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TWO NOTES ON EVIDENCE: PRIVILEGES AND HEARSAY

Hon. J. W. Deese */

A. PRIVILEGES

I. Introduction

Evidentiary rules of privilege differ from other rules of evidence or rules of admissibility in two important ways: (1) at some administrative tribunals, such as those under the Federal Administrative Procedure Act and some State Administrative Procedure Acts, the rules of evidence applicable in courts of general jurisdiction are not required to be applied; but even in these tribunals the rules of privilege still apply. (2) Unlike other rules of admissibility, which either determine the relevance of evidence or impose conditions of admissibility directed to improving the quality of proof and rejecting evidence which is either untrustworthy or unreliable; rules of privilege exist, not to enhance the search for the truth, but instead to forbid the admission of evidence because some consideration extrinsic to the search for the truth is regarded as more important. Each privilege to be discussed serves a purpose totally outside the search for the truth in the legal proceeding. While the rules of evidence are used to get the most trustworthy information possible, the rules of privilege seek to protect extrajudicial public policy interests.

The Federal Rules of Evidence, enacted by Congress, are worth considering, not only because of their use in Federal tribunals, but also because a number of states have adopted either the Federal rules, or their own rules very similar to the Federal rules. The United States

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Supreme Court proposed to the Congress the adoption of nine specific privileges. However, Congress declined to adopt the rule as proposed, and instead adopted a general rule:

FRE501-General Rule: "Except as otherwise required by the Constitution of the United States or provided by Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof, shall be governed by the principles of the Common Law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

The Commission on Uniform State Laws has, in recommending evidence laws to the states, followed the format proposed by the Supreme Court, with several changes: the required reports privilege was omitted, the extension of the attorney-client privilege to a representative of the client (corporate employee) was omitted, the psychotherapist-patient privilege was expanded to include all physicians, the spousal privilege was expanded to include privilege for confidential marital communications, and the governmental secret privileges were "compressed". Most of the state evidence codes had followed the listed privileges format rather than the broad Common Law approach found in the Federal Rules of Evidence.

PROPOSED TO CONGRESS	COMMISSION ON UNIFORM STATE LAWS	RECOGNIZED BY STATES
Trade Secrets		Protected but not privileged
Psychotherapist- patient		Does not always include psychologist
No	Added physician- patient privilege	Physician-patient (some include nurses and den- tists)

PROPOSED TO CONGRESS	COMMISSION ON UNIFORM STATE LAWS	RECOGNIZED BY STATES
Clergyman-penitent		Varies
Husband-wife	Not absolute disqualification	Yes
No	Confidential Marital Communications	Confidential Marital Communications
Attorney (& rep.)-client	Rep. of client deleted (Upjohn)	Yes
No	(only if working with attorney)	Accountant-client
Secrets of State	Reduced	Yes
No	Not as such	Work product
Identity of informer		Generally allowed, particularly in search warrant applications
Political Vote		No
Required reports	Rejected--unnecessary	No
Not mentioned		Journalist

II. Constitutional Privileges

The best known evidentiary privilege contained in the United States Constitution is the privilege against self-incrimination. U.S. Const. Amd. V. This "fifth amendment" privilege, guaranteed by the United States Constitution in all tribunals whether bound by the rules of evidence or not, whether administrative or not, consists of two separable privileges: (1) the right of a criminal accused, including parolee in parole revocation proceedings, to refuse to be sworn and to testify at all, and (2) the right of any witness to refuse to answer a particular

question, the answer to which may tend to incriminate the witness.

