#34

June 1, 1961

Memorandum No. 18(1961)

Subject: Uniform Rules of Evidence (Privileges Article - Rules 23-25)

At the May 1961 meeting the Commission decided to review each rule in the Privileges Article. This is the first of a series of memoranda that will set out the basic policy questions to be considered in connection with each rule in the Privileges Article. At the same time these basic policy questions are presented for Commission consideration, the memoranda will also indicate (when known) the actions taken by the Northern and Southern Sections of the State Bar Committee appointed to consider the Uniform Rules of Evidence.

Attached as Exhibit I (green pages) are Rules 23-25 of the Uniform Rules as revised to date by the Commission (except that the provisions of Rules 23 and 25 relating to comment have been deleted and will be incorporated into Rule 39 for consideration by the Commission at the time Rule 39 is considered).

Attached as Exhibit II (yellow pages) is an extract from the Minutes of the Southern Section of the State Bar Committee. Attached as Exhibit III (pink pages) is an extract from the Minutes of the Northern Section of the State Bar Committee.

Also attached is a copy of our research consultant's study on Rules 23 to 25. References in this memorandum to "Study" are to the research consultant's study on Rules 23 to 25.

It is proposed in this Memorandum to first consider Rules 24 and 25 (self-incrimination). It is suggested that a decision as to the scope of protection under Rules 24 and 25 should be made before a decision as to the scope of protection under Rule 23 (right of accused in criminal action) is made.

The following matters should be considered in connection with Rules 23-25:

RULE 24

Rule 24 as set out in Exhibit I contains the revisions made at the May 1961 meeting.

The basic policy question presented by the definition of incrimination is whether the definition should be restricted to a crime or public offense under the laws of this State or should be extended to include crimes under federal laws or under the laws of other states, or both. See Study, pp. 52-54.

Both the Northern and Southern Sections of the State Bar Committee believe that the definition should be extended to include incrimination under the laws of the United States as well as under the laws of this State. Both agree that the definition should not be extended to include incrimination under the laws of other states.

At the May 1961 meeting the Commission requested the staff to report on the extent to which the U.S. Constitution provides protection against self-incrimination. The staff finds that the federal constitution does not operate:

(1) To grant a privilege against self-incrimination in a federal court, where the danger is only of prosecution under a state law.[1]

(2) To grant a privilege against self-incrimination in a state court, where the danger is only of prosecution under the law of another state or under federal law.[2]

---

1. In United States v. Murdock, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210 (1931), Murdock was indicted for violation of a federal statute (refusing to furnish to a federal revenue agent information concerning the recipients of certain payments claimed as tax deductions). His claim of privilege, based on possible incrimination under a state law, was rejected. The court said:

> The English rule of evidence against compulsory self-incrimination, on which historically that contained in the 5th Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. . . . This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.

2. In Knapp v. Schweitzer, 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393 (1958), the petitioner was questioned by a New York grand jury investigating union bribery and extortion. Despite a grant of full immunity under the New York statute, he refused to answer on the ground that he might incriminate himself under the Federal Labor Management Relations Act, pointing out that the United States Attorney in that area had publicly announced his intention of cooperating with the New York district attorney in prosecuting criminal cases of this character. Held, contempt conviction affirmed. Under the long settled principle of federalism and state autonomy a state may require full disclosure in exchange for state immunity regardless of the fact that the witness may be exposed to federal prosecution. The Federal Government cannot take advantage of this rule to evade the bill of rights, e.g., by a federal officer being a party to compulsion of testimony by state agencies; but the public announcement here did not constitute a joint federal and state act. The court pointed to the danger of a contrary rule - that a state law would easily be thwarted by the extensive sweep of federal law:

> In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions,

(3) To grant a privilege against self-incrimination in a federal or state court, where the danger is only of prosecution under the law of a foreign country.

It should be noted that under federal law - The Compulsory Testimony Act of 1954 (18 U.S.C. § 3486) - when testimony concerning national security is compelled in compliance with the Act, immunity is given from prosecution "in any court," i.e., not only from federal prosecution (which is all the federal privilege protects against) but also from prosecution in a state court. This extension of immunity beyond the scope of the privilege was held within the power of Congress.[3]

Our research consultant has found no California decision indicating whether or not the present California constitutional provision and statutes relating to the privilege against self-incrimination extend protection to incrimination under the laws of any sovereignty other than California. Note, however, Penal Code Section 1324:

> 1324. In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby,

---

> investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution . . . . If a person may, through immunized self-disclosure before a law-enforcement agency of the State, facilitate to some extent his amenability to federal process, or vice versa, this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.

3. Adams v. Maryland, 347 U.S. 179, 74 S.Ct. 442, 98 L.Ed. 360 (1954) (Witness before Senate crime investigating committee admitted running gambling business; held immune from prosecution under Maryland anti-lottery laws).

> and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, <u>or could subject the witness to a criminal prosecution in another jurisdiction</u>, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. [Emphasis supplied]

The policy reflected in Section 1324 appears to be that protection should be provided not only against criminal prosecution in this State but also against compelling disclosures that would subject the witness to criminal prosecution in "another jurisdiction."

Whether the scope of protection that California is to provide should be limited to incrimination under the laws of this State or is to extend to incrimination under federal laws or laws of other states is a question of state policy. There are several alternatives available to the Commission:

(1) Approve Revised Rule 24 which is limited to incrimination under the law of this State.

(2) Extend Revised Rule 24 - as suggested by the State Bar Committee - to include incrimination under a federal law (but not incrimination under the law of another state).

(3) Extend Revised Rule 24 to include incrimination under a federal law or the law of another state (but not a foreign country).

Another matter the Commission may want to consider at this time is the scope of protection to be provided under Section 1324 of the Penal Code. Assuming that Rule 24 is limited to incrimination under California law, a witness could not claim the privilege where he could be incriminated only under a federal law or the law of another state. Yet in cases where he could claim the privilege under Rule 24, he could not be compelled to testify if such testimony "could subject the witness to criminal prosecution in another jurisdiction." It should be noted, however, that the federal act - The Compulsory Testimony Act of 1954 - also provides greater protection than the federal privilege.

RULE 25 (See attached green pages for revised rule)

Opening Paragraph. The privilege provided by Rule 25 is limited to natural persons. Both the Northern and Southern Sections of the State Bar Committee and the Commission have approved this limitation which is a codification of the existing California law.

The Commission deleted from the opening paragraph of Rule 25 the phrase "in an action or to a public official of this state or any governmental agency or division thereof." Both the Northern and Southern Sections of the State Bar Committee approve this deletion. Both the Northern and Southern Sections suggest, however, that (in lieu of the deleted phrase) the phrase "in any action or proceeding" be inserted. The staff suggests that this addition is unnecessary. Rule 2 prescribes the scope of the Uniform Rules. Moreover, generally speaking, it is only when a rule is to be more restricted than or broader than Rule 2 in its scope that the Uniform Commissioners have considered it necessary to specify when the privilege may be claimed. For example, such specification is made in Rule 23 (limited to a criminal action), Rule 25 (extended to an action or to a proceeding before a public official or any governmental agency or division thereof), Rule 27 (restricted to a civil action or a prosecution for a misdemeanor); but no such specification is made where the scope of the rule is determined by Rule 2 as in Rules 26, 28, 29, 30, 31, 32, 33, 34 and 36. The Commission may want to consider making the scope of the Privileges Article broader than Rule 2.

