials all act under authority and pursuant to rules prescribed by the State. It would seem to be just as much a deprivation of property without due process for the State to take away a defendant's property to give it to a plaintiff when the State has prescribed a rule permitting the plaintiff to withhold relevant evidence from the defendant. Actually, the government's privilege is less onerous to litigants than are the other privileges. The privileges enjoyed by private persons by and large are absolute privileges. The government's privilege, unless a specific statute creates an absolute privilege, is a qualified privilege granted only after a weighing by the judge of the need for the evidence in the case in the interest of justice against the need of the public to keep the information confidential. Accordingly, the staff recommends that the choices forced upon government in criminal cases should not also be forced upon the government in civil cases. Neither should any consequences flow from the government's exercise of its privilege in litigation between third parties.

At the June meeting, the Commission indicated that it wished to see the governmental privileges expressed in three different rules. The tentative recommendation contains but two because there are in reality but two types of privileges. Nonetheless, if the Commission desires to have three rules, there are appended to this memorandum as Exhibit I (blue paper) drafts of rules 34 and 36 as they would appear if the informer privilege were separated from the official information privilege.

Rule 36.5.

The Commission asked the staff to draft a rule permitting the judge to claim a privilege on behalf of an absent holder. Rule 36.5 is that rule.

Rule 40.1.

When the Commission was considering Rule 25, it suggested that a rule be added to the privileges article stating that existing statutes on privilege are not repealed by implication and that the privileges article neither brings within any privilege any information declared by statute to be unprivileged nor makes unprivileged any information declared by statute to be privileged. Rule 40.1 is suggested to accomplish this purpose. It is virtually identical with a similar rule that was added to the Hearsay Article.

Respectfully submitted,

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EXHIBIT I

RULE 34. OFFICIAL INFORMATION

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

(a) "Official information" means information not open or theretofore officially disclosed to the public [~~relating to the internal affairs of this State or of the United States~~] acquired by a public employee [~~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,~~]

(b) "Public employee" means an officer or employee of the United States or an officer or employee of a public entity in this State.

(c) "Public entity in this State" means the State, the Regents of the University of California, a county, city, district, public authority, public agency or other political subdivision or public corporation in this State.

(2) A [~~witness~~] person has a privilege to refuse to disclose, and to prevent another from disclosing, 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 the Congress of the United States or a statute of this State [~~,~~] ; or

(b) [~~disclosure of the information in the action will be harmful to the interests of the government of which the witne~~

~~is an officer in a governmental capacity.~~] Disclosure of the information is against the public interest, because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if 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 or proceeding.

(3) If in a criminal action or proceeding a public entity in this State refuses to disclose or to permit disclosure of information on the ground that it is privileged under this rule, the judge shall make an order or finding of fact adverse to the people of the State upon any issue in the case to which the privileged information is material.

RULE 36. IDENTITY OF INFORMER

(1) As used in this rule:

(a) "Public employee" means an officer or employee of the United States or an officer or employee of a public entity in this State.

(b) "Public entity in this State" means the State, the Regents of the University of California, a county, city, district, public authority, public agency or other political subdivision or public corporation in this State.

(2) A [~~witness~~] person has a privilege to refuse to disclose, and to prevent another from disclosing, the identity of a person, unless such identity has already been disclosed, who has furnished information as provided in subdivision (3) of this rule 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~~] law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated [~~,-and-evidence-thereof-is-inadmissible, unless~~] if the judge finds that:

(a) [~~the-identity-of-the-person-furnishing-the-information has-already-been-otherwise-disclosed~~] Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(b) [~~disclosure of his identity is essential to assure a fair determination of the issues.~~] Disclosure of the information is against the public interest because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if 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 or proceeding.

(3) This rule applies only if the information is furnished directly to a law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or is furnished to another for the purpose of transmittal to such officer or representative.

(4) If in a criminal action or proceeding a public entity in this State refuses to disclose or to permit disclosure of information on the ground that it is privileged under this rule, the judge shall make an order or finding of fact adverse to the people of the State upon any issue in the case to which the privileged information is material.