

8/26/60 *Me*

## Memorandum No. 83(1960)

Subject: Uniform Rules of Evidence - Privileges.

Attached to this memorandum are those portions of the Uniform Rules of Evidence relating to Privileges that have not yet been finally acted upon by the Commission. The following are the remaining matters to be considered:

(1) Rule 25. SELF-INCRIMINATION: EXCEPTIONS. All of this rule has been approved as revised by the Commission with the exception of Paragraph (10).

References: Chadbourn Memo on Rules 23-25, pages 59-63 (see also footnote 84, pages FN 15-16);

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

Discussion of Paragraph 10. This paragraph, in accordance with the Commission's instructions, purports to restate the present law of this State. Two matters seem to be reasonably clear under existing law. First, if the defendant in a civil case, for example, 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." *Fross v. Wotton*, 3 C.2d 384 (1935). Second, if a non-party witness 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 the credibility of his

testimony in such action or proceeding "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement." Nelson v. Southern Pacific Ry. Co., 8 C.2d 648 (1937); see also People v. Kynette, 15 C.2d 731 (1940); Keller v. Key System Transit Lines, 129 C. A.2d 593 (1954); People v. Irwin, 79 Cal. 494 (1888)(no inference drawn against defendant from refusal of non-party witness to testify at criminal trial); People v. Glass, 158 Cal. 650 (1910)(same). While there are no California cases as to whether a prior claim of the privilege by a party to the civil action or proceeding is to be treated the same as a claim of privilege in the action or proceeding, there appears to be no rational basis for treating these situations differently and paragraph (10) is drafted accordingly.\*

If paragraph (10) of Rule 25 is approved, the portion of the explanation relating to paragraph (10) (following the statement of the text of the revised rule) should be examined to determine if it correctly states the reason the Commission has adopted this paragraph.

(2) Rule 37. WAIVER OF PRIVILEGE. The Commission has considered this rule but has not finally approved it. See attached material for revised rule and explanation. If Rule 37 is approved, the explanation

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\* 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.

of Rule 37 should also be examined to determine if it correctly states the reasons for the revisions the Commission has made in Rule 37.

(3) RULE 39. This rule was previously approved by the Commission. However, Rule 39 has been further revised to conform to revised Rule 25(10) and some unnecessary language has also been deleted from Uniform Rule 39. See the revised rule and the explanation thereto.

(4) RULE 40. This rule is set out as approved by the Commission. The explanation of the rule should be examined to determine if it correctly states the reasons for the revisions the Commission has made in the rule.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Revised 8/22/60  
Revised 2/11/60  
Revised 12/10/59  
Revised 11/10/59  
10/14/59

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 [7] :

[~~(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 [7] or his physical or mental condition. [~~+-and~~]

(3) No person has the privilege to refuse to demonstrate his identifying characteristics such as, for example, his handwriting, the sound of his voice and manner of speaking or his manner of walking or running.

[~~(c)~~] (4) No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. [~~+-and~~]

[~~(d)~~] (5) 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

(Rule 25)

matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some ~~[either-person-or-a]~~ corporation, partnership, ~~[or-either]~~ association, organization or other person has a superior right to the possession of the thing ordered to be produced. ~~[;and]~~

~~[(e)]~~ (6) A public ~~[official]~~ officer or employee 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, employment, activity, occupation, profession or calling require him to record or report or disclose concerning it. ~~[;and]~~

~~[(f)]~~ (7) A person who is an officer, agent or employee of a corporation, partnership, ~~[or-either]~~ association ~~[,]~~ or other organization does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation, partnership, ~~[or]~~ association or organization or the conduct of its business require him to record or report or disclose. ~~[;and]~~

~~[(g)]~~ (8) 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 as to all matters about which he was examined in chief.

(9) Except for the defendant in a criminal action or proceeding, a witness who voluntarily testifies in an action or proceeding before the trier of fact with respect to a transaction which incriminates him does not have the privilege to refuse to disclose in such action or proceeding any matter relevant to the transaction.