The staff suggests that consideration of the cross reference to Rule 37 be deferred until Rule 37 is considered.

The consultant discusses the opening paragraph on pages 15-21 of the Study.

Subdivision (a) [renumbered as subdivision (1) by Commission]. The Northern Section of the State Bar Committee believes that this subdivision is ambiguous (see pink sheets, pages 3-4). The Southern Section did not share this view and approved the Commission's redraft of this subdivision.

Subdivision (b) [renumbered as subdivision (2) by Commission]. Both the Northern and Southern Sections are concerned by the inclusion of the words "mental condition" in this subdivision. The Northern Section approved this subdivision as proposed by the Uniform Commissioners after a consideration of the constitutionality of requiring a person to submit to examination for the purpose of discovering his mental condition (vote 3-1). The Southern Section approved the subdivision except for the inclusion of the words "mental condition" and, as to that aspect of the subdivision, the Southern Section has taken no final action. Both the Northern and Southern Sections apparently believe that the question of constitutionality of the "mental condition" provision should be given additional study before final approval of the URE rules. (See consultant's Study, pages 25-38, concluding that the URE subdivision would be constitutional in California and is desirable.)

The Commission, at its May 1961 meeting, inserted the words "his body" following the word "submit" in subdivision (2). This may eliminate the problem presented by the words "mental condition" if it is to be construed to prevent the questioning of a person for the purpose of

determining his mental condition. Was this the intent of the Commission in adopting this revision? If this was the intent, it might be more clearly indicated by deleting "mental condition".

Subdivision (3) [new subdivision proposed by Commission]. The Southern Section believes that it is unwise to attempt to codify specific types of physical conduct as those which fall outside the scope of the privilege. The consensus of opinion of the Southern Section was that specific types of conduct (such as, for example, handwriting, walking, speech, etc.) should be left to court construction, subject to the operation of the general statement contained in subdivision (2) of the revised rule.

Subdivision (2) provides that there is no privilege "to refuse to submit to examination . . . ." The Commission has changed this to read "to refuse to submit his body to examination . . ." Witkin, California Evidence, page 507, points out:

> On a somewhat hazy distinction between passive cooperation and active participation, it has occasionally been asserted that an accused may be fingerprinted, photographed, etc. . . , but may not be required to furnish a specimen of his handwriting, or to speak words for the purpose of identifying his voice.

With the inclusion of the words "his body" in subdivision (2), the inclusion of subdivision (3) is all the more necessary. Certainly, subdivision (3) does clarify the rule to make it clear that no such distinction is to be taken between passive cooperation and active participation; and, if the principle of the subdivision is acceptable, the staff believes that the previous action of the Commission should be retained. This matter is one example of the ambiguity created by inserting "his body" in subdivision (2).

Subdivision (c) [remumbered as subdivison (4) by Commission]. This subdivision was approved by both the Northern and Southern Sections. See Study, pages 22-25.

Subdivision (d) [remumbered as subdivision (5) by Commission]. The Commission's redraft of this subdivision was approved by the Southern Section. The Northern Section approved the subdivision as drafted by the Uniform Commissioners on the basis that "if there is any merit to the idea of a uniform code slight changes, such as this, should not be adopted."

The staff believes that if there is any justification for the subdivision, the revision made by the Commission merely makes clear the probable meaning of the URE subdivision. See Study, pages 38-39.

Subdivision (e) [renumbered as subdivision (6) by Commission]. Both the Northern and Southern Sections of the State Bar Committee object to this subdivision on the ground that, taken literally, its language is so broad in its applicability to private callings that it would be unconstitutional (as violating the constitutional privilege against self-incrimination). The Southern Section would limit the subsection to public officers and employees and eliminate any reference to private callings. The Northern Section suggests that the subdivision be redrafted so as to provide that if some purpose other than obtaining proof of violation of a law is reasonably to be achieved by the keeping of records, then the privilege against self-incrimination shall not apply.

The classic illustration of the subdivision is the culpable motorist involved in an accident who, though culpable, must identify himself, give his address and the registration number of his vehicle. Such legisla-

tion is not an infringement of the privilege against self-incrimination.

In his study, Professor Chadbourn points out that there are a number of statutes which require persons to give information which would tend to support possible subsequent criminal charges if introduced in evidence. He then states:

> Such regulations are permissible under Art. I, § 13. We should take care therefore lest in a legislative statement of the scope of the incrimination privilege we so broaden the scope that such regulations would be inconsistent with our legislative statement of privilege. That, however, is precisely what we would do if we were to adopt the general rule of 25 omitting any exception to embrace regulations of the kind adverted to. 25(e) is therefore fashioned (in part) as an exception designed to exclude from the general rule of 25 regulations of the kind in question.

The following extract from Witkin, California Evidence, pages 516-517, may be of interest:

> In recent years, an obvious limitation on the privilege has become very significant: "[A] public official 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, activity, occupation, profession or calling require him to record or report or disclose concerning it." (Unif. Rule 25(e); see also Model C., Rule 207; 68 Harv. L. Rev. 340; 70 Harv. L. Rev. 1461; 9 Stanf. L. Rev. 375; McCormick, p. 281; 8 Wigmore, §2259c; Selected Writings, pp. 270, 287, 292.) The situations may be roughly classified as follows:
>
> (1) Public Record in Custody of Public Official or Employee. Official public records are of course subject to compulsory production regardless of their tendency to inciminate an individual. (See Unif. Rule 25(e), supra; 8 Wigmore, §2259c; 9 Stanf. L. Rev. 377.)
>
> (2) Required Records and Reports of Dangerous Business or Activity. Dealers in narcotic drugs or liquor, or pawnbrokers who sometimes receive stolen property, may be required to file regular reports and keep records open to inspection by law enforcement officers. (See Model C., Rule 207, Comment; McCormick, p. 283; 8 Wigmore, §2259c.) Similarly, "hit-and-run" statutes require an automobile driver involved in an accident to report it. (See People v. Diller (1914) 24 C.A. 799, 142 P. 797; Model C., Rule 207, Comment; McCormick, p. 283.)

(3) Required Records and Reports of Non-Dangerous Regulated Business or Activity. The non-privileged required records doctrine appears to be applicable to the almost innumerable statutory regulations requiring the filing or disclosure of records to regulatory agencies. In Shapiro v. United States (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787, S was charged with violation of the Emergency Price Control Act. He claimed immunity under the Compulsory Testimony Act (infra, §470) because of the prior production of his books and records under subpena in an administrative hearing. Held, no immunity was gained by the production of these unprivileged records. "Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator." (68 S.Ct. 1379.) (See 19 So. Cal. L. Rev. 423; 22 So. Cal. L. Rev. 303; Selected Writings, pp. 270, 287; 9 Stanf. L. Rev. 379.) [Emphasis in original]

Subdivision (e) -- now subdivision (6) -- was apparently approved by the Commission on the theory that has been applied to other rules -- that (to use the language of the comment of the Uniform Commissioners to Rule 7) "any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule." Chadbourn's conclusion is that "we cannot improve upon 25(e) as a statement of general principle. We recognize, however, that, if enacted and held valid in this state, it would have to be construed as not intended to deny privilege in situations in which privilege is vouchsafed by Art. I, § 13." See Study, pages 39-43. The staff agrees with our consultant; disclosure is required under Rule 25 only if the statute or regulation requiring the record, report or disclosure itself does not violate Art. I, § 13.

Subdivision (f) [renumbered as subdivision (7) by Commission]. Professor Chadbourn concluded that subdivision (f) would be unconstitutional and on that ground recommended its disapproval (see Study, pages 43-48).

