INTRODUCTION

This memo is a report on the following Rules:

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

Rule 38. Admissibility of Disclosures Wrongfully Compelled.

Rule 39. Reference to Exercise of Privileges.

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

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

Rule 37 provides:

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

Part V of the U.R.E., consisting of Rules 23-40, is entitled "Privileges". Rule 37 is a rule of waiver which seems intended to apply to all of the privileges stated in Part V. Below we discuss the two subdivisions of the Rule in inverse order.

Subdivision (b).

This subdivision is as follows:

> "A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the

judge finds that he or any other person while the holder of the privilege has. . . (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

McCormick calls the doctrine of this subdivision the once-published-permanently-waived doctrine.[1]

In previous memos we have investigated this doctrine in reference to certain of the U.R.E. privileges.[2] We have found that in California the doctrine has been most fully developed in connection with lawyer-client privilege and we have advanced the following three propositions as statements of the law under both subdivision (b) and present California law:

1. If a client, knowingly possessed of privilege under Rule 26, voluntarily testifies in an action as to any part of the privileged communications, he or his attorney must then testify fully respecting the communications.
2. If a client testifies as stated in paragraph 1, supra, he thereby waives privilege not only in the action in which he testifies but also in any subsequent judicial proceeding.
3. If a client without coercion and with knowledge of his privilege makes an out-of-court disclosure of all or part of a Rule 26 (1) communication, thereafter the communication is not privileged.[3]

No reason is apparent why we should not have similar results with reference to waiver of physician-Patient privilege (Rule 27), Marital Privilege, (Rule 28) and Priest-Penitent Privilege (Rule 29). Probably, too, we should have similar results with reference to the Religious Belief (Rule 30), Political Vote (Rule 31) and Trade Secret (Rule 32) privileges.

However, special considerations are applicable to the other privileges.

It will be remembered that Rule 33 (Secrets of State), Rule 34 (Official Information) Rule 35 (Communication to Grand Jury), and Rule 36 (Identity of Informer) are all rules both of privilege and of inadmissibility.[4] Because of their dual nature the interrelation of these Rules and Rule 37 (b) is somewhat peculiar. Since these Rules are Rules of privilege, the privilege is waivable under 37 (b), but, since the Rules are also Rules of inadmissibility, such waiver does not make the evidence automatically admissible. A party may exclude the evidence, although the privilege is waived.[5]

Special considerations are also involved as regards the application of 37 (b) to the privilege against self-incrimination. The Commissioners suggest this in the following comment: "As to the privilege against self-incrimination [subdivision (b)] goes beyond the majority of the decisions".[6] As we pointed out in our memo on self-incrimination privilege, there is also the question whether subdivision (b) goes beyond the scope of legislation permitted by Calif. Const. Art. I, § 13.[7]

Subdivision (a).

This subdivision is as follows:

> "A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege . . ."

Subdivision (a) is derived from A.L.I. Code Rule 231 (b). The official A.L.I. commentary on the latter is, in part, as follows:

> "This clause goes further than any known case. Under it, when a person contracts with anyone, whether or not a party to the action, to waive a privilege as to a particular matter, the privilege is gone with reference to that matter, completely and forever and it is immaterial that the other contracting party has no interest in, or connection with, the action in which the privilege is claimed. The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise."

Is this theory sound, or to rephrase the question, is subdivision (a) desirable? In our opinion the answer is "Yes" for reasons which we have stated in the memos on Lawyer-Client, Physician-Patient and Marital Privilege.[8] However, for reasons stated in memo on Self-incrimination privilege, we doubt whether subdivision (a) would be constitutional as applied to that privilege.[9]

Should Rule 37 be amended?

Assuming the soundness of our doubts respecting the constitutionality of Rule 37 as applied to the privilege against self-incrimination, should the Rule be amended to state expressly

its non-application to that privilege?

The final paragraph of The Prefatory Note to the Uniform Rules states in part as follows:

> "It should be noted that no special effort has been made to relate the rules of admissibility to all possible limitations arising out of constitutional requirements of due process, personal security and the like. Of course a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional rights. That goes without saying . . . . [The rules] in no way [attempt] to modify or impair any constitutional right. This is true throughout the work."

If this official statement of purpose is used as a guide in construing the Rules, there is no danger that any Rule will be overthrown as infringing constitutional guarantees (unless, of course, the only possible area of coverage or manner of operation of the Rule would constitute infringement of constitutional right).[10]

It is our judgment that there is no necessity to state in express terms that Rule 37 is subject to Art. I § 13. In fact, we think there would be danger of confusion in so amending Rule 37 and in not amending other Rules the application of which may be limited by constitutional considerations.