The first privilege, that of a criminal accused not to testify, extends beyond a regular criminal prosecution, all probation and parole revocation proceedings, and prison inmate disciplinary matters; to include ancillary civil or administrative proceedings, including license revocations, personnel matters, and even unemployment insurance, where criminal charges have been placed against a person, or are clearly expected to be placed against such person. If an owner of this privilege testifies, it must appear on the record that such testimony was voluntary and that the owner of the privilege was aware of the privilege not to testify. If an owner of this privilege declines to testify, no mention may be made of the silence of the accused, and, in this situation, no adverse inference may be drawn from the election by the accused to exercise his constitutionally guaranteed right. The second "fifth amendment" privilege, the right of any witness to refuse to answer an incriminating question, extends to any witness, whether that person has been or is believed to be about to be accused of any criminal act, but only extends to questions that call for an answer which would expose the witness to criminal liability. Where no criminal liability can be suspected before the asking of the question, there is no requirement that the witness be informed on the record of this privilege. However, any witness may consult its own counsel as to potential criminal liability regarding any question, and may claim this privilege. If the witness answers the question, voluntarily, without claiming the privilege, the privilege is waived. The Judge, in order to decide whether the privilege applies to a particular question, may require in camera disclosure of the information, which would not be placed in the record, and then rule upon whether the information would be incriminating. Under this privilege, a showing may be required that the information sought to be withheld actually would expose the witness to criminal liability, as opposed to civil liability or disqualification for a claimed benefit.

The fifth amendment to the United States Constitution provides "no person . . . shall be compelled in any criminal case to be a witness against himself". This provision absolutely protects the owner of the privilege against all legal compulsion to testify unless there has been a grant of immunity to the witness. There are two types of immunity, neither of which can be granted by an administrative tribunal. The lesser immunity, use immunity,

provides that the testimony of the witness may not thereafter be used against him in any criminal proceeding, but prosecution may be had if the criminal act can otherwise be proven. A broader immunity is transactional immunity, which bars any prosecution for the event about which testimony is compelled.

In Hoffman v. United States, 341 U.S. 479, 486, 1951, the United States Supreme Court held that this privilege must "be accorded liberal construction in favor of the right it was intended to secure". Clearly, this privilege is applicable in every type of legal proceeding, including all types of administrative proceedings, as well as civil matters, legislative hearings, governmental investigations, and any other proceedings. However, the Supreme Court, in Marchetti v. United States, 390 U.S. 39, 48, 1968, limited this protection to "real and appreciable" dangers, and denied it to fears that were only "imaginary and unsubstantial". Four years later, in Zicarelli v. Investigation Commission, 406 U.S. 472, 478, 1972, the court reiterated this policy, limiting protection to "real dangers, not remote and speculative possibilities".

Self-incrimination is defined as the production of evidence which subjects or may subject the witness to criminal liability in any jurisdiction in which prosecution is realistically possible, regardless of whether or not criminal charges are already pending.

Similarly, this privilege is not restricted to a criminal proceeding, but may be claimed in any proceeding, if the information sought to be protected would potentially expose the witness to a criminal or quasi-criminal sanction in either that or any other proceeding.

This privilege, however, only extends to natural persons, and does not extend to corporations, partnerships, labor unions, churches, or other artificial entities.

Generally, public employees enjoy the same fifth amendment privileges as do private citizens, as to criminal prosecutions. However, because a higher standard of conduct is imposed on public employees than upon private citizens, this protection does not automatically extend to employment discipline proceedings. The United States Supreme Court, in Gardner v. Broderick, 392 U.S. 273, 1968, and again in Lefkowitz v. Turley, 414 U.S. 70, 1973, held that public employees may be required to answer questions which are directed specifically and narrowly to the performance of

their job, or else suffer loss of employment. See also Book v. United States Postal Service, 675 F.2d 158. In 1977, the court held in Lefkowitz v. Cunningham, 431 U.S. 801, 806, that public employees may be required to answer even potentially incriminating questions "if they have not been required to surrender their constitutional immunity". However, in that case the court restated its earlier holding in Gardner, supra, that a state may not discharge an employee merely for refusing to sign a waiver of immunity. Even when testimony can be compelled in an administrative proceeding, and such testimony results in dismissal from employment, such testimony compelled under threat of discharge was held in Garrity v. New Jersey, 385 U.S. 493, 1967, inadmissible against the (former) employee in a criminal prosecution. The following year, in Uniformed Sanitation Men's Assn. v. Commissioner of Sanitation, 392 U.S. 280, 1968, the court held that where an employee refused to testify at the administrative hearing because of a threat of use of the testimony in a criminal proceeding, the employee may not be discharged for refusing to testify.