The Northern Section of the State Bar Committee, pointing out that this subdivision would require an officer, agent or employee of a corporation not only to produce the records of the corporation but also to testify as to matters involved therewith, recommended that the subdivision be disapproved as clearly unconstitutional. The Southern Section of the State Bar Committee suggested the following revision of subdivision (f):

> (7) An officer, agent or employee of a corporation has no privilege to refuse to produce, or to identify records of, the corporation, or to testify concerning the whereabouts, existence, or non-existence of such records, whether or not such records are required by law to be kept.

In connection with this subdivision and the alternative proposed by the Southern Section, the following extract from Witkin, California Evidence, pages 514-516 may be helpful:

> [§461] Corporations and Unincorporated Associations.
>
> (1) Corporations. Unlike the constitutional guarantee against unlawful search and seizure (supra, § 23), the self-incrimination privilege does not protect a corporation from compulsory disclosure of corporate records incriminating the corporation. The usual explanation is that the corporation is chartered by the state with special powers, and the state may examine corporate records to discover abuse of the powers. (See United States v. Bausch & Lomb Optical Co. (1944) 321 U.S. 707, 64 S.Ct. 805, 815, 88 L.Ed. 1024; 44 Cal. L. Rev. 408; McCormick, p. 262; 8 Wigmore, §2259a; Selected Writings, p. 281; 120 A.L.R. 1102; cf. Unif. Rule 25 ["every natural person"].)
>
> (2) Large Unincorporated Associations. In United States v. White (1944) 322 U.S. 694, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, the court brought large unincorporated associations within the rule which denies the privilege to corporations. The holding was that an officer of an international labor union could not refuse to produce its records under a claim of the privilege. The test, said the court, is whether "a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its

constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity." (See 17 So. Cal. L. Rev. 322; 18 So. Cal. L. Rev. 157; 44 Cal. L. Rev. 408; Selected Writings, p. 283; 152 A.L.R. 1208.)

(3) Privilege of Officer. Production of the corporate or association records is required even though they would also personally incriminate an officer or agent who has custody of them. (Wilson v. United States (1911) 221 U.S. 361, 31 S.Ct. 538, 544, 55 L.Ed. 771; Essgee Co. v. United States (1923) 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917; Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614; Unif. Rule 25(f) ["a person who is an officer, agent or employee of a corporation . . . does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation . . . or the conduct of its business require him to record or report or disclose"]; cf. Wheeler v. United States (1913) 226 U.S. 478, 33 S.Ct. 158, 57 L.Ed. 309 [after dissolution of corporation and transfer of books to stockholders, former officers cannot invoke privilege as to records].) And the officer may not have a privilege to refuse to identify the records produced. (See McCormick, p. 263.)

Nevertheless, the personal privilege of the officer remains intact. And it is a violation of that privilege to compel him to testify to the location of corporate or association records which, if produced, might incriminate him. In Curcio v. United States (1957) 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225, a federal grand jury investigating racketeering in unions summoned petitioner, secretary-treasurer of an alleged "phantom union," to appear and produce the union books. He appeared without the books and refused to answer questions as to their whereabouts. In view of his criminal record and other facts the Government conceded the tendency of the books to incriminate him. Held, his refusal was justified. The Government argued that records will be obtained more readily if the custodian is threatened with summary commitment for contempt for failing to testify as to their whereabouts, rather than with prosecution for disobedience of the subpena to produce the records themselves. But the court said: "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." (77 S.Ct. 1151.)

[§462] Partnerships and Individuals Doing Business.

There is a conflict in the lower federal courts as to the application of the White test of "impersonality" (supra, § 461) to a small association such as a business or family partnership. It may be that the papers are privileged in the hands of any partner. (See 23 So. Cal. L. Rev. 94; 44 Cal. L. Rev. 408.)

An individual doing business is of course entitled to the protection of the privilege as to oral testimony and ordinary private records. But Uniform Rule 25(d) provides that he must produce a document or chattel if some other person "has a superior right" to its possession; e.g., a bankrupt must surrender books to his trustee. (See Model C., Rule 206, Comment; McCormick, p. 263; 13 Cal. L. Rev. 259; cf. Dier v. Banton (1922) 262 U.S. 147, 43 S.Ct. 533, 67 L.Ed. 915.) And he has no privilege to refuse disclosure of records required by statute. (See infra, § 463.)

Subdivision (g) [renumbered as subdivision (8) by Commission]. The Southern Section of the State Bar Committee approved the Commission's redraft of this subdivision (which is a codification of existing California law now found in Penal Code Section 1323). The Southern Section, however, recommended that the word "voluntarily" be eliminated as being unnecessary. The Northern Section approved the original URE version of the subdivision, stating that if there is any question about the constitutionality of the original URE version of subdivision (g), the Constitution should be amended.

Subdivision (9) [new subdivision proposed by Commission]. This subdivision was not considered by the Northern Section. The Southern Section proposed the following redraft of the subdivision:

> (9) Except for the defendant in a criminal action or proceeding, a witness who, without having claimed the privilege against self-incrimination, 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, on the ground of self-incrimination, to disclose in such action or proceeding any matter relevant to the transaction.

Subdivision (10) [new subdivision proposed by Commission]. This subdivision dealt with the right to comment upon the exercise of a privilege against self-incrimination and was limited to cases not covered by subdivision (g) -- subdivision (8) of the revised rule. This subdivision has been deleted and will be considered when Rule 39 relating to comment is considered.

RULE 23 (See attached green pages for revised rule)

See Study, pages 5-9.

Paragraph (1). Paragraph (1) of Revised Rule 23 is a new provision that reflects the action taken by the Commission at its May 1961 meeting. Paragraph (1) provides:

> (1) As used in this section, "an accused" includes not only the defendant in a criminal action or proceeding but also a person accused or charged with the commission of a crime or public offense and a person who is the subject of an investigation in connection with a crime or public offense.

The Commission added the language "person accused or charged with the commission of a crime or public offense and a person who is the subject of an investigation in connection with a crime or public offense" to Rule 23 so that the scope of Rule 23 would not be more restrictive than Penal Code Section 1323.5 which provides:

> 1323.5. In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which the testimony is given.
>
> This section shall not be construed as compelling any such person to testify.

Section 1323.5 was added to the Penal Code in 1953. But an examination of the legislative history of this section indicates that the 1953 enactment was a direct result of the decision in People v. Talle, 111 C.A.2d 650, 245 P.2d 633 (1952). The substance of what is now Section 1323.5 was first enacted in 1865. The 1865 section was amended in 1872. The 1865 section (as amended in 1872) was not compiled in the Penal Code;

and during the period from 1872 to 1953 the section could be found only in the uncodified laws. The Talle case held that the 1865 section (as amended in 1872) was still the law of California and was not repealed by implication by the adoption of the Penal Code. Thus, the enactment of Section 1323.5 in 1953 was merely the codification of the 1865 section (as amended in 1872).

Note that Section 1323.5 does not contain the Revised Rule 23 phrase "person who is the subject of an investigation in connection with a crime or public offense." The staff is concerned about the meaning of this phrase and believes that it will introduce an element of uncertainty into the law. Moreover, our research consultant in commenting on Section 1323.5 suggests that the phrase "persons accused or charged with the commission of crimes or offenses" (which the Commission has also incorporated into Rule 23) is subject to the objection that the meaning of this phrase is "not at all clear."

