

Date of Meeting: December 18-19, 1959

Date of Memo: December 10, 1959

MEMORANDUM NO. 2

Subject: Uniform Rules of Evidence - Privilege Evidence Division.

Attached is a report on each of the rules in the Privilege Evidence Division of the Uniform Rules of Evidence. The report indicates those rules that have been approved or disapproved by the Commission. The report also indicates those rules that require further action to be taken by the Commission and the nature of the problems remaining to be considered with respect to those rules.

This report is to be used in connection with Memorandum No. 1 (December 10, 1959) which contains the suggested revision of each rule in the Privilege Evidence Division that has not yet been approved or disapproved by the Commission.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

COMMISSION ACTION

12/10/59

ON

PRIVILEGE DIVISION (RULES 23-40)

UNIFORM RULES OF EVIDENCE

Rule 23. PRIVILEGE OF DEFENDANT IN CRIMINAL ACTION. See Memo. No. 1 (12/10/59).

This rule has been approved as revised in substance. The Commission has not approved the addition of the words "to the extent authorized under Section 13, Article I of the California Constitution" although the Commission has approved this addition in substance.

Rule 24. DEFINITION OF INCRIMINATION. See Memo. No. 1 (12/10/59).

This rule has been approved as revised December 10, 1959.

Rule 25. SELF-INCRIMINATION: EXCEPTIONS. See Memo. No. 1 (12/10/59).

This rule has been approved as revised by the Commission with the following exceptions:

- (1) Paragraph (3) - The Commission directed the Staff to draft the substance of paragraph (3) for consideration by the Commission.
Reference: Chadbourn Memo on Rules 23-25, pages 25-27.
- (2) Paragraph (7) - The Commission approved the substance of this paragraph but has not considered the language used in the revised paragraph. The paragraph has been revised to be consistent with paragraph (5).
- (3) Paragraph (9) - The Commission has not considered this paragraph.
References: Chadbourn Memo on Rules 23-25, pages 54-58;
Chadbourn Memo on Rules 37-40, pages 1-5.

The extent to which the privilege against self-incrimination can be waived is not entirely clear. However, the privilege can be claimed in the following cases. Witness without compulsion testifies before grand jury to facts incriminating him. Grand jury indicts X. At X's trial, the witness is called and claims the privilege. Claim of privilege would be sustained in California. Same result if testimony was at the preliminary hearing of People v. X and the claim of privilege is at the trial.

(4) Paragraph (10) - The Commission has not considered this paragraph.

References: Chadbourn Memo on Rules 23-25, pages 59-63;

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

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

(10) attempts to preserve this right to draw an inference from the claim of the privilege against self-incrimination.

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

Rule 26. LAWYER-CLIENT PRIVILEGE.

This rule has been approved as revised October 1, 1959.

Rule 27. PHYSICIAN-PATIENT PRIVILEGE.

This rule has been approved as revised November 10, 1959.

Rule 28. MARITAL PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS.

This rule has been approved as revised November 9, 1959.

Rule 29. PRIEST-PENITENT PRIVILEGE.

This rule has been approved as revised December 1, 1959.

Rule 30. RELIGIOUS BELIEF.

This rule has been approved as revised November 9, 1959.

Rule 31. POLITICAL VOTE.

This rule has been approved.

Rule 32. TRADE SECRET.

This rule has been approved.

Rule 33. SECRET OF STATE.

This rule has been disapproved.

Rule 34. OFFICIAL INFORMATION. See Memo No. 1 (12/10/59)

This rule has been approved except that the Commission determined at its November meeting that this rule should be revised to make it clear that the identity of an informer could not be concealed under the official information privilege of Rule 34. The rule has been further revised to insert the words "Subject to Rule 36," at the beginning of paragraph (2) of the rule. This revision needs Commission approval although the revision has already been approved in principle.

Rule 35. COMMUNICATION TO GRAND JURY.

The Commission has disapproved this rule.

Rule 36. IDENTITY OF INFORMER. See Memo No. 1 (12/10/59)

This rule has been approved in substance by the Commission except that the Commission has not considered wording of paragraph (2) of the revised rule which replaces the words "directly or indirectly" which were previously added before "furnished" in paragraph (1) of the rule.

Rule 37. WAIVER OF PRIVILEGE. See Memo No. 1 (12/10/59)

The Commission has not yet considered this rule. See Memo No. 1 (12/10/59) for revised rule and explanation.

Rule 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED.

The Commission has approved this rule as revised 11/10/59.

Rule 39. REFERENCE TO EXERCISE OF PRIVILEGE. See Memo No. 1 (12/10/59)

The Commission has discussed but not approved this rule.

Rule 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE. See Memo No. 1 (12/10/59)

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 of 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.