Therefore, we recommend approval of Rule 37 in the form in which it is now stated.

RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED.

Rule 38 provides:

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

This Rule copies Model Code Rule 232. In the debates on the Code Professor Morgan explained as follows the scope of the Rule:

> "[The Rule] excludes or makes inadmissible evidence where the evidence has been obtained by the violation of a privilege claimed. For instance, a judge in an action between A and B compels X to incriminate himself and then later in the prosecution of X the former testimony of X is offered against him. Or suppose that he compels him wrongfully to disclose a communication between an attorney and client in an action between two other persons. Then, in an action against the client himself, the communication is offered. This Rule 223 will make that evidence inadmissible."11

It seems clear that the Rule accords with prevailing law insofar as evidence seized in violation of the privilege against self-incrimination is concerned,[12] and the Commissioners are apparently of the opinion that the Rule states the prevailing view as to all privileges since they say that the Rule "states the generally accepted view".[13] Be that as it may, the policy of the Rule seems clearly sound (in the words of the Commissioners, the policy is to safeguard "the privileges against destruction by their very violation"). Therefore, Rule 38 is recommended for approval.

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES.

Rule 39 provides:

> "Subject to paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact

may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege."

Inference and argument based on suppression of evidence - general rule.

Wigmore states as follows:

". . . The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."14

In California this general principle is codified in terms of the following presumption:

"That evidence wilfully suppressed would be adverse if produced".15

Exception to general rule for suppression by invoking rule of inadmissibility.

Wigmore states the following by way of exception to the general rule above:

"Of course, a rule of evidence other than a rule of privilege for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection

> to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage, since by hypothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of the evidence, as privileged evidence is (post, § 2196), but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by innuendo to give an unfavorable meaning to such objections. But the rules of Evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that no inference can lawfully be urged in consequence of such objections."16

Should there be an exception for suppression by invoking privilege?

If a party or a witness suppresses evidence by invoking a rule of privilege, should this be a legitimate basis for adverse inference and argument against the party? In other words, should we apply here the general rule above stated (allowing such inference and argument in general) or should we here recognize an exception to such rule analogous to the exception above stated? Manifestly Rule 39 proceeds upon the theory that (save for a special rule in re incrimination privilege) inference and argument predicated upon a privilege claim shall be prohibited. Moreover this seems to be substantially the majority[17] and the present California view. For example, consider the following extract from the opinion in Estate of Carpenter:[18]

> "The Court also instructed the jury, at the instance of the plaintiffs, that 'it is a presumption of law that evidence willfully suppressed would be adverse if produced.'

> I have examined the voluminous record in vain to find any evidence that there has been any suppression of evidence. Respondents, in their brief here on this point, say that Dr. Stockton's testimony would naturally be considered the best evidence upon Carpenter's condition of mind, and that there was evidence that proponents would not use it; that they suppressed it by objecting to it when offered by contestants.
>
> Of course this, if it occurred, was not a suppression of evidence, and it would be strange that the court, having decided that the evidence was not admissible, should, nevertheless, instruct the jury that the party offering it should have the benefit of a presumption that it was favorable, and that the other party, because he made a legal and proper objection, should thereby lay his case under the suspicion that he had been guilty of suppressing testimony. The instruction would naturally have an injurious effect."

The rationale supporting this view is, in the words of the Commissioners, that a "recognized privilege not to introduce evidence should not be impaired by giving the judge any right to comment and the exercise of the privilege to the prejudice of the one exercising the privilege".[19] Or, in the eloquent words of Lord Chelmsford, the rationale is as follows:

> "'The exclusion of such evidence is for the general interest of the community, and therefore to saythat when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?'"[20]

The opposing view is illustrated by Model Code Rule 233 which provides as follows:

> "If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom."

The argument in behalf of this Rule is set forth in the comment thereon which reads in part as follows:

> "This Rule is the subject of sharp conflict in the authorities. Where a party to the action claims a privilege and thereby excludes relevant matter, it is impossible to prevent the trier of fact from drawing unfavorable inferences against him. A party's privilege is of great practical importance only where the exclusion of the privileged matter will keep the issue from the trier of fact, and in such a case the Rule is inapplicable. The lessening of the value of the privilege by allowing comment on its claim by a party is therefore comparatively slight."

