

#34

6/24/64

Memorandum 64-47

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--
Division 8--Privileges)

PRIVILEGE AGAINST SELF-INCRIMINATION

As you know, the United States Supreme Court recently held that the privilege against self-incrimination under the United States Constitution applies in state proceedings as well as federal proceedings. Moreover, the privilege under the United States Constitution provides protection against incrimination under federal law as well as the law of the particular state in which the privilege is claimed. We have not had an opportunity to examine the case; we base these statements on newspaper accounts.

The Proposed Evidence Code provides for the Privilege Against Self-Incrimination in Sections 940-948. Although the California self-incrimination privilege is constitutional, we attempted to set out in the statute a statement of the California self-incrimination privilege and thereby collect in one place the rules that can now be determined only from an examination of a large body of case law. The staff suggests that no change be made in the statement of the privilege against self-incrimination in the Evidence Code. To the extent that the Evidence Code provides a narrower privilege (if it does) than the federal privilege, the federal privilege will be available to the privilege claimant. To the extent that the Evidence Code provides a broader privilege than the federal privilege, the Evidence Code privilege will supplement the federal privilege. To the extent that the Evidence Code privilege is broader than the privilege under the California Constitution (it does not appear to be), the Evidence Code privilege will provide the privilege claimant with justifiable protection.

On the other hand, the privilege under California law is a constitutional one. Perhaps the Commission would prefer that the California Supreme Court determine the scope of the privilege. The Evidence Code may not provide the certainty that it did before the federal decision because the limits of the federal privilege (now available in California proceedings) will have to be worked out on a case by case basis and both the federal privilege and the state privilege will, no doubt, be claimed in each case where the privilege is claimed.

The Commission may prefer to delete the detail of the statement of the privilege from the Evidence Code and include merely a statement that the privilege exists to the extent provided by the State Constitution. If this alternative is selected, we suggest that Sections 940 to 948 be deleted, and the following substituted in place thereof:

940. Privilege against self-incrimination.

940. Unless the privilege is waived as provided in Section XXX (set out below) or Section 941, every natural person who claims the privilege has a privilege to refuse to disclose any matter that will incriminate him to the extent that such privilege is provided by the California Constitution.

941. Waiver by person other than criminal defendant.

941. Except for the defendant in a criminal action, a person who, without having claimed the privilege under this article, testifies in a proceeding before the trier of fact with respect to a matter does not have a privilege under this article to refuse to disclose in such proceeding anything relevant to that matter.

The following section should be added to the chapter on Method and Scope of Examination of Witnesses:

XXX. Cross-examination of criminal defendant.

XXX. Notwithstanding Section 940 and subject to the limitations contained in this chapter, a defendant in a criminal action who testifies in that action upon the merits before the trier of fact may be cross-examined as to all matters about which he was examined in chief.

Even if the article on the self-incrimination privilege is not changed, consideration should be given to moving the last section set out above to the division on Witnesses in the chapter on Method and Scope of Examination.

COMMENTS TO PRIVILEGES DIVISION

Attached hereto are the comments for the sections in the Privileges Division. We would like to send these to the printer to be set in type as soon as we are able to prepare them for the printer. (We have a substantial amount of material to be set in type for our final report and we should send portions of this material to the printer as soon as possible.) We will make any adjustments necessary in view of changes made at the July meeting in the text of the statute and we plan also to make minor editorial revisions in the comments.

Please mark any editorial changes or suggested revisions on the copy of the comments attached to this memorandum so that they can be considered when we prepare the comments for the printer.

We do not plan to discuss the comments at the July meeting. However, if some Commissioner believes that they should be discussed before they are

set in type, we suggest that they be considered at the July meeting only if the discussion can be completed within a fairly short time. If an extended discussion of the comments is required, consideration will have to be deferred until a later meeting (probably the October meeting).

The Commission will have an opportunity to examine the comments after they are set in type and before our final report is printed. However, unless the comments appear to be entirely satisfactory, we do not want to set them in type now because of the cost of correcting them after they are set in type.

Respectfully submitted,

John H. DeMouilly
Executive Secretary