The privilege against self-incrimination may be claimed in any administrative proceeding, civil or criminal, in any legislative proceeding, in juvenile proceedings, in Internal Revenue proceedings and with respect to required Internal Revenue forms, returns and reports, in registration and other required reports, in parole revocation and correctional matters, in civil litigation, and in all criminal matters, including examinations, interrogations, sentencing, pretrial motions, grand jury proceedings, and of course, criminal trials.

While this constitutional privilege may be waived, the waiver is not self-executing. Any doubt about the waiver must be resolved in favor of the privilege. While not required outside of a criminal case, the better practice would be for the Judge to make sure that any witness entitled to this privilege is aware of the privilege. The United States Supreme Court, in Brady v. United States, 397 U.S. 742, 1970, held that waiver of the privilege against self-incrimination must both be voluntary and be "knowing, intelligent acts, done with sufficient awareness of relevant circumstances and likely consequences".

The second Constitutional privilege arises from the Fourth Amendment to the United States Constitution and subsequent cases which have held that evidence obtained as a result of any violation of the prohibition against improper search and seizure cannot be used substantively against the

person whose rights have been violated. In a number of states, this privilege is limited to criminal matters. However, parole revocation is, for this purpose, a "criminal matter". In these states, unconstitutionally obtained evidence may be used in civil or administrative proceedings that have no relation to criminal justice. Also, unconstitutionally obtained evidence may be used to impeach a person who has already testified, even when that evidence could not be used as part of the case in chief against that person.

III. Spousal Privileges

There are two separate spousal or marital privileges. The first of these consists of a spouse's privilege not to testify against the other spouse; and the second consists of the privilege of either spouse to prevent the other spouse from disclosing confidential marital communications. With both of these privileges the law varies greatly from one jurisdiction to another, and both privileges are so rapidly changing that a Judge must constantly review the law of one's own state. The purpose of both of these privileges is to foster family harmony by avoiding the intra-family turmoil that would occur when one spouse is made to testify against another, or when one spouse discloses a confidential communication; and to insure privacy and open communication between spouses.

The privilege not to testify is recognized in approximately two-thirds of the states, in one of three forms: Six states consider a spouse incompetent to testify against his or her spouse. Some states allow the spouse to prevent the other from giving adverse testimony, or in a few of these states any testimony at all. Most states allow the witness spouse to elect not to testify, or at least to refuse to testify against the other spouse. In most states this privilege applies only in criminal cases, but in all of these states parole revocation would be considered for this purpose a criminal case. In a few states, it applies in criminal cases and in those civil cases to which one spouse is a party (e.g., California Evidence Code Section 970), however, this privilege does not apply in five types of cases: 1. spouse against spouse; 2. spouse abuse, child abuse, or neglect; 3. cases involving injury to the person or property of a third party, arising from an offense committed by one spouse against the other spouse; 4. matters occurring prior to marriage; and 5. bigamy. Under this privilege, a valid marriage is required, and once established, encompasses all knowledge of the witness spouse.

There is considerable question as to which spouse is the owner of this privilege. In the Federal courts and some states, only the witness spouse is the holder, and can claim it against the adverse party but not the party spouse. In other states, including California, the witness spouse is the owner of the privilege, and can claim it against any adverse party, including the party spouse. In other states, only the party spouse is the owner. In other states, either or both spouses is the owner. "When one spouse is willing to testify against the other in a criminal proceeding--whatever the motivation--their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace . . . Accordingly, we conclude that the existing rules should be modified so that the witness spouse alone has the privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." Trammel v. United States, 445 U.S. 40, 53, 1980.