Revised Rule 23 applies only to a "criminal action or proceeding." Subdivision (2) of Revised Rule 23 provides:

> (2) Every person has in any criminal action or proceeding in which he is an accused a privilege not to be called as a witness and not to testify.

No definition of "criminal action or proceeding" is provided in Rule 23 or in the Uniform Rules. URE 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.

Rule 2 may shed some light on the meaning of the phrase "criminal action or proceeding." But an examination of the code title relating to grand

juries indicates that it is far from clear that a grand jury proceeding is a proceeding "conducted by or under the supervision of a court." For example, Section 934 of the Penal Code provides:

> 934. The grand jury may, at all times, ask the advice of the court, or the judge thereof, or of the district attorney. Unless such advice is asked, the judge of the court shall not be present during the sessions of the grand jury.

Thus, the revision of Rule 23 may not accomplish its purported purpose, for Section 1323.5 (which will be repealed) may have a broader scope of protection than Revised Rule 23. Revised Rule 23 applies in "any criminal action or proceeding" whereas Section 1323.5 applies "in the trial or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal." It should be noted that the meaning of the phrase quoted from Section 1323.5 is far from clear.

The Southern Section of the State Bar Committee took a different approach than the Commission to Rule 23, for the Southern Section made no attempt to expand the scope of the privilege provided by Rule 23 to cover all of the Penal Code Section 1323.5 situations. Instead, the Southern Section approved Rule 23 substantially as drafted by the Uniform Commissioners and retained Section 1323.5. The Southern Section took this action because the Southern Section believed that to incorporate the substance of Section 1323.5 into Rule 23 would, in effect, extend the right to comment (under the comment provision of Rule 23) to cases now covered by Section 1323.5 but which may not be covered by URE Rule 23(1). However, no objection was made to incorporating the substance of Section 1323.5 into Rule 23 on the ground that it would be difficult to draft appropriate language to accomplish this result.

Whether the Rule 23 privilege not to be called and not to testify should be restricted to the "accused" in a "criminal action or proceeding" is, of course, a question of policy. Should the privilege apply to a person who is "the subject of an investigation" by the grand jury? In connection with the Rule 25 privilege against self-incrimination, it should be recognized that the testimony privileged under Rule 25 may be compelled under Penal Code Section 1324 in appropriate cases if the judge finds that such testimony would not subject the witness to criminal prosecution in another jurisdiction and in such case the witness is granted immunity from prosecution in California. Thus, it is possible to reach the leaders of criminal conspiracies by guaranteeing immunity to their underlings and minor helpers. If these underlings and minor helpers have a privilege under Rule 23 (even when they are not the accused but are "a person who is the subject of an investigation") there is little hope of obtaining vital evidence in the frequent cases where the sole possessors of that evidence are themselves criminally implicated.

Section 939.3 of the Penal Code provides:

> 939.3. In any investigation or proceeding before a grand jury for any felony offense when a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, proceedings may be had under Section 1324.

It is possible that Revised Rule 23 will permit a witness who contends that he is a "subject of the investigation" to defeat the scheme set up by Section 939.3 and Section 1324 of the Penal Code for obtaining evidence in cases where immunity is granted.

The Comment of the Uniform Commissioners to Rule 23(1) states in part: "Although there is considerable variation in the phrasing of the

privilege in different states, this [Rule 23(1)] 'neither enlarges nor narrows the scope of the privilege as already accepted, understood, and judicially developed in the common law'." [Emphasis in original]

Witkin, California Evidence, page 498, states: "As subsequently developed and almost universally applied today the privilege protects an accused, i.e., a person properly charged, from being required to testify against himself . . . . [Emphasis in original] At page 501, Witkin states: "The common law disqualification of the accused has long been abolished. By an 1865 statute (now codified in P.C. 1323.5) he is a competent witness 'at his own request, but not otherwise,' and he cannot be compelled to testify. Thus he has a privilege to refuse to be called or be sworn as a witness by the prosecution . . . ." In California, Section 1323.5 has apparently extended the common law privilege and the policy question presented to the Commission is whether this is desirable in view of Section 1324 of the Penal Code.

There are a number of alternatives available to the Commission:

(1) Approve Revised Rule 23 and repeal Section 1323.5. As pointed out above, this is subject to several objections: First, Revised Rule 23 may not be clear; second, Section 1323.5 may provide a broader scope of protection than Revised Rule 23 (although the meaning of Section 1323.5 is far from clear); third, this alternative will apparently make it impossible to obtain vital evidence by granting immunity under Section 1324 to witnesses who are not the accused but who, for example, may be one of the "subjects" of a grand jury investigation.

(2) Extend the scope of protection under Rule 23 (by specifying what is intended to be covered in addition to a criminal action or

proceeding) so that Rule 23 will cover precisely the situations desired to be covered, recognizing that to do so will be to provide for a privilege in situations that may not be within the scope of Rule 2. If this action is taken, Section 1323.5 can be repealed. The primary objection to this alternative is that it will prevent the obtaining of vital evidence from a person who is not the accused although it is recognized that this objection apparently applies to the existing law (no cases so applying Section 1323.5 have been found). In connection with this alternative, the Commission may want to consider extending the provisions of Section 1324 of the Penal Code to cover a person who claims a privilege not to be called as a witness and not to testify but who is not a person "accused or charged with" the commission of a crime or public offense.

(3) Take the same action as the Southern Section - approve Rule 23(1) and (3) in substantially the form proposed by the Uniform Commissioners and preserve Section 1323.5. This course of action is subject to the objections that, first, we would have two sections covering basically the same privilege, second, the meaning of Section 1323.5 is not clear, and third, it will not be possible in some cases to obtain (under Section 1324 of the Penal Code) the testimony of a person who is not the accused.

(4) Approve Rule 23(1) and (3) in substantially the form proposed by the Uniform Commissioners and repeal Section 1323.5. Then only the "accused" in a "criminal action or proceeding" will have a Rule 23 privilege. This would mean that to the extent protection is not provided by Rule 23, the witness will not be able to refuse to be sworn or

to answer proper, non-incriminating questions. He may, of course, under Rule 25 decline to answer any incriminating questions that might be asked. If this course of action is taken, Rule 23 would read:

> (1) Every person has in any criminal action or proceeding in which he is an accused a privilege not to be called as a witness and not to testify.
>
> (2) An accused in a criminal action or proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

In connection with this alternative, the case of In re Lemon, 15 C.A.2d 82, 59 P.2d 213 (1936) should be noted. The Lemon case involved a grand jury investigation of alleged graft in the police department. Petitioner, a police captain, was summoned as a witness. He refused to testify, contending that he was a "prospective defendant." Held, he was guilty of contempt. As a witness, he could refuse to answer any incriminating questions that might be asked. But, since the grand jury proceeding is not a criminal prosecution, a witness therein is not a party defendant, and he could not refuse to be sworn or to answer proper, non-incriminating questions. Section 1323.5 would apparently reverse the decision in the Lemon case. If the police captain in the Lemon case had declined to answer an incriminating question, his testimony could have been obtained if the conditions of Section 1324 of the Penal Code were met. But if the police captain were given a Rule 23 privilege, apparently his testimony could not be obtained under Section 1324 of the Penal Code even if immunity from prosecution were granted. It should be noted also that a previous claim (such as before the grand jury) of the privilege against self-incrimination by a defendant in a criminal action cannot be shown at the trial nor can it be commented upon.