(10) If a party in a civil action or proceeding claims or has previously claimed the privilege to refuse to disclose particular matters at issue in such action or proceeding on the ground that such disclosure would tend to incriminate him, such claim may be commented upon by the court and by counsel and the trier of fact may draw any reasonable inference therefrom. If a witness in an action or proceeding who is not a party to such action or proceeding claims or has previously claimed the privilege to refuse to disclose particular matters at issue in such action or proceeding on the ground that such disclosure would tend to incriminate him and if such claim tends to impeach the credibility of the testimony of the witness, such claim may be commented upon by the court and by counsel and may be considered by the trier of fact as bearing on the credibility of the testimony of the witness.

Revised 8/29/60  
Revised 12/10/59  
Revised 11/10/59

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

(Rule 25)

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."



(Rule 25)

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.

Paragraph (3) has been inserted to make it clear that the defendant in a criminal case, for example, can be required to walk so that a witness can determine if he limps like the person she observed at the scene of the crime. Under paragraph (3), the privilege against self-incrimination cannot be invoked to prevent the taking of a sample of handwriting, a demonstration of the witness speaking the same words as were spoken by a criminal as he committed a crime, etc. This matter may be covered by paragraph (b), now paragraph (2), of the Uniform Rule; but paragraph (3) will avoid any problems that might arise because of the phrasing of paragraph (2).

In paragraph (d) of the Uniform Rule, now paragraph (5) 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.

The Commission has revised paragraph (g) of the Uniform Rule, now paragraph (8) of the revised rule, to incorporate the substance of the present California law (Section 1323 of the Penal Code). Paragraph (g) of the Uniform Rule (in its original form) conflicted with Section 13, Article I, of the California Constitution, as interpreted by the California Supreme Court.

The Commission has included a specific waiver provision in paragraph (9) of Rule 25. The Uniform Rules provide in Rule 37 a waiver provision that

(Rule 25)

applies to all privileges. However, the Commission has revised Rule 37 so that it does not apply to Rule 25 and has included a special waiver provision in Rule 25. The Commission has done this because the waiver provision of Rule 37 was not suitable for application to Rule 25. Note that the waiver of the privilege against self-incrimination under paragraph (9) of revised Rule 25 applies only in the same action or proceeding, not in a subsequent action or proceeding. California case law appears to limit a waiver of the privilege against self-incrimination to the particular action or proceeding in which the privilege is waived; a person can claim the privilege in a subsequent case even though he waived it in a previous case. The extent of waiver of the privilege by the defendant in a criminal case is indicated by paragraph (8) of the revised rule.

Paragraph (10) of the revised rule is a provision relating to comment on and the effect of the exercise of the privilege by a party to a civil action or proceeding and by a non-party witness to any action or proceeding. It is believed to restate existing law. (As far as the defendant in a criminal action or proceeding is concerned, the right to comment is covered by revised Rule 23(3)) If a party to a civil action or proceeding invokes the privilege against self-incrimination to keep out relevant evidence, the other party is presently entitled to comment on that fact and the trier of fact may draw inferences from it. For example, if the plaintiff in a civil action calls the defendant under C.C.P. § 2055 and the defendant refuses to answer pertinent inquiries on the ground of self-incrimination, an inference adverse to the defendant may be drawn from his privilege claim because to hold otherwise would, in the words of the California court, "be an unjustifiable extension of the privilege for a purpose it was never

(Rule 25)

intended to fulfill." While there is no case dealing with a prior claim of privilege by a party to a civil action, the same principle would seem logically to apply. The claim of the privilege against self-incrimination (at the trial or previously) by a witness who is not a party may be shown under existing California law to impeach his credibility "since the claim of privilege gives rise to an inference bearing upon the credibility of his statement." Paragraph (10) continues this rule in effect. Paragraph (10) does not, however, permit the trier of fact to draw an inference from a claim of privilege by a non-party witness. This is because while the party can choose between testifying and claiming the privilege he cannot compel the witness to testify and it would unduly penalize the party to permit inferences to be drawn from the silence of the witness.

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12/10/59

Note: This is Uniform Rule 37 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 37. WAIVER OF PRIVILEGE.

