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6/10/63

Memorandum No. 63-11 First Supplement

Subject: Study No. 34(L) - Uniform Rules of Evidence - Rule 37

Attached to this memorandum is Exhibit II (yellow pages) of Memorandum No. 63-11. This is an extract from the minutes of the southern section of the State Bar committee considering the URE.

The section agrees with the Commission in excluding Rules 23-25 and 34-36 from the operation of Rule 37. The section also agreed that Rule 31 (political vote) should be excluded from the waiver provisions of Rule 37; although one member did not believe that a person should be able to talk freely about his vote and then refuse to testify concerning it when the nature of the vote becomes important in a lawsuit.

The section disapproves Rules 32, 33 and 35; hence, it agrees that they should be excluded from Rule 37. The minutes contain no report on the application of Rule 37 to Rule 30 (religious belief).

The section is uncertain concerning what was accomplished by the Commission's deletion of the provision relating to waiver by contract. They indicate that they agree with the action if the deletion means there can be no waiver by contract.

The remaining subdivisions the section objects to are no longer in the rule.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXTRACT FROM THE MINUTES OF THE SOUTHERN SECTION OF STATE BAR
COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

(January 10, 1963)

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The meeting was devoted to a discussion of Rule 37, which deals with waiver of privilege by contract or by previous disclosure. Mr. Henigson submitted a report on this Rule.

Applicability of Rule 37 to Rules 23 through 25.

The first aspect discussed was whether the waiver provided for by Rule 37 should apply to the rule against self-incrimination. It was noted that Prof. Chadbourn (the Commission's consultant) and also Lawrence Baker (the reporting member of the Northern Section) both had concluded that it would be unconstitutional to apply the waiver provisions of Rule 37 to the privilege against self-incrimination. While there appears to be no direct court holding on the constitutionality point, nevertheless the Section members agreed that to apply the waiver rule to the privilege against self-incrimination would be a substantial (and undesirable) deviation from the existing pertinent California case law. All of the Section members were of the opinion that the special nature and importance to our system of the privilege against self-incrimination are such that this privilege should be permitted to have a resurgent quality which would prevent waiver; that in this respect the privilege against self-incrimination stands on a somewhat different footing from the other privileges. Therefore, the Section agreed with the recommendation of the Commission that Rule 37 not be applicable to Rules 23, 24 and 25.

Next the Section considered the question of whether the waiver provisions of Rule 37 should be applied to Rules 31 through 36, inclusive. It was noted that the Law Revision Commission, in revising Rule 37, had made Rule 37 inapplicable to the rules of privilege encompassed by Rules 31 through 36. The propriety of this action by the Commission was discussed, and the Section members' conclusions and reasons therefor appear below in these minutes.

Applicability of Rule 37 to Rule 31.

The majority of the members felt that Rule 31 involves a type of privilege (i.e., political vote) which is sufficiently important from a public policy standpoint that it should be excluded from Rule 37 on policy grounds, even though there may not be any strictly logical reasons for its exclusion. Mr. Henigson was opposed to the exclusion of Rule 31 from the waiver provisions of Rule 37. His view was that a person should be able to waive his right not to disclose the tenor of his political vote. Also, he pointed out that Rule 31 does not contain within its four corners any language which specifies when it is available and when it is not, and the LRC's stated reason for not making Rule 37 applicable to Rules 31 through 36 is that Rules 31 through 36 themselves contain language specifying when they are available and when they are not.

Applicability of Rule 37 to Rule 32.

Since Rule 32 has been rejected, the question of whether Rule 37 should apply to Rule 32 has become moot.

Applicability of Rule 37 to Rule 33.

Since Rule 33 has been rejected, the question of whether Rule 37 should apply to Rule 33 also has become moot.

Applicability of Rule 37 to Rules 34 and 36.

Since Rules 34 and 36 do themselves contain language which deals with the effect of prior disclosure on the privileges which are the subject matter of those rules, the Section members agreed with the Commission that it would be pointless to make the waiver provisions of Rule 37 applicable to Rules 34 and 36.

Applicability of Rule 37 to Rule 35.

Since Rule 35 has been disapproved, the question of whether Rule 37 should apply to Rule 35 has become moot.

Summary

By way of summary up to this point, the Section members have agreed with the LRC that (i) Rule 37 should not apply to Rules 23 through 25, inclusive, and (ii) Rule 37 should not apply to Rules 31 through 36, inclusive.

Having determined to what other Rules No. 37 should be made applicable, the Section next turned to the problem of what the actual content of Rule 37 should be.

The Committee was somewhat puzzled by the LRC's explanation of the effect of its revision on the problem of "waiver by contract." The consensus view of the members was that the LRC's explanation of what it sought to accomplish by its revised rule insofar as waiver by contract

is concerned does not seem to tie in with the LRC's suggested revision. In other words, the rule as revised by the LRC does not seem to accomplish what the LRC says it wishes to accomplish.

It was noted that the LRC, in making its revision, had completely eliminated subparagraph (a) of the URE version of Rule 37. This subparagraph relates to waiver by contract. The Southern Section members agreed that retention of the language of subparagraph (a) of URE Rule 37 would pose a great many problems that would be extremely difficult to deal with in the Rules. [For example, should one be able prospectively to waive by contract his attorney-client privilege?]. As far as the members of the Southern Section were able to determine, waiver by contract no longer would exist under the LRC revision of the Rule, since subparagraph (a) of the URE draft has been eliminated. If this is the effect intended by the Law Revision Committee, the Southern Section concurs in it.

Another point of uncertainty was discussed in respect to the language of subparagraph 1(b) of the LRC's revision of Rule 37. There was uncertainty in the minds of the members as to whether, under the language of this subparagraph 1(b), consent to disclosure made in an insurance application would operate as a waiver for all purposes. The LRC's comment on its revision indicates that such a consent in an insurance application would not operate as a waiver for all purposes (and the Section members agreed that it should not so operate). However, it was the opinion of the Section members that the Rule as revised by the Commission does not at all make this clear.

Subparagraph (2) of the LRC's revision did not seem to the members to pose any particular problem, and this subparagraph was approved.

As to subparagraphs (3), (4), and (5) of the LRC's revision of Rule 37, the Section members (1) agreed with the views expressed by Lawrence Baker, in his report to the Northern Section, that these subparagraphs do not seem to add a great deal and (11) decided to take the same action (i.e., disapproval) that had been taken by the Northern Section, and for the same reasons [see minutes of Northern Section, April 17, 1962].