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Memorandum No. 15(1960)

Subject: Uniform Rules of Evidence - Privileges.

Attached to this memorandum are those portions of the Uniform Rules of Evidence relating to Privileges that have not yet been finally acted upon by the Commission. The following are the remaining matters to be considered:

(1) Rule 25. SELF-INCRIMINATION: EXCEPTIONS. All of this rule has been approved as revised by the Commission with the exception of Paragraph (10).

References: Chadbourn Memo on Rules 23-25, pages 59-63 (see also footnote 84, pages FN 15-16);

Chadbourn Memo on Rules 37-40, pages 6-11.

If the defendant in a civil case, for example, is called by the plaintiff as a witness and the defendant refuses to answer pertinent inquiries on the ground of self-incrimination, under the California cases an inference adverse to defendant may be drawn from his privilege claim because to hold otherwise "would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill." In the case of a non-party witness, if he claims the privilege with respect to particular matters at issue in an action or proceeding, whether such claim was made before or in such action or proceeding, his claim may be shown to impeach the credibility of his testimony in such action or proceeding "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement."

Logically, the same principle should apply to a party in a civil action -- his prior claim of the privilege may be shown to impeach the credibility of his testimony in the civil action. Paragraph (10) preserves this right (which apparently exists under the California cases) to draw an inference from the claim of the privilege against self-incrimination.

There is no provision in Rule 25 regarding comment on the exercise of the privilege against self-incrimination by a defendant in a criminal case. If such privilege is exercised, comment may be made under Rule 23(3), as revised by the Commission, as to the defendant's failure to explain or deny by his testimony any evidence or facts in the case against him. Under Rule 23, the defendant in a criminal case has a privilege not to testify or to limit his testimony on direct examination to those matters he wishes to discuss. Cross examination of the defendant in a criminal case is limited under Rule 25(8), as revised by the Commission, to matters about which the defendant was examined on direct.

(2) Rule 37. WAIVER OF PRIVILEGE. The Commission has not yet considered this rule. See attached material for revised rule and explanation.

(3) Rule 39. REFERENCE TO EXERCISE OF PRIVILEGE. The Commission has discussed but not approved this rule. See attached material for revised rule.

(4) Rule 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE. This rule has not been approved by the Commission. At its October 1959 meeting the Commission suggested that the staff add the substance of the second sentence of the revised rule. However, the second sentence may be unnecessary since

the first sentence is restricted in its application to a "party" which would perhaps not include a non-party witness who declined to answer and is now bringing habeas corpus proceedings.

Respectfully submitted,

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Executive Secretary

Revised 2/11/60
Revised 12/10/59
Revised 11/10/59
10/14/59

Note: This is Uniform Rule 25 as revised by the Law Revision Commission. See attached explanation of this revised rule. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 25. SELF-INCRIMINATION: EXCEPTIONS.

Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose [~~in-an-action-or-to-a-public-official-of this-state-or-any-governmental-agency-or-division-thereof~~] any matter that will incriminate him, except that under this rule [7] :

[~~(a)-if-the-privilege-is-claimed-in-an-action~~]

(1) The matter shall be disclosed if the judge finds that the matter will not incriminate the witness. [~~and~~]

[~~(b)~~] (2) No person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics [7] or his physical or mental condition. [~~and~~]

(3) No person has the privilege to refuse to demonstrate his identifying characteristics such as, for example, his handwriting, the sound of his voice and manner of speaking or his manner of walking or running.

[~~(c)~~] (4) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [~~and~~]

[~~(d)~~] (5) No person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing

(Rule 25)

matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some [~~either-person-or-a~~] corporation, partnership, [~~or-either~~] association, organization or other person has a superior right to the possession of the thing ordered to be produced. [~~;-and~~]

[~~(e)~~] (6) A public [~~official~~] officer or employee or any person who engages in any activity, occupation, profession or calling does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the office, employment, activity, occupation, profession or calling require him to record or report or disclose concerning it. [~~;-and~~]

[~~(f)~~] (7) A person who is an officer, agent or employee of a corporation, partnership, [~~or-either~~] association [~~;~~] or other organization does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation, partnership, [~~or~~] association or organization or the conduct of its business require him to record or report or disclose. [~~;-and~~]

[~~(g)~~] (8) Subject to Rule 21, a defendant in a criminal action or proceeding who voluntarily testifies in the action or proceeding upon the merits before the trier of fact [~~does-not-have-the-privilege-to-refuse-to-disclose-any-matter-relevant-to-any-issue-in-the-action~~] may be cross examined as to all matters about which he was examined in chief.