~~[A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege made disclosure of any part of the matter or consented to such a disclosure made by anyone.]~~

(1) Subject to Rule 38, a holder of a privilege under Rules 26 to 29, inclusive, waives his right to claim the privilege with respect to a specified matter protected by the privilege if he has made a disclosure of any part of such matter, or another has made such a disclosure with his consent, in an action or proceeding or otherwise. Consent of the holder of the privilege to disclosure may be given by any words or conduct indicating his consent to the disclosure, including but not limited to his failure to claim the privilege in an action or proceeding in which he has the legal standing and an opportunity to claim the privilege. A disclosure that is privileged under these rules is not a disclosure for the purposes of this rule.

(2) Except as otherwise provided in paragraphs (3), (4) and (5) of this rule, the right to claim a privilege under Rules 26 to 29, inclusive, as to a specified matter cannot be asserted by anyone once the right to

(Rule 37)

claim the privilege with respect to that matter is waived under paragraph (1) of this rule by any person who is a holder of the privilege.

(3) Subject to subparagraph (d) of paragraph (5) of Rule 26, when a privileged communication relevant to a matter of common interest to two or more clients is made to a lawyer whom they have retained in common, even though one of the clients or a person acting as the holder of the privilege on behalf of such client has waived the right to claim the privilege provided by Rule 26, the privilege is not waived so far as any other client is concerned unless such other client or a person acting as the holder of the privilege on behalf of such other client has also waived the right to claim the privilege under paragraph (1) of this rule.

(4) When a privileged communication relevant to a matter of common interest to two or more patients is made to a physician whom they have consulted in common, even though one of the patients or a person acting as the holder of the privilege on behalf of such patient has waived the right to claim the privilege provided by Rule 27, the privilege is not waived so far as any other patient is concerned unless such other patient or a person acting as the holder of the privilege on behalf of such other patient has also waived the right to claim the privilege under paragraph (1) of this rule.

(5) Even though one spouse or a person acting as the holder of the privilege on behalf of such spouse has waived the right to claim the privilege provided by Rule 28, the privilege is not waived so far as the other spouse is concerned unless the other spouse or a person acting as the holder of the privilege on behalf of the other spouse has also waived the privilege under paragraph (1) of this rule.

EXPLANATION OF REVISED RULE 37 (WAIVER OF PRIVILEGE)

Limitation of Scope of Rule 37. Rule 37, relating to waiver of privilege, has been revised so that it applies only to Rules 26 to 29. The revised rule does not apply to Rules 23 to 25 nor to Rules 30 to 36.

Rule 23, relating to the right of a defendant not to testify in a criminal action or proceeding, can be waived only when the defendant offers himself as a witness in the specific action or proceeding and then the waiver is only to cross examination on that part of the matter testified to on direct. Thus, as far as Rule 23 is concerned, the provisions of revised Rule 37 have no application.

Rules 24 and 25 relate to the privilege against self-incrimination. A new paragraph (9) is suggested for addition to Rule 25. (See revised Rule 25). Because this new paragraph and paragraph (8) of revised Rule 25 cover the scope of waiver as far as the privilege against self-incrimination is concerned, revised Rule 37 has no application to Rule 25.

Revised Rule 37 likewise has no application to the privileges provided in Rules 30 to 36, inclusive, since each of these rules specifies when the privilege is available and when it is not.

Waiver by contract. Under revised Rule 37 the fact that a patient, for example, has in an insurance application authorized his physician to disclose privileged matter does not waive the physician-patient privilege for other purposes unless disclosure is actually made pursuant to such authorization. This differs from the Uniform Rule. The Commission can see no valid reason why an insurance applicant should not be allowed in such a case to make a contract authorizing disclosure without waiving the

(Rule 37)

privilege in all cases. The fact that a person has applied for insurance should not be the determining factor as to whether a privilege exists in a case having no relationship to the insurance contract. On the other hand, once a disclosure is made pursuant to such authorization the seal of secrecy is broken and the holder of the privilege should no longer be able to claim it.

Two persons entitled to claim privilege at same time. Generally speaking, under revised Rule 37, the right to claim a privilege as to a specified matter cannot be asserted by anyone once the right to claim the privilege with respect to that matter has been waived by a holder of the privilege. However, three exceptions to this general rule are stated in paragraphs (3), (4) and (5) of the revised rule: Where two persons are the holder of a privilege at the same time (two spouses, two patients who jointly consult a physician, two or more clients who jointly consult a lawyer), any one of the holders of the privilege may claim it unless he or a person acting on his behalf has waived the privilege. In other words, where several persons are the holders of any of these privileges at the same time, a waiver by one of them does not waive the privilege on behalf of the others.

