

Date of Meeting: November 27-28, 1959

Date of Memo: November 18, 1959

Memorandum No. 8

Subject: Uniform Rules of Evidence -- Rules 38, 39 and 40.

Attached are revised Rules 38, 39 and 40. These have not been approved by the Commission. The revisions are those suggested at the October meeting when the Commission gave these rules some preliminary consideration.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Draft -- 11/10/59

Note: This is Uniform Rule 38 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 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED.

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure or to prevent another from making the disclosure, but [was] nevertheless the disclosure was required to be made [make-it].

Comment: This rule has not been approved by the Commission. The rule has been revised to provide protection where a person other than the holder of the privilege is required to testify.

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

RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES.

Subject to paragraph ~~[(4),]~~ (3) of Rule 23 and paragraph (7) of Rule 25, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or proceeding or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege ~~[,]~~ and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as ~~[herein]~~ provided in this rule, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, ~~[may]~~ shall instruct the jury ~~[in support of such privilege]~~ that no inference is to be drawn from the exercise of the privilege.

Comment: This rule has not been approved by the Commission. The revised rule, as set out above, is based on the assumption that the following new paragraph would be added to Rule 25 (self-incrimination):

(7) If a party in a civil action or proceeding claims the privilege under this rule, the fact that the party claimed the privilege may be commented upon by the court and by counsel and may be considered by the court or the jury.

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

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

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

Comment: This rule has not been approved by the Commission. At its October meeting the Commission suggested that the staff add the substance of the second sentence to the rule. However, the second sentence may be unnecessary since the first sentence is restricted in its application to a "party" which would perhaps not include a non-party witness who declined to answer and is now bringing habeas corpus proceedings.