Right to Comment - Paragraph (4) of URE 23. Paragraph (4) of URE Rule 23 and paragraph (3) of Revised Rule 23 as previously approved by the Commission relate to the right to comment. Both of these subdivisions have been deleted from Rule 23 because the right to comment on the Rule 23 privilege is a matter that will be considered in connection with Rule 39.

Respectfully submitted,

John H. DeMoully,
Executive Secretary

EXHIBIT I

Revised 10/14/59
11/10/59
12/10/59
5/25/61

Note: This is Uniform Rule 23 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 23. PRIVILEGE OF ACCUSED

(1) As used in this section, "an accused" includes not only the defendant in a criminal action or proceeding but also a person accused or charged with the commission of a crime or public offense and a person who is the subject of an investigation in connection with crime or public offense.

[(1)] (2) Every person has in any criminal action or proceeding in which he is an accused a privilege not to be called as a witness and not to testify.

[(2) An accused in a criminal action has a privilebe to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.]

(3) An accused in a criminal action or proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

[(4)--If-an-accused-in-a-criminal-action-does-not-testify,-counsel may-comment-upon-accused's-failure-to-testify,-and-the-trier-of-fact-may draw-all-reasonable-inferences-therefrom.]

RULE 23 (PRIVILEGE OF ACCUSED) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 23, relating to the privilege of an accused, as revised by the Commission.

Revised Rule Subdivision (1) - Definition of "An Accused"

The Commission has added a definition of "an accused" so that Rule 23 will not be more restrictive than the present California statute, Penal Code Section 1323.5 which is ambiguous but apparently gives a person a right not to be called in pretrial proceedings in which he is technically not a criminal defendant or an accused.

URE Subdivision (1) [Revised Rule Subdivision (2)] - Privilege of Accused

Under existing California statutes as construed by the courts, the defendant in a criminal case has a privilege not to testify and not to be called as a witness.

URE Subdivision (2) - Marital Privilege of Accused in Criminal Case

The special marital privilege provided by this paragraph for an accused in a criminal case becomes unnecessary, because the Commission has enlarged the privilege stated in Uniform Rule 28 so that in all cases a spouse has a privilege which is the substantial equivalent of that provided by paragraph (2) for an accused in a criminal case, viz. the privilege - subject to exceptions comparable to those stated in paragraph (2) - to prevent the other spouse from testifying to confidential communications, which privilege survives the termination of the marriage. The Commission has, consequently, deleted subdivision (2) of Uniform Rule 23.

URE Subdivision (4) - Comment on Accused's Exercise of Privilege

Paragraph (4) of Uniform Rule 23 has been deleted because the matter of commenting on the exercise of the privilege provided by Rule 23 will be covered by Rule 39.

Note: This is Uniform Rule 24 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 24. DEFINITION OF INCRIMINATION

A matter will incriminate a person within the meaning of these rules if it constitutes, or forms an essential part of, or, taken in connection with other matters [~~disclosed~~], is a basis for a reasonable inference of, such a [~~violation of~~] crime or public offense under the laws of this State as to subject him to liability to [~~punishment therefor~~] conviction thereof, unless he has become [~~for any reason~~] permanently immune from [~~punishment~~] conviction for such [~~violation~~] crime or public offense.

COMMENT

The URE rule, the substance of which is approved by the Commission, provides no protection against possible incrimination under a federal law or a law of another state or foreign country. The scope of the privilege as it now exists in California is not clear, for no decision has been found indicating whether or not the existing California privilege provides protection against incrimination under the laws of a sovereignty other than California.

This rule will not, of course, affect Penal Code Section 1324 which provides that if the privilege against self-incrimination is claimed, the testimony of a witness may be compelled unless the court "finds that to do so would be clearly contrary to the public interest, or could subject the witness to criminal prosecution in another jurisdiction."

The word "disclosed" has been deleted from the Uniform Rule. The witness may be aware of other matters which have not been "disclosed" but which, when taken in connection with the question asked, is a basis for a reasonable inference of such a crime or public offense under the laws of this State as to subject him to liability to conviction thereof.

Revised 10/14/59
11/10/59
12/10/59
2/11/60
8/22/60
1/ 3/61
5/25/61

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 [~~,~~] <u>:</u>

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

<u>(1)</u> The matter shall be disclosed if the judge finds that the matter will not incriminate the witness<u>.</u> [~~;-and~~]

[~~(b)~~] <u>(2)</u> No person has the privilege to refuse to submit <u>his body</u> to examination for the purpose of discovering or recording his corporal features and other identifying characteristics [~~,~~] or his physical or mental condition<u>.</u> [~~;-and~~]

<u>(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.</u>

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

[~~(d)~~] <u>(5)</u> 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

matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some [other-person-or-a] corporation, partnership, [or-other] 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-other] 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 voluntaily 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.

Revised 11/10/59
12/10/59
8/29/60
1/ 3/61
5/26/61

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. The Commission has deleted this 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

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

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 would probably be unconstitutional if applied 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.

EXHIBIT II

EXTRACT OF MINUTES OF SOUTHERN
SECTION OF STATE BAR
COMMITTEE

Rule 23, Subdivision (1).

The recommendation of the Law Revision Commission that the words "or proceeding" be inserted following the words "criminal action" was approved.

The suggestion made by the members in the North to the effect that the word "proceeding", by itself, be substituted for the word "action" in the URE draft was disapproved. The Southern Section believes that the phrase "action or proceeding" is broader and more inclusive than the word "action" or the word "proceeding" alone; that the use in Rule 23(1) of the phrase "action or proceeding" would be consistent with the practice which was followed by the Committee and by the Commission in connection with the rules on hearsay, where in many instances the phrase "action or proceeding" was substituted in place of the word "action" alone [see, for example, the modifications of Rules 63(2) and 63(3)].

The suggestion made by the Northern Section that the word "accused" should be retained in Rule 23(1) was approved, and the suggestion of the Law Revision Commission that the word "defendant" be substituted was disapproved. The Southern Section

believes that the reasons stated in Mr. Lasky's report for opposing the Commission's substitution of the word "defendant" for "accused" are sound.

The Southern Section then considered the question of whether Rule 23(1), as presently drafted, is sufficiently broad in scope to cover what now is covered in Cal. Penal Code § 1323.5; that if it is not, then whether the Rule should be broadened. It appeared to the members of the Southern Section that Penal Code § 1323.5 is broader than Rule 23(1), in that the Penal Code provision purports to give a person a right not to be called as a witness in pre-trial proceedings in which he is not technically a criminal defendant or an accused. Penal Code § 1323.5 appears to be applicable to situations where the application of Rule 23(1), as presently drafted, may be doubtful [for example, grand jury hearings, coroners' inquests, etc.] The members of the Southern Section were in substantial agreement that the benefits available under Penal Code § 1323.5 are desirable and should be retained as a part of the law of California. It was felt that Penal Code § 1323.5 essentially is a procedural provision rather than a privilege against self-incrimination; that if a person refuses to take the stand in reliance upon the provisions of Penal Code § 1323.5, the right of impeachment recognized by the Kynette case [People v. Kynette, 15 Cal. (2d) 731] may not be available because the Kynette rule is applicable only where there has been an exercise of a privilege against

self-incrimination; that in view of the decisions in People v. Snyder and People v. Calhoun, the Kynette rule either has been, or should be weakened; that failure to preserve the provisions of Penal Code § 1323.5 as a part of our law might strengthen, rather than weaken, the Kynette rule.