This argument has reference to the situation in which the party claims privilege. The argument in behalf of the Rule in the situation in which a non-party witness claims privilege is set forth in the appended footnote.[21]

Special rule as to incrimination privilege.

As pointed out in our memo on the incrimination privilege, there is in Calif. Const. Art. I § 13 a special rule as to comment and inference when an accused elects at his trial to exercise the incrimination privilege.[22] As was also pointed out in the same memo, Rule 39 is inconsistent with our present law as to inference from privilege claim by a party in a civil action and as to such inference as impeaching a witness.[23] The recommendation of the memo was (and still is) to amend Rule 39 so as not to alter the present law above mentioned.[24]

Recommendation.

It is recommended that the first sentence of Rule 39 be amended as follows:

"~~Subject to paragraph (4), Rule 23,~~[25] ~~if~~ If a privilege (other than the privilege against ~~self~~-incrimination) is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege."

It is further recommended that Rule 39, as thus amended, be approved.

RULE 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE.

Rule 40 provides:

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

Both Wigmore[26] and McCormick[27] support the principle of this rule. McCormick expounds the rationale as follows:

". . . If the court erroneously recognizes an asserted privilege and excludes profered testimony on this ground, of course the adverse party has been injured in his capacity as litigant and may complain on appeal. But if a claim of privilege is wrongly denied, and the privileged testimony erroneously let in, the distinction which we have suggested between privilege and rule of exclusion would seem to be material. If the adverse party to the suit is likewise the owner of the privilege, then, while it may be argued that the party's interest as a litigant has not been infringed, most courts decline to draw so sharp a line, and permit him to complain of the error.

> Where, however, the owner of the privilege is not a party to the suit, it is somewhat difficult to see why this invasion of a third person's interest should be ground of complaint for the objecting party, whose only grievance can be that the overriding of the outsider's rights has resulted in a fuller fact-disclosure than the party desires. In view of the usual willingness of trial courts of their own motion to safeguard the privileges, it can hardly be necessary to afford this extreme sanction to prevent a breakdown in their protection."28 . .

An identical Rule (Rule 234) is proposed by the A.L.I. Model Code of Evidence. The comment on and illustrations of Code Rule 234 are as follows:

> "Comment:
>
> This represents the English common law view. The American cases are in conflict.
>
> Illustrations:
>
> 1. In a civil action against D for damages inflicted by D's automobile, D's chauffeur C is called as a witness against D. Asked to describe his manner of driving in connection with the accident, C claims privilege against self-incrimination, the claim is improperly overruled, and C gives testimony incriminating himself and tending to subject D to liability. D may not effectually assign error.
>
> 2. If an action similar to that described in Illustration 1 is brought against C, and C's claim of privilege is improperly overruled, C may effectually assign error upon his ruling."

California cases are in accord with Rule 40.[29]

It is recommended that Rule 40 be approved.

FOOTNOTES

1. McCormick, p. 198.

2. See memo on Incrimination Privilege, pp. 54 - 59; Lawyer-Client Privilege, pp. 28 - 31; Physician-Patient Privilege, pp. 22 - 25; Marital Privilege, pp. 15 - 17.

3. Memo on Lawyer-Client Privilege, pp. 28 - 31.

4. See memo on Rules 29 - 36, pp. 10 - 12, 21, 25.

5. See memo on Rules 29 - 36, pp. 10 - 12.

6. Rule 37 (b), Comment.

7. See memo on Incrimination Privilege, pp. 54 - 59.

8. See memo on Lawyer-Client Privilege, pp. 28 - 31; Physician-Patient Privilege, pp. 22 - 25; Marital Privilege, pp. 15 - 17.

9. See memo on Incrimination Privilege, pp. 54 - 59.

10. We have advanced the opinion that Rule 23 (4) and Rule 25 (g) are unconstitutional on the basis stated in the "unless" clause in the text. See memo on Incrimination Privilege, pp. 9 - 15 and pp. 49 - 52.

11. XIX, A.L.I. Proceedings, p. 180.

12. See McCormick §§ 127 and 137.

13. Rule 38, Comment.

14. Wigmore § 285.

15. C.C.P. § 1963 (5).

16. Wigmore § 286.

17. See Rule 39, Comment.

18. 94 C. 406, 419 (1892). See also Thomas v. Gates, 126 C. 1 (1899) and Cook v. Los Angeles Ry. Corp., 169 C. 113 (1915).