(9) Except for the defendant in a criminal action or proceeding, a witness who voluntarily testifies in an action or proceeding before the trier of fact with respect to a transaction which incriminates him does not have the privilege to refuse to disclose in such action or proceeding any matter relevant to the transaction.

(10) If a party in a civil action or proceeding claims or has claimed the privilege under this rule with respect to particular matters at issue in such action or proceeding, such claim may be commented upon by the court and by counsel and may be considered by the court or the jury. If a witness in an action or proceeding who is not a party to such action or proceeding claims or has claimed the privilege under this rule with respect to particular matters at issue in such action or proceeding and if such claim tends to impeach the credibility of the testimony of the witness, such claim may be commented upon by the court and by counsel and may be considered by the court or the jury.

RULE 25 (SELF-INCRIMINATION; EXCEPTIONS) AS

REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 25, relating to the privilege against self-incrimination, as revised by the Commission.

THE PRIVILEGE

The words "in an action or to a public official of this state or to any governmental agency or division thereof" have been deleted from the statement of the privilege. Uniform Rule 2 provides: "Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced." The Commission has deleted the language from Uniform Rule 25 because the Uniform Rules are, by Uniform Rule 2, concerned only with matters of evidence in proceedings conducted by courts and do not apply to hearings or interrogations by public officials or agencies. For example, the Uniform Rules of Evidence should not be concerned with what a police officer may ask a person accused of a crime nor with what rights, duties or privileges the questioned person has at the police station. Even if it were decided to extend the rules beyond the scope of Uniform Rule 2, it is illogical to speak of a privilege to refuse to disclose when there is no duty to disclose in the first place. An evidentiary privilege exists only when the person questioned would, but for the exercise of the privilege, be under a duty to speak. Thus, the person who refuses to answer a question or accusation

(Rule 25)

by a police officer is not exercising an evidentiary "privilege" because the person is under no legal duty to talk to the police officer. Whether an accusation and the accused's response thereto are admissible in evidence is a separate problem with which Uniform Rule 25 does not purport to deal. Under the California law, silence in the face of an accusation in the police station can be shown as an implied admission. On the other hand, express or implied reliance on the constitutional provision as the reason for failure to deny an accusation has recently been held to preclude the prosecutor from proving the accusation and the conduct in response thereto although other cases taking the opposite view have not been overruled. If given conduct of a defendant in a criminal case in response to an accusation is evidence which the court feels must be excluded because of the Constitution, there is no need to attempt to define these situations in an exclusionary rule in the Uniform Rules of Evidence. A comparable situation would be where the judge orders a specimen of bodily fluid taken from a party. The rules permit this. But the Uniform Commissioners point out that "a given rule would be inoperative in a given situation where there would occur from its application an invasion of constitutional rights. . . . [Thus] if the taking is in such a manner as to violate the subject's constitutional right to be secure in his person the question is then one of constitutional law on that ground.

The effect of striking out the deleted language from Uniform Rule 25 is that the rule will then apply (under Uniform Rule 2) "in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

(Rule 25)

EXCEPTIONS

In paragraph (a) of the Uniform Rule, now paragraph (1) of the revised rule, the words "if the privilege is claimed in an action" have been omitted as superfluous because the rule as revised by the Commission applies only in actions and proceedings.

Paragraph (3) has been inserted to make it clear that the defendant in a criminal case, for example, can be required to walk so that a witness can determine if he limps like the person she observed at the scene of the crime. Under paragraph (3), the privilege against self-incrimination cannot be invoked to prevent the taking of a sample of handwriting, a demonstration of the witness speaking the same words as were spoken by a criminal as he committed a crime, etc. This matter may be covered by paragraph (b), now paragraph (2), of the Uniform Rule; but paragraph (3) will avoid any problems that might arise because of the phrasing of paragraph (2).