The matter of whether the language of Rule 23(1) should be broadened to include the language of Penal Code § 1323.5 then was discussed. It was concluded that Rule 23(1) should not be modified by adding the language of Penal Code § 1323.5 to it, because such a modification in the body of Rule 23(1) might result (undesirably, in the opinion of the Southern Section) in extending the right of comment [which is given by URE Rule 23(4)] to situations which now are covered by Penal C. § 1323.5 but which may not be covered by Rule 23(1) in its present form. It was concluded that, instead of modifying Rule 23(1) to incorporate the language of Penal C. § 1323.5, the desired objective should be reached by amending Rule 23(4) [which deals with the right of comment on the exercise of a privilege against self-incrimination] to make specific reference to Penal C. 1323.5. The nature of the amendment approved by the members of the Southern Section will be summarized under the discussion relating to Rule 23(4).

Rule 23, Subdivision (2).

The deletion of subdivision (2) from Rule 23, as recommended by the Law Revision Commission and by the Northern Section, was approved. It was agreed that there was no reason to retain

subdivision (2) as a part of Rule 23 in view of the fact that Rule 28, dealing with marital privilege, has been modified by the Commission to include those situations which would be covered by subdivision (2).

Rule 23, Subdivision (3) [renumbered as subdivision (2) by the Commission.]

After some discussion, the Southern Section voted to approve the Law Revision Commission's redraft of subdivision (3) with one exception: namely, the Southern Section believes that the word "accused" which appears in the URE draft of this subdivision should be retained and that the word "defendant" should not be substituted as the Commission proposes. With reference to this subdivision, the members of the Southern Section were not fearful, as were the members of the Northern Section, that the wording of the subdivision might be inept in the light of such cases as Rochin v. California, 342 U.S. 165. The Southern Section considers such fears to be inapplicable, because it believes that the Rochin case basically is a case involving due process and not privilege. [Comment of staff of Law Revision Commission: Rochin case, involved use of brutal force (stomach pump) for the extraction of evidence from person of an accused.]

It was noted that the Northern Section, in discussing subdivision (3), had recommended repeal of Penal Code Sections 688, 1323 and 1323.5 "as serving no further purpose if Rule 23 should be adopted with the proposed changes" [see Northern

Section, minutes, Aug. 9, 1960 meeting]. While the Southern Section would have no objection to the repeal of Penal Code §§ 688 and 1323 should Rule 23 be adopted, it has strong objections to the repeal of Penal Code § 1323.5, for reasons previously expressed in these minutes.

Rule 23, subdivision (4) [renumbered as subdivision (3) by the Commission].

After discussion, it was decided to approve the Law Revision Commission's redraft of subdivision (4) provided that there is added to this subdivision additional language which recognizes that there is no right of comment where an accused simply has taken advantage of the procedural right now given by Penal Code § 1323.5 [that is, a right not to request that he be allowed to testify as a competent witness].

The following draft of a clause to be added to the Commission's revision of subdivision (4) was approved:

> "Nothing in this subdivision (3) shall be deemed to authorize comment on the failure of an accused, in proceedings prior to the trial, to request that he be a competent witness, as provided by Penal Code § 1323.5."

Rule 24.

While the Southern Section admits that Rule 24 is consistent with existing California law, it believes, as does the Northern Section, that the definition of incrimination under Rule 24 should be extended to include incrimination under the laws

of the United States as well as under the laws of this State. It also believes, as does the Northern Section, that the definition should not be extended to include incrimination under the laws of other states. Accordingly, the Southern Section voted to approve Rule 24 as amended by the Northern Section [see 8/9/60 minutes]. Thus, the amendment approved would read as follows:

> "A matter will incriminate a person within the meaning of these Rules if it constitutes, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State <u>or of the United States of America</u> as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation."

<u>Rule 25.</u>

<u>Opening Paragraph.</u>

The first matter discussed was whether the privilege should be limited to "natural" persons, as stated in the URE and LRC drafts, or whether it should be extended to include corporations [see Northern Section minutes, 8/16/60]. A limitation of the privilege to natural persons appears to be in accordance not only with present California law but also in accordance with the laws of other jurisdictions. It was

concluded that existing law should not be extended in this regard, and that the privilege should be confined to "natural" persons only.

The Section then reviewed the reasons stated by the Law Revision Commission for deleting from the opening paragraph the phrase, "in an action or to a public official of this state or any governmental agency or division thereof". It was concluded that the Commission was correct in suggesting that the rules should confine themselves, at least in this regard, to matters of evidence in court proceedings and should not attempt to flow over into the field of hearings before public officials and administrative agencies. Accordingly, the Commission's action in suggesting deletion of the reference to public officials and government agencies was approved, but the Southern Section would retain the words "in an action" and would add, following those words, the additional words, "or proceeding". Thus, the opening paragraph in its approved form would read as follows:

> "Subject to Rules 23 and 37, every natural person has a privilege, which he may claim, to refuse to disclose in any action or proceeding any matter that will incriminate him, except that under this rule:"

Approval of the opening paragraph in the above form was made subject to later consideration of Rule 37, which is referred to in the opening paragraph but which has not yet been considered by the Southern Section.

Rule 25, Subdivision (a) [renumbered as subdivision (1) by the Commission].

The Southern Section concluded that there was no ambiguity in the Commission's redraft of subdivision (a) [now subdivision (1)], as suggested by the Northern Section, and accordingly approved the Commission's redraft.

Rule 25, Subdivision (b) [renumbered as subdivision (2) by the Commission].

The members of the Southern Section, like their northern brethren, are disquieted by the inclusion of the words "mental condition" in this subdivision. It occurs to them that, in homicide cases where a defendant raises the defenses of not guilty and not guilty by reason of insanity, Rule 25(b) may, in effect, compel a man to convict himself out of his own mouth, i.e., by requiring him to talk to a state appointed alienist. The Southern Section believes that the problems raised by this portion of Rule 25(b) have implications so serious and extensive that they should be explored further; that the simple statement contained in this subdivision to the effect that no privilege exists with respect to mental condition is too summary a disposition to be made of the matter.

The members of the Section had no objection to this subdivision other than those raised with reference to the inclusion of the words "mental condition" and, as to that aspect of the subdivision, it was decided to defer final consideration.

Rule 25, Subdivision (3) [new subdivision proposed by Commission].

Subdivision (3), the new subdivision proposed by the Commission, was reviewed and discussed. The members felt that it was unwise to attempt to codify, as this subdivision would do, specific types of physical conduct as those which fall outside the scope of the privilege. The consensus of opinion was that specific types of conduct (such as, for example, handwriting, walking, speech, etc.) should be left to court construction, subject to the operation of the general statement contained in subparagraph (b) of Rule 25 [the Commission's subparagraph (2)].

Rule 25, Subdivision (c) [renumbered as subdivision (4) by the Commission].

The Commission's redraft of this subdivision was approved.

Rule 25, Subdivision (d) [renumbered as subdivision (5) by the Commission].

The Commission's redraft of this subdivision was approved.

Rule 25, Subdivision (e) [renumbered as subdivision (6) by the Commission].