This privilege can only be claimed during marriage, not after divorce, and not in the absence of a valid legal marriage. When claimed, this privilege allows the witness spouse not to testify at all. It is, therefore, not required to be claimed on a question-by-question basis. If claimed, no inference may be drawn from the claim of the privilege. This privilege may be waived by the owner of the privilege, and may be impliedly waived, as well as expressly waived. Implied waiver exists when the holder of the privilege fails to object before the witness spouse commences to testify about the substance of the case. Unlike self-incrimination, no admonition by the Judge to a possible holder of this privilege is necessary.

The marital communications privilege, intended not only to foster family harmony, but to also insure privacy and therefore facilitate open communication between spouses and protect the confidentiality of the marital relationship, allows a spouse to prevent the other spouse from disclosing a confidential communication exchanged during the marriage. This privilege applies in all criminal cases, including parole revocation, and also largely is applicable in civil cases. This relationship also requires a valid marriage, but would also include a voidable marriage that has not been annulled. In this situation, there is distinction between voidable marriage and void marriage. Engagement, cohabitation, or an invalid common-law marriage would not be

sufficient for the privilege to apply. Common-law marriage, in a state where such is recognized, is a valid marriage. The key to the applicability of this privilege lies in whether the information sought to be excluded was a confidential marital communication. The burden of proof on this question is upon the claimant of the privilege. For a communication to be privileged, it must have been either a verbal or nonverbal communication, intended as a communication at the time. Nonassertive conduct does not qualify. The communication must have been between spouses, in the absence of any third party, and must have been intended at the time to be confidential, and not to be disclosed. Whether a child of the family constitutes a third person, taking the communication out from under the privilege, depends upon the age and cognition of the child. In Schmied v. Frank, 86 Ind. 250, 257, 1882, a statement from one spouse to another, directing the second spouse to sign a note at the bank tomorrow, was held not to be a confidential marital communication. A number of states also include within this privilege any fact derived from the confidential communication, the disclosure of which would tend to reveal the content of the confidential communication. (McCormick on Evidence § 191.) While the better view is to limit this privilege to actual communications, a few courts have extended this privilege to nonassertive acts which occurred in private. With this privilege also, there are three views as to who owns the privilege. In California and some other states, either spouse owns the privilege; in New Mexico and some other states, the witness spouse owns the privilege; and in a number of states the original communicator owns the privilege. As to whether this privilege may be claimed against eavesdroppers, a growing minority holds that it can. (McCormick, § 196 and 197.) This privilege must be claimed on a question-by-question basis, and no inference may be drawn from the claim of the privilege. Only the owner of the privilege can waive it, which waiver can be implied from voluntary disclosure of the information or failure to object when there is adequate opportunity to do so. Implied waiver does not result if the owner of the privilege has no opportunity to object or if disclosure has been compelled.

IV. Attorney-Client Privilege

The purpose of the attorney-client privilege is to enhance open and complete communication between attorney and client by insuring privacy, so that the client is free to completely disclose all appropriate facts to counsel, which is necessary in order for counsel to be effective. This

privilege is recognized by all jurisdictions and applies in all cases, civil, criminal or administrative. The privilege applies to any consultation with any attorney, licensed or reasonably believed to be licensed to practice law in any jurisdiction, if the consultation either consisted or was for the purpose of rendition or receipt of legal services. It is immaterial whether a fee was paid, requested, or the services were gratuitous. However, conversation with an attorney, as personal friend, business consultant, or some other non-attorney capacity, do not generally create an attorney-client relationship. Once created, this relationship continues until terminated by either attorney or client, or upon the death of either attorney or client, but communication which occurred during the existence of the relationship continues to be privileged thereafter. There are four recognized exceptions to this privilege: 1. cases between lawyer and client; 2. cases between two or more clients who jointly consulted the same lawyer; 3. cases where the client communicates with a lawyer intending to commit a future crime or fraud; and 4. cases between parties who claim through the same deceased client. As with most privileges, the burden of proving the existence of the relationship rests upon the claimant of the privilege.

