

Date of Meeting: November 27-28, 1959
Date of Memo: November 10, 1959

Memorandum No. 5

Subject: Uniform Rules of Evidence - Rules 23-25.

Attached are Uniform Rules 23-25 as revised to date by the Commission.

Rule 23 has been approved by the Commission in its revised form.

Rules 24 and 25 have not been approved by the Commission, but are presented as revised to date by the Commission.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Revised 11/10/59
10/14/59

Note: This is Uniform Rule 23 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 23. PRIVILEGE OF ~~[ACCUSED.]~~ DEFENDANT IN CRIMINAL ACTION.

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

~~[(2)--An-accused-in-a-criminal-action-has-a-privilege-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.]~~

~~[(2)]~~ (2) ~~[An-accused]~~ A defendant 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.

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~~[(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.]~~

(3) In a criminal action or proceeding, whether the
defendant testifies or not, his failure to explain or to deny
by his testimony any evidence or facts in the case against him
may be commented upon by the court and by counsel and may be
considered by the court or the jury.

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RULE 23 (PRIVILEGE OF DEFENDANT IN
CRIMINAL ACTION) AS REVISED BY THE COMMISSION

It is the purpose of this memorandum to explain Uniform Rule 23, relating to the privilege of defendant in a criminal action, as revised by the Commission.

Paragraph (2) - Marital Privilege of Defendant in Criminal Case.

Paragraph (2) of Uniform Rule 23 has been deleted in the revised rule. This paragraph, relating to the special marital privilege of a defendant in a criminal case, becomes unnecessary because the Commission has modified Uniform Rule 28 to give the substantially same privilege as was given under Uniform Rule 23(2) to a spouse in all cases -- the right to prevent the other spouse from testifying and to provide for the existence of the privilege after the termination of the marriage. The Commission has, consequently, deleted subsection (2) of Uniform Rule 23.

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Paragraph (4) • Comment on Defendant's Exercise of Privilege. There may be several important, substantive differences between the comment-inference scheme set up by Uniform Rules 39 and 23(4) and that provided by California Constitution, Art. I, § 13. The Uniform Rule scheme may be more restrictive than the Constitutional provision and if it is more restrictive would be unconstitutional if adopted in California in the form of legislation.

The Commission disapproves paragraph (4) of Rule 23 and instead has substituted in the revised rule the provision of Art. I, § 13 of the California Constitution, changing the word "case" appearing in the Constitution to "action or proceeding" in order to be consistent with the rest of revised Rule 23.

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 [,] :

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

(1) The matter shall be disclosed if the judge finds that the matter will not incriminate the witness. ~~(; -and)~~

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

[~~(c)~~] (3) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [; -and]

[~~(d)~~] (4) 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]~~ individual or a

corporation, partnership, [or-ether] association, organization or other person has a superior right to the possession of the thing ordered to be produced. [, -and]

[(e)] (5) A public [official] officer 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. [, -and]

[(f) -a-person-who-is-an-officer,-agent-or-employee-of-a-corporation-or-ether-association,-does-not-have-the-privilege-to-refuse-to disclose-any-matter-which-the-statutes-or-regulations-governing-the corporation-or-association-or-the-conduct-of-its-business-require-him-to record-or-report-or-disclose;--and]

[(g)] (6) Subject to Rule 21, a defendant in a criminal action or proceeding who voluntarily 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 by the counsel for the people as to all matters about which he was examined in chief.

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. Uniform 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." The Commission has deleted the 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."

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.

In paragraph (d) of the Uniform Rule, now paragraph (4) 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.

Paragraph (f) of the Uniform Rule has been deleted because of the belief of a majority of the Commission members that the paragraph is unconstitutional in that it would require a witness who is a custodian of corporate records to testify on matters contained within the documents which would incriminate him personally.

The Commission has revised paragraph (g) of the Uniform Rule, now paragraph (6) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). The Commission believes that paragraph (g) of the Uniform Rule (in its original form) probably would be unconstitutional because it conflicts with Section 13, Article 1, of the California Constitution.