The Committee concluded that it had no objection to this subdivision insofar as it purports to apply to public officers or employees. However, there was unanimous agreement by the members that the language of the subdivision is so broad in its

applicability to private callings that it would be unconstitutional, as violative of the constitutional privilege against self incrimination. It was the general sense of the Committee that perhaps a more logical and effective way of handling the matter which is the subject of subdivision (e) would be to treat the problem as one involving a waiver of the privilege by public officials by reason of their acceptance of their public office; that it is an unsound approach to say that there is no privilege at all, which subdivision (e) seems to say; that if the subject matter of this subdivision is to be treated as a "no-privilege" matter and retained in its present place under Rule 25, then the subdivision should be redrafted so as to limit its applicability to public officers and employees and to eliminate any reference to private callings. The Committee believes that it is unsound policy to retain the broad language of the subdivision and to rely upon whatever limitations might be imposed upon that language by reason of its conflict with a constitutional privilege.

Rule 25, Subdivision (f) [renumbered as subdivision (7) by the Commission].

This subdivision, as the Committee understands it, not only would require a corporate officer or agent to produce records, etc., but also would require him to testify personally as to matters connected with such records. The Commission's redraft would extend the scope of the subdivision to partnerships and to other "organizations" as well as corporations.

After some discussion, the members of the Committee reached unanimous agreement on the following points:

(i) The language of the URE draft is too broad, even though it is limited to agents etc. of corporations and does not purport to cover other types of business organizations. For example, the phrase "regulations governing the corporation" could be construed as including the corporation's by-laws, rather than regulations promulgated by some governmental authority.

(ii) The McLain case referred to in Prof. Chadbourn's report did not, in the opinion of the Committee, definitely settle the law in California on the constitutional problem raised by this subdivision. The statements contained in that case with regard to constitutionality probably are dictum, because the real issue in the case was the applicability of the special immunity statute pertaining to testimony before legislative investigating committees.

(iii) The language of this subdivision, as presently proposed, is broad enough to be susceptible to an interpretation which could cut the very heart out of the privilege against self-incrimination insofar as that privilege might be claimed by any person who happens to be an officer, agent, or employee of any type of business organization--in other words almost everybody.

(iv) The applicability of the subdivision should not be extended to partnerships and other organizations, as the Law Revision Commission suggests. Such an extension simply would broaden the dangers mentioned below.

As to corporations, the Committee was in full agreement that the corporation itself should not have a privilege against self-incrimination. The Committee also agreed that it would be desirable to adopt a rule which would insure the production of corporate documents and records by employees, etc. without reference to a claim of privilege. However, the Committee believes that, in reaching this result, care should be taken not to infringe unnecessarily upon the personal privilege of those employed by the corporation. It was the Committee's conclusion that, beyond compelling testimony as to the existence, non-existence or whereabouts of such corporate records, it would be dangerous to go without running the risk of infringing upon a personal privilege.

Accordingly, the Committee voted to disapprove both the URE draft of subdivision (f) and the Law Revision Commission's redraft. There was submitted to the Committee the following proposed revision of subdivision (f), which the Committee voted to approve:

[f] "(7) An officer, agent, or employee of a corporation has no privilege to refuse to produce, or to identify records of, the corporation,

or to testify concerning the whereabouts, existence, or non-existence of such records, whether or not such records are required by law to be kept."

Rule 25, Subdivision (g) [renumbered as subdivision (8) by the Commission].

After some discussion, the Committee voted as follows:

-- disapproved the conceptual approach of the URE draft of this subdivision, the URE approach being to eliminate the privilege as to any matter "relevant" to the action whenever an accused has taken the stand and has testified in such action;

-- approved the Law Revision Commission's redraft, that redraft being a codification of existing California law as the Committee understands it. The Committee agrees that existing California law, as incorporated in Penal Code § 1323, should not be changed. The Committee would, however, eliminate the word "voluntarily" as being unnecessary. Since this subdivision deals with a defendant in a criminal action, that defendant's testimony would have to be voluntary.

Rule 25, subdivision (9) [newly proposed by the Commission].

This new subdivision was discussed at length. The use of the word "relevant" suggests to the Committee that the waiver of the privilege by a witness who testifies may not be intended to be limited just to matters that have been testified to on

direct examination. If it is the Commission's purpose to permit cross-examination beyond the scope of the direct examination, the Committee would not want to go that far. On the assumption, however, that the Commission does not intend to enlarge the scope of the witness's examination beyond what normally would be permitted under cross-examination, the Committee would accept the use of the word "relevant".

An additional objection to the language of the subdivision was raised: namely, the fact that the word "voluntarily" may be misleading. For example, is this word supposed to mean that the witness did not claim his privilege, or is it supposed to mean that he testified without being subpoenaed? Probably the former meaning is intended, but the point may be arguable.

The Committee voted to disapprove the Commission's draft of subdivision (9) in its present form. A suggested redraft was put before the Committee, and was approved. The redraft approved by the Committee reads as follows:

> "(9) Except for the defendant in a criminal action or proceeding, a witness who, without having claimed the privilege against self-incrimination, 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, on the ground of self-incrimination, to disclose in such action or proceeding any matter relevant to the transaction."

Rule 25, Subdivision (10) [newly proposed by the Commission].

First sentence. As the Committee reads the first sentence of subdivision (10), the effect would be, in a civil action: (i) to give a right of comment upon the exercise by a party of the privilege against self-incrimination, and also, (ii) to permit or even require the drawing of an unfavorable inference by reason of the exercise of that privilege. The Committee believes that the right of comment should be preserved in a civil action as well as in a criminal action, but the Committee also believes that an adverse inference should not be drawn from the exercise of a privilege in a civil case any more than it should be drawn in a criminal case [see Rule 23(3)]. If an inference cannot be drawn in a criminal case, as People v. Snyder and People v. Calhoun appear to have decided, then no logical reason exists, in the opinion of the Committee, why a civil case should be treated differently. Prof. Chadbourn indicates in his report, and the Commission also indicates in its report on Rule 25 [Memo 15(1960)], that existing California law permits an unfavorable inference to be drawn in a civil case. The Committee is of the opinion that what formerly may have been settled under prior cases has become unsettled since the Snyder and Calhoun cases were decided.

For the above reasons, the Committee approved the first sentence of subdivision (10) on the condition that the sentence end after the word "counsel" and that the phrase "and may be

considered by the court or the jury" be deleted. This change would, in the Committee's opinion, eliminate the possibility of any implication that an adverse inference is to be drawn from the exercise of the privilege by a party.

Second sentence. The Committee voted to disapprove the second sentence of subdivision (10) because it believes that it opens up a wide area for visiting the sins of a witness upon a party who may have no connection with the witness. This sentence would make it possible to victimize a party because a non-party witness has claimed the privilege against self-incrimination. The frame-up possibilities inherent in such a situation are evident, and they substantially influenced the Committee's decision to disapprove this sentence.

EXHIBIT III

EXTRACT OF MINUTES OF
NORTHERN SECTION OF STATE BAR
COMMITTEE

Rule 25

Opening Paragraph

The first paragraph of Rule 25 accords with present California law except for its reference to Rule 37 which provides that all of the privileges may be waived by contract not to claim the privilege or where without coercion and with knowledge of his privilege a person who otherwise would have a privilege has made disclosure of any part of the matter or consented to such a disclosure made by anyone. California cases have held that such waivers are not constitutionally valid. Mr. Lasky expressed his belief that whatever should constitute a waiver of the other privileges under Section 37 should likewise be effective to waive the privilege under Rule 25 and that if necessary the Constitution should be amended to permit this.

Mr. Erskine expressed his view that the privilege against self incrimination should not be so eroded. Mr. Lasky then stated that he had some reservations regarding the wording of Section 37 as a whole and its application to all privileges and it was therefore decided by the Committee to postpone further discussion of the effect of Rule 37 upon Rule 25 until such time as Rule 37 shall itself be considered.