In paragraph (d) of the Uniform Rule, now paragraph (5) of the revised rule, the rule has been revised to indicate more clearly that a partnership or other organization would be included as a person having a superior right of possession.

The Commission has revised paragraph (g) of the Uniform Rule, now paragraph (8) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). Paragraph (g) of the Uniform Rule (in its original form) conflicted with Section 13, Article I, of the California Constitution, as interpreted by the California Supreme Court.

The Commission has included a specific waiver provision in paragraph (9) of Rule 25. The Uniform Rules provide in Rule 37 a waiver provision that

(Rule 25)

applies to all privileges. However, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. The Commission has done this because the waiver provision of Rule 37 was not suitable for application to Rule 25. Note that the waiver of the privilege against self-incrimination under paragraph (9) of revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit a waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the privilege in a subsequent case even though he waived it in a previous case. The extent of waiver of the privilege by the defendant in a criminal case is indicated by paragraph (8) of the revised rule.

Paragraph (10) of the revised rule is a provision relating to comment on the exercise of the privilege. As far as the defendant in a criminal action or proceeding is concerned, the right to comment is covered by revised Rule 23(3). As far as a party in a civil action or proceeding is concerned, if such party invokes the privilege against self-incrimination to keep out relevant evidence, the other party should be entitled to comment on that fact. Suppose in the civil action the plaintiff calls the defendant under C.C.P. § 2055 and the defendant refuses to answer pertinent inquiries on the ground of self-incrimination. In California an inference adverse to the defendant may be drawn from his privilege claim because to hold otherwise would, in the words of the California court, "be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill." The claim of the privilege against self-incrimination by a witness who is not a party may be shown under existing California law, and under paragraph (10) of the revised rule, to impeach his credibility "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement."

Note: This is Uniform Rule 37 as revised by the Law Revision Commission. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 37. WAIVER OF PRIVILEGE.

~~[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.]~~

(1) Subject to Rule 38, a holder of a privilege under Rules 26 to 30, inclusive, waives his right to claim the privilege by:

(a) Disclosing, in an action or proceeding or otherwise, any part of the matter protected by the particular privilege; or

(b) Consenting to disclosure being made by another person, in an action or proceeding or otherwise, of any part of the matter protected by the particular privilege. Consent to disclosure may be given by any words or conduct which indicates consent to the disclosure, including but not limited to failure to claim the privilege in an action or proceeding which affords the holder of the privilege an opportunity to claim the privilege.

(2) Except as otherwise provided in paragraphs (3), (4) and (5) of this rule, the right to claim a particular privilege provided under Rules 26 to 30, inclusive, as to any part of the matter protected by the

(Rule 37)

particular privilege cannot be asserted by anyone once the right to claim the privilege is waived under paragraph (1) of this rule.

(3) Even though one spouse or a person acting as the holder of the privilege on behalf of such spouse has waived the right to claim the privilege provided by Rule 28, the privilege is waived so far as the other spouse is concerned only if the other spouse or a person acting as the holder of the privilege on behalf of the other spouse has also waived the privilege under paragraph (1) of this rule.

(4) Subject to subparagraph (d) of paragraph (5) of Rule 26, when a communication relevant to a matter of common interest between two or more clients is made to a lawyer whom they have retained in common, even though one of the clients or a person acting as the holder of the privilege on behalf of such client has waived the right to claim the privilege provided by Rule 26, the privilege is waived so far as any other client is concerned only if such other client or a person acting as the holder of the privilege on behalf of such other client has also waived the right to claim the privilege under paragraph (1) of this rule.

(5) Where there are two guardians for the same person and one guardian waives the right to claim a privilege on behalf of such person, the other guardian nevertheless may claim the privilege on behalf of such person unless such other guardian has also waived the right to claim the privilege under paragraph (1) of this rule.

EXPLANATION OF REVISED RULE 37 (WAIVER OF PRIVILEGE).

Limitation of Scope of Rule 37. Rule 37, relating to waiver of privilege, has been revised so that it applies only to Rules 26 to 30. The revised rule does not apply to Rules 23 to 25 nor to Rules 31 to 36.