19. Rule 38, Comment.

20. Quoted in McCormick § 80.

Wigmore seems to support this view as a general proposition (§ 286) and as applied to Lawyer-Client Privilege (§ 2322) and to Physician-Patient Privilege (§ 2286) but apparently he thinks the view should not be applicable to Marital Privilege. (§ 2340, footnote 2.)

21. "When a witness, other than a party, claims a privilege, the party desiring the answer may take one of two positions; (1) that the witness is falsely trying to aid the opponent by giving the jury the impression that the answer would be unfavorable to the witness but not to the opponent, or (2) that the answer would injure the opponent. In either event there can be no weighty objection on the ground that the comment will lessen the value of the privilege. No rights or duties of the witness are to be adjudicated; the comment can do him no harm in the action. The one objection which the opposing party might make is that the claim of privilege shuts off all possibility of inquiry into the validity or invalidity of the claim.

> By further examination he might develop facts which would destroy all basis for the argument. He has no means of testing the truth of the inference, as he would have if the witness testified directly to the inferred fact. This is to say that some of the objections applicable to hearsay are applicable to the comment. If hearsay statements by persons whose direct testimony is unavailable are to be received, then the comment should be permitted."

McCormick seems to lean in the direction of the A.L.I. view. See McCormick § 80.

22. See memo on Incrimination Privilege, pp. 9 - 15.

23. See memo on Incrimination Privilege, pp. 62 - 63.

24. Ibid.

25. As to reasons for striking the "Subject to" clause, see memo on Incrimination Privilege, pp. 9 - 15.

26. Wigmore § 2196.

27. McCormick § 73.

28. McCormick, pp. 152 - 153.

29. People v. Gonzales, 56 C.A. 330 (1922). (Rape. Prosecutrix claims privilege. Overruled. Appeal from judgment of conviction assigning error in overruling privilege claim. Judgement affirmed.)

> "The point is not well made. Conceding for the purposes of the argument that the court should have allowed the privilege to the young girl and not have compelled her to answer questions, the

> error was not an error committed as against the defendant, and, therefore, not a matter about which he may complain. The testimony was relevant and competent when given and, being so, it was proper to be considered by the jury. Had the witness stood upon her refusal to answer and been committed for contempt in consequence, the question as to whether the court had ruled properly would be presented in a proceeding brought to test the validity of the imprisonment. That matter would be a thing wholly outside of any question proper to be considered in defendant's case."

People v. Judson, 128 C.A. 768 (1933) (similar); People v. Mann, 148 C.A.2d 851 (1957) (similar). These cases show that the non-holder of the privilege may not predicate error upon the denial of the privilege. As to the ability of the holder to predicate error, see People v. Mullings, 83 C. 138 (1890). (Murder. Defendant testifies. On cross-examination prosecution asks as to defendant's statement to his wife. Defendant's objection overruled. Appeal from judgment of conviction, assigning as error overruling of objection. Judgment reversed on ground objection should have been sustained.) People v. Warner, 117 C. 637 (1897) (similar).

See discussion by Professor Kidd in Some Recent Cases in Evidence, 13 Calif. L. Rev. 285, 295 - 296 (1925).

Supplement To Rule 37 10/24/59

WAIVER: INCRIMINATION PRIVILEGE

(7) A witness who voluntarily testifies respecting a transaction which inscriminates him does not have the privilege to refuse to disclose any matter relevant to such transaction.

WAIVER: ATTORNEY-CLIENT

(7) The privilege under paragraph (2) of this rule is waived if:

(a) The communication is disclosed in judicial proceedings or otherwise to a person or persons other than those stated in paragraph (2), and

(b) Such disclosure is with the consent of the holder or holders of the privilege.

The holder or holders of the privilege give such consent by any words or conduct which indicates consent, including failure to claim the privilege in judicial proceedings which afford the holder or holders opportunity to make the claim.

(8) If the privilege is waived as described in paragraph (7), no person may thereafter claim the privilege respecting the communication as to which such privilege was waived.

WAIVER: DOCTOR-PATIENT

(8) The privilege under paragraph (2) of this rule is waived if:

(a) The communication is disclosed in judicial proceedings or otherwise to a person or persons other than those stated in subdivision (c) of paragraph (2), and

(b) Such disclosure is with the consent of the holder or holders of the privilege.

The holder or holders of the privilege give such consent by any words or conduct which indicate consent, including failure to claim the privilege in judicial proceedings which afford the holder or holders opportunity to make the claim.

(9) If the privilege is waived as described in paragraph (8), no person may thereafter claim the privilege respecting the communication as to which such privilege was waived.