Mr. Lasky then discussed the effect of the language "natural persons" appearing in the opening paragraph. Confining the privilege to natural persons would accord with the present California law and with that which has been universally applied in other jurisdictions. A corporation, of course, cannot testify but under the rule as now applied, since it is not a natural person, it can be required to produce its documents. However, Mr. Lasky noted that the purpose of the rule is to prevent extraction of testimony by word of mouth. If a natural person has the privilege, as he has under present law, to refuse to produce his documents even though this does not involve word of mouth testimony Mr. Lasky saw no reason why the same privilege should not be accorded to corporations. This would not involve any constitutional difficulty since the privilege would be extended rather than limited. Conversely Mr. Lasky expressed the view that thought might well be given to eliminating the privilege given to a natural person so far as his documents are concerned. After discussion the Committee decided to approve the use of the term "natural persons" as now written in Rule 25 with the caveat that consideration might well be given to extending the privilege to corporations with respect to the production of documents, or on the other hand, eliminating the privilege of natural persons so far as the production of documents is concerned.

The Committee's attention was then called to the fact that the opening paragraph refers to the claim of privilege "in an action" and to the advisability of changing this language to

"in a judicial proceeding" for the same reason that a similar change was proposed with respect to Rule 23. It appears that the Law Revision Commission adopted this change and then later eliminated the words "or to a public official of this state or any governmental agency or division thereof" on the theory that the uniform rules of evidence is concerned only with evidence in court. Thereafter, the Law Revision Commission revised the opening paragraph entirely to provide,

> "Subject to Rule 23 and 37, every natural person has a privilege which he may claim to refuse to disclose any matter which may incriminate him, except that under this rule,".

The Committee felt that this left the meaning of the paragraph somewhat ambiguous. Was it the intention to restore the paragraph to its original form, or if not, what was the intention? If the intention is to restore it to its original form it should be left in that form. Accordingly upon motion the Committee recommended adoption of the opening paragraph in its original form with the substitution of the words "in a judicial proceeding" for the words "in an action" and subject of course to future consideration of the effect of Rule 37 when that rule itself shall come before the Committee for its consideration.

Subdivision (a)

As this section is now written it provides that the judge may determine whether the matter will incriminate the witness if the privilege is claimed in an action. By implication the only place where the judge would have power to determine

whether the testimony would incriminate the person claiming the privilege would be in an action with the result that the witness would be the sole judge of whether the testimony would incriminate him if the privilege is claimed otherwise than in an action. This overlooks the right to resort to the Court to compel a witness to speak, if in a non-judicial hearing he has claimed the privilege, and the power of the Court then to determine whether the matter will incriminate him.

It appears that the Law Revision Commission, following the same line of thought previously noted, changed the words "in an action" to "in a judicial proceeding". Later the Commission voted to revise subdivision (a) to read:

> "The matter shall be disclosed if the judge finds that the matter will not incriminate the witness."

It was pointed out that this left an ambiguity in view of the Commission's revision of the opening paragraph of Rule 25 to omit "judicial proceeding". Mr. Lasky proposed the following language as a substitute for the present subdivision (a):

> "(a) Whenever the question shall arise in any judicial proceeding whether the matter shall be, or should have been disclosed, in that proceeding or elsewhere, the judge shall find whether the matter would incriminate the witness, and shall rule accordingly."

Upon motion the Committee recommended the adoption of this language.

<u>Subdivisions (b) and (c)</u>

The only problem with regard to these subdivisions

appears to be the presence of the words "or mental condition" in subdivision (b). Mr. Lasky argued that since the privilege has to do with testimony by word of mouth the conferring of permission upon alienists to question an accused concerning his mental condition would violate the Constitution and further that consistency in application of the permission requires that the accused have the right to refuse to answer such questions. The prosecution has a strong weapon in its right to comment upon such a refusal as evidence that the accused is sane.

Discussion followed with respect to the constitutionality of this subdivision insofar as it authorizes examination for the purpose of discovering the mental condition of a person. Mr. Lasky expressed the view that the policy of the state should support subdivision (b), but that he had some doubt as to its constitutionality. In his opinion, however, the subdivision should be approved in its present form leaving the question of constitutionality for later determination. If necessary a constitutional amendment validating the subdivision should be adopted.

Mr. Erskine expressed his opinion that a person should not be subjected to an examination of his mental condition either in court or out of court because in his view it would infringe upon the person's constitutional rights. Mr. Erskine therefore voted against approval of the subdivision.

Messrs. Bates and Baker were of the opinion that the subdivision accorded with sound policy, that it is constitutional and should be approved.

Subdivision (b) was therefore approved by a vote of three to one.

Subdivision (d)

Mr. Lasky expressed curiosity as to the reason for including this provision in the rules but could see no real objection to its inclusion and therefore recommended its approval. He noted that the Law Revision Commission had added the word "partnership" to the list of those designated in the rule who might have a superior right to a document or chattel. He stated his belief that if there is any merit to the idea of a uniform code slight changes, such as this, should not be adopted.

The Committee voted unanimously to approve subdivision (d) in its original form and to disapprove the change proposed by the Law Revision Commission.

Subdivision (e)

Mr. Lasky stated that in his view there can be no objection to this section insofar as the section denies the privilege to public officials but that the inclusion of private activities, occupations or callings in the section presents a more difficult problem. It is so broad in scope as to do away with the constitutional privilege. He noted that Professor Chadbourn has concluded that it would be impossible to improve on Subdivision

(e) and that it should therefore be disapproved.

Mr. Lasky felt that as written this section should be disapproved but that some effort should be made to rewrite it in a form which would be constitutional. He suggested that if the subdivision were to be reworded so as to provide that if some purpose other than obtaining proof of violation of the law is reasonably to be achieved by the keeping of records then the privilege against self incrimination shall not apply. He suggested that the Law Revision Commission might be in a better position to redraft this subdivision along these lines.

Accordingly, the Committee voted unanimously to disapprove Subdivision (e) in its present form and to request that the Law Revision Commission attempt to redraft it along lines similar to that proposed by Mr. Lasky or in any other manner which would limit the application of the section so as to preserve its constitutionality.

Subdivision (f)

Mr. Lasky pointed out that this subdivision would require an officer, agent or employee of a corporation not only to produce the records of the corporation but to testify as to matters involved therewith. This would appear to be clearly unconstitutional and it was recommended that the subdivision therefore be disapproved.

The Committee voted unanimously to disapprove the subdivision.

Subdivision (g)

This section would deprive a defendant of any further privilege if he gives any testimony upon the merits.

Penal Code Section 1323 retains the defendant's privilege with respect to any matter to which he has not testified upon his examination in chief.

In People v. O'Brien, 66 Cal.602-603 (1885) the court pointed out, perhaps by way of dictum, in commenting on the last mentioned statement that the right of the defendant to refuse to testify upon any matter not brought out in his examination in chief was secured by the Constitution.

Mr. Lasky felt that the court in the O'Brien case had written a meaning into the Constitution which is not there and that further consideration by the Supreme Court of this state could very well result in overruling the O'Brien case.

He therefore recommended approval of Subdivision (g) upon the assumption that its constitutionality would be upheld by the courts, or as an alternative, that the Constitution be amended so as to validate Subdivision (g).

The Committee voted unanimously to approve Subdivision (g) as worthy, and if there be any question about its constitutionality recommended that the Constitution be amended.