This privilege protects written, verbal, or non-verbal communication by a client or client's representative to the lawyer or the lawyer's representative, but does not include non-assertive conduct. As the lawyer's representative this may include the attorney's staff employee or an accountant working in conjunction with and for the attorney. As to the client's representative, states and Federal courts split. Many states limit the privilege, for corporations, to the control group of the corporation; that is, representatives of the corporation who have the authority to seek out and act upon legal advice for the corporation. However, the Federal courts and a minority of states follow Upjohn v. United States, 449 U.S. 383, 1981, which, more broadly, allows the privilege whenever the communication relates to the employee's assigned duties and is treated as confidential information by the corporation. Where different attorneys represent different clients on a matter of common interest, each client and attorney is allowed a privilege as to his own statements. Obviously, communications between attorneys representing the same client are privileged. It must be shown, however, that the communications were when made not intended to be disclosed. The presence of third parties, other than attorney or client staff, may destroy this privilege. The identity of the client is not privileged, nor are, generally, matters regarding attorneys'

fees. The holder of the privilege, the client, may always claim the privilege, and after the client is dead, the personal representative may in many states claim the privilege. The attorney may also claim the privilege on behalf of his client, and may be required to do so. The Judge has discretion to assert this privilege for the client; but the opposing party does not. Death of the client does not terminate this privilege. This privilege can be claimed against the attorney who seeks to divulge information without authorization, and to any third person whose presence was known. States split, but the trend is toward extending this privilege to eavesdroppers. The privilege must be claimed on a question-by-question basis.

V. Accountant-Client Privilege

While no accountant-client privilege existed at common law, approximately 20 states, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Mexico, Pennsylvania, Tennessee, Texas, and Vermont; but not the Federal tribunals, have allowed a privilege for accountant-client communication, for the same purposes and for the same reasons that attorney-client communications are privileged. Colorado, Florida, Kansas, Louisiana, and Michigan have, however, restricted this privilege to communications with certified public accountants. As with the attorney-client privilege, two states, Florida and Nevada, specifically allow the accountant to assert the privilege on behalf of the client. Not only are oral and written communications from the client to the accountant privileged, but all books, accounts, and other financial records supplied by the client to the accountant are also protected. Communications made to the accountant by third parties, directly related to the services the accountant is providing for the client, are also privileged. The accountant's work papers and files are privileged under this privilege, and may also be privileged in other states under the work product privilege.

VI. Work Product Privilege

The work product privilege serves the purposes of the protection of the adversarial process itself and the protection of the right of counsel to prepare the case in reasonable privacy. It is divisible into two parts: an absolute privilege, and a qualified privilege. The absolute privilege, well explained in the last sentence of Federal Rules of Civil Procedure 26(B)(3), protects against

disclosure of the mental impressions, conclusions, opinions and legal theories of an attorney or other representative (consultant, surety, insurer, accountant, or other agent) of a party concerning the litigation.

In addition to the absolute privilege for mental impressions, a qualified privilege extends to all documents and tangible things prepared for litigation or in anticipation of litigation. These documents, exhibits, and other tangibles are privileged and protected from disclosure both at discovery and at trial except where the party seeking disclosure demonstrates to the satisfaction of the tribunal that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of such materials by other means". Undue hardship, more often than not, consists of impossibility, rather than expense, such as in a case where an automobile involved in a wreck has been examined, and then destroyed. Hickman v. Taylor, 329 U.S. 495, 1947; United States v. Nobles, 422 U.S. 225, 1975; and Upjohn Co. v. United States, 449 U.S. 383, 1981. This privilege does not include documents prepared in the regular course of business (which are not privileged at all), but includes written statements of a witness, written reports of an attorney or investigator, or physical objects, prepared in anticipation of litigation by a party or a representative of a party. See Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 1974; Virginia Electric Co. v. Sum Shipbuilding Co.; 68 F.R.D. 397, 1975; Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 1980; A.P.L. Corp. v. Aetna Ins. Co., 91 F.R.D. 10, 1980; Fine v. Bellafonte Ins. Co., 91 F.R.D. 420, 1981; Carver v. Allstate Ins. Co., 94 F.R.D. 131, 1982. This privilege may be claimed by either the party or the lawyer or other representative. Lohman v. Superior Court, 81 Cal. App. 3d 90, 146 Cal. Rptr. 171, 1978. Where this privilege applied, it is waived, however, when the party calls as a trial witness the person whose statement is claimed to fall within the work product privilege. At that point, the statement becomes evidence available for impeachment. Nobles, supra. It is noted that this privilege has been held to extend beyond the case for which the materials were prepared. FTC v. Grolier, Inc., --U.S.--, 51 USLW 4660, June 6, 1983.