Rule 23, relating to the right of a defendant in a criminal action or proceeding, can be waived only when the defendant offers himself as a witness in the specific action or proceeding and then the waiver is only to cross examination on that part of the matter testified to on direct. Thus, as far as Rule 23 is concerned, the provisions of revised Rule 37 have no application.

Rules 24 and 25 relate to the privilege against self-incrimination. A new paragraph (9) is suggested for addition to Rule 25. (See revised rule 25). Because this new paragraph and paragraph (8) of revised rule 25 cover the scope of waiver as far as the privilege against self-incrimination is concerned, revised Rule 37 has no application to Rule 25.

Revised Rule 37 likewise has no application to the privileges provided in Rules 31 to 36, inclusive, since each of these rules specifies when the privilege is available and when it is not.

Waiver by contract. Under revised Rule 37 the fact that a patient, for example, has waived the physician-patient privilege in an insurance application does not waive this privilege for other

(Rule 37)

purposes. This differs from the Uniform Rule. The Commission can see a valid reason why an insurance applicant should not be allowed to make a limited waiver in this case without waiving the privilege in all cases. The fact that a person has applied for insurance should not be the determining factor as to whether a privilege exists in a case having no relationship to the insurance contract.

Two persons entitled to claim privilege at same time. Generally speaking, under revised Rule 37, where two persons are the holder of a privilege at the same time (two spouses, two guardians, two or more clients who jointly consult a lawyer), any one of the holders of the privilege may claim it unless he or a person acting on his behalf has waived the privilege. In other words, where several persons are the holders of the privilege at the same time, any one of them may claim the privilege even though the other holders of the privilege waive it.

Examples:

Rule 26 - several clients.

- (1) One client appears as a witness and is willing to disclose a confidential communication made to his attorney; another client who retained the lawyer jointly with the witness client objects: Objection sustained.
- (2) One client appears as a witness and testifies as to a confidential communication made to the attorney; the other client who jointly consulted the lawyer is not a party to the proceeding. In a second proceeding the

(Rule 37)

first client is called upon to repeat the same testimony or the record of the previous testimony is presented. The other client who retained the lawyer jointly with the witness client objects. Objection sustained.

Rule 28 - husband and wife.

- (1) Husband appears as a witness and agrees to testify as to confidential communication between husband and wife. Wife objects. Objection sustained.
- (2) Husband appears as a witness and testifies as to confidential communication between husband and wife; wife is not present at the time and is not a party to action or proceeding. In a second action the husband is called upon to testify as to the same communication. Husband objects; objection overruled - he has waived. Wife objects; objection sustained.

Two guardians of same person.

- (1) The guardian of the person of the client waives privilege. Guardian of estate objects. Objection sustained.
- (2) The guardian of the person of a client waives attorney-client privilege in writing. The guardian of estate refuses to waive the privilege and no attempt is made to get testimony introduced in an action involving the client

(Rule 37)

and a third party "X". Client dies. Attorney is called to stand to testify in an action between Y and the personal representative; personal representative objects on grounds of privilege. Objection overruled - privilege has been waived by a holder of the privilege and in this case revised rule does not give a privilege to the personal representative.

Note: This is Uniform Rule 39 as revised by the Law Revision Commission. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES.

Subject to paragraph [~~4~~] (3) of Rule 23 and paragraph (10) of Rule 25 [~~7~~] :

(1) If a privilege is exercised not to testify or to prevent another from testifying, either in the action or proceeding 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 [~~7~~] and the trier of fact may not draw any adverse inference therefrom. [~~In these 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,~~]

(2) The court, at the request of [~~the~~] a party [~~exercising~~] who the court finds may be adversely affected because an unfavorable inference may be drawn by the trier of fact because the privilege has been exercised, [~~may~~] shall instruct the jury [~~in support of such privilege~~] that no inference is to be drawn from the exercise of the privilege.

Note: This is Uniform Rule 40 as revised by the Law Revision Commission. The changes in the Uniform Rule are shown by underlined material for new material and by bracketed and strike out material for deleted material.

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

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege. In proceedings arising out of a witness being adjudged guilty of a contempt upon refusal to obey an order to testify or to disclose a matter, the witness may predicate error on a ruling disallowing a claim of privilege only if the privilege was claimed by a person authorized under these rules to claim the privilege.