VII. Doctor-Patient Privilege

This privilege, unknown at common law, recognized by most states, but severely limited in Federal tribunals,

applies in the majority of states only to civil actions (which should include administrative proceedings), but in some cases applies to both civil and criminal matters, 74 ALR3d 1458. This privilege exists for the purpose of enabling a patient to communicate freely without fear of discovery, for the purpose of obtaining needed health care. Most states allow some exceptions to the privilege, generally including: cases between doctor and patient, cases involving child abuse or neglect, cases involving gunshot wounds or venereal disease, will contests, involuntary mental commitment proceedings and cases in which the patient's communication was in furtherance of a future crime or fraud. What constitutes a doctor within the meaning of this privilege, varies from state to state. The present Federal rule limits this to psychotherapists. Most states include any licensed physician. Many do not include a psychologist, but some do. Chiropractors, naturopaths, optometrists, nurses, and other medical technologists and therapists other than physicians are often included, the inclusion varying from one state to the next. 47 ALR2d 742. As with the attorney-client privilege, what is required is a communication for the purpose of receiving treatment. As with attorney-client, it does not matter whether employment actually occurs, or whether a fee is paid or by whom. It is required, however, that the communication be intended to be confidential. The privilege generally dies with the patient. Communications to a physician employed for the purpose of examination in connection with litigation, or for the purpose of qualifying for some benefit (e.g., social security), cannot be a privileged communication, because such physician is communicated with for the purpose of examination and not for the purpose of treatment. As is usually the case, verbal and nonverbal communications are included but non-assertive conduct is not considered a communication. Observations, however, of the physician, in a privileged setting, such as the patient walking through an empty waiting room, are included. The physician's observations of the patient's body are included, particularly such observations as would not be visible to the public at large. While the presence of third parties may remove a communication or observation from the confidential realm, neither nurses or the doctor's staff, nor members of the patient's family who are assisting the patient with treatment, are considered third parties for the purpose of removing the communications or observations from the privilege. The holder of this privilege is the patient, and it may be claimed by the patient's personal representative after the patient's death, for communications occurring during the patient's lifetime. The doctor may claim the privilege, in

behalf of the patient, when the patient is not present. The Judge has discretion to assert this privilege, but the opposing party has no standing to assert the privilege. As with other privileges, states split as to whether it may be asserted against eavesdroppers, whose presence was not known. The better rule is that it can be. No inference may be drawn from the claiming of this privilege which generally must be claimed on a question-by-question basis. It may be waived by voluntary disclosure, only by the holder of the privilege. Waiver may be implied when there is a failure to object to disclosure, with an opportunity to do so.

VIII. Clergyman-Penitent

This privilege exists for the purpose of protecting religious confessions, and therewith, freedom of religion. This privilege is now recognized by statute in nearly every state, but the recognition varies, both as to who is considered a clergyman, and what types of communication are protected. Generally protected are communications made in confidence for the purpose of procuring religious advice or "forgiveness". The penitent "confessor's" own ordained minister is generally included. Some states extend the privilege to any ordained minister, whether the penitent's own minister or not, and Iowa extended the privilege to elders of a Presbyterian church. On the other hand, Oklahoma and New Jersey deny the privilege to communications to a Catholic nun. While some states name specific religions, the constitutionality of granting the privilege to members of one faith, and not to members of another faith, is in grave doubt. This privilege clearly applies in both civil and criminal matters, as well as administrative proceedings. The holder of the privilege is the penitent, but it may be claimed by the penitent, the personal representative of a deceased penitent, the guardian or conservator of a juvenile or incompetent penitent, or by the clergyman, claiming on behalf of the penitent. In some states, this testimony is simply prohibited, without any claim of the privilege. Only the penitent may waive the privilege. Implied waiver may occur when the penitent testifies to the contents of the communication.

IX. Governmental Privileges and Secrets of State

The purpose of this privilege is to protect the national defense and international relations of the United States and to protect from disclosure contrary to the public interest other official information within the custody of a governmental entity. The privilege for secrets of state,

which includes classified military information is absolute, while it has been held that the privilege for other official information is qualified, and protected where it is shown to the satisfaction of the tribunal that the public interest against disclosure outweighs the necessity of disclosure. In making this determination, the Judge may examine the information in camera, except that classified military information is absolutely privileged and a state Judge (including Administrative Law Judge) must recognize the classification imposed by the United States Government. However, if the prosecution imposes this privilege and refuses to disclose information necessary to the defendant for his defense, while the disclosure of the information may not be compellable, an alternative remedy is to dismiss the charge against the defendant. From the standpoint of the defendant, this is an adequate remedy. Also, from the standpoint of the government, it is an adequate remedy in that the protection and preservation of the official secrets remain inviolate. As to the identity of a criminal informant, it has been held in a number of search and seizure cases, that where the informant has merely provided information which constituted probable cause for obtaining a search warrant, and those facts are not used as evidence in the prosecution case in chief, but were only used to obtain a warrant, the execution of which yielded evidence, the informant's identity need not be disclosed. This is a correct holding because the prosecution's case does not rest upon the informant's veracity, and nothing the informant has said is being presented to the ultimate trier of fact. If the execution of the search warrant yielded evidence that is being used, it thus appears that the informant's information proved to be correct. Therefore, the defendant's only use of the identity of the informant would be to cause harm to the informant, which would be against the interest of justice.

X. Trade Secrets

The privilege protecting trade secrets is qualified and limited, and exists for the purpose of protecting proprietary information from compelled disclosure and therefore unjust profiteering by competitors. Whether this privilege is to be allowed depends upon the nature of the case, the identity of the party seeking disclosure, and whether adequate protection may be had simply by sealing the record. It has been held that trade secrets are not to be privileged against the public need for disclosure for the protection of the environment or the protection of public interests. In such cases, usually the adverse party is the state, and

adequate protection may be had simply by sealing the record, and closing the courtroom.

XI. Political Vote

While a privilege for political vote was proposed by the Supreme Court, it was not included in the Federal Rules of Evidence. However, where a political vote is under the election laws a secret ballot, states will generally not compel its disclosure. Sometimes an exception is made where necessary in the litigation of dishonest vote counting, ballot box stuffing, and similar election frauds.

XII. Required Reports

A privilege for required reports was submitted to the Congress by the Supreme Court, but was not adopted, with the view held by Congress that no such privilege is necessary. Generally, states do not recognize any such privilege.

XIII. Journalist's Sources

Some cases have protected the identity of a journalist's informant, but most have not. Newsmen have been jailed for contempt for refusing to identify their "sources".

B. HEARSAY

I. Introduction

The credibility of a witness is generally based upon an evaluation of four factors--the witness's: 1. perception, 2. memory, 3. truthfulness, 4. clarity of narration. Before the Judge or jury must determine credibility, the opposing party may test that credibility by cross examination. The objection to the admission of hearsay arises from the absence of the speaker whose credibility must be determined in order to weigh the evidence presented. The out-of-court witness is not available for cross examination.

Hearsay is: a statement (oral, written, or assertive conduct) made out of court and offered to prove the truth of the contents of the statement. Testimony about an act which when committed was not intended to be a communication is not hearsay and is not excluded under this rule. Testimony about a statement made out of court, when not offered to prove the truth of the contents of that