Examples:

Rule 26 - several clients.

(1) One client appears as a witness and is willing to disclose a confidential communication made to his attorney; another client who retained the lawyer jointly with the witness client objects: Objection sustained.

(2) One client appears as a witness and testifies as to a confidential communication made to the attorney; the other client who jointly consulted the

(Rule 37)

lawyer is not a party to the proceeding. In a second proceeding the first client is called upon to repeat the same testimony or the record of the previous testimony is presented. The other client who retained the lawyer jointly with the witness client objects. Objection sustained.

Rule 28 - husband and wife.

(1) Husband appears as a witness and agrees to testify as to confidential communication between husband and wife. Wife objects. Objection sustained.

(2) Husband appears as a witness and testifies as to confidential communication between husband and wife; wife is not present at the time and is not a party to action or proceeding. In a second action the husband is called upon to testify as to the same communication. Husband objects; objection overruled - he has waived. Wife objects; objection sustained,

Rule 27 - physician and patient.

Two patients jointly consult a physician. (For example, a husband and wife may jointly retain a physician regarding a fertility problem or a husband and wife may jointly consult a psychiatrist.) In the course of consultation a privileged communication is made to the physician.

(1) Husband appears as a witness and agrees to testify as to the privileged communication. Wife objects. Objection sustained.

(2) Husband waives physician-patient privilege in writing. Wife does not waive privilege. In a subsequent action, wife is called to testify. Husband objects: objection overruled. Wife objects: objection sustained.



(Rule 37)

Consent to disclosure. The revised rule makes it clear that failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a consent to disclosure. This is existing California law.

Knowledge of the privilege. The Uniform Rule provides that a waiver is effective only if disclosure is made by the holder of the privilege "with knowledge of his privilege." The Commission has eliminated this requirement because the existing California law apparently does not require a showing that the person knew he had a privilege at the time he made the disclosure. The privilege is lost because the seal of secrecy has in fact been broken. Furthermore, if disclosure is made it indicates that the person did not himself consider the matter confidential.

Coercion in disclosure. The Uniform Rule requires that the disclosure be made without coercion. This provision has been eliminated by the Commission because Rule 38 specifically covers admissibility of a disclosure wrongfully compelled.

Privilege disclosures. The revised rule provides that a disclosure that is privileged under these rules is not a disclosure for the purpose of waiver of a privilege. Thus, a husband who consults a physician may tell his wife what he told the physician without waiving the physician-patient privilege.

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Revised 12/10/59

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 (10) of Rule 25[7] :

(1) If a privilege is exercised not to testify or to prevent another from testifying ~~[, either in the action or]~~ with respect to ~~[particular matters]~~ any matter, 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 as to the credibility of the witness or as to any matter at issue in such action or proceeding. ~~[In these jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case,]~~

(2) The court, at the request of ~~[the]~~ a party ~~[exercising the]~~ who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, ~~[may]~~ shall instruct the jury ~~[in support of such privilege]~~ that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in such action or proceeding.

(Rule 39)

EXPLANATION OF REVISED RULE 39 (REFERENCE TO EXERCISE OF PRIVILEGE)

General comment.

The Commission approves the principle of Rule 39 except insofar as Rule 39 applies to the privilege against self-incrimination.\* A recognized privilege should not be impaired by giving the judge or counsel a right to comment on the exercise of the privilege to the detriment of the one exercising the privilege. Nor should the trier of fact be permitted to draw any inference from the exercise of the privilege as to the credibility of a witness or as to any matter at issue in the case. To permit comment on or inferences to be drawn from the exercise of a privilege tends to destroy the privilege. This is the existing California law.

Instruction in support of privilege mandatory.

Upon request of a party who may be adversely affected because an unfavorable inference may be drawn because a privilege has been exercised, the court is required under revised Rule 39 to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of the privilege. The Uniform Rule permits but does not require the court to give such an instruction. The Commission is unable to see why this matter should be within the court's discretion.

Nature of instruction in support of privilege.

The Commission has revised Rule 39 to state more specifically the nature of the instruction that should be given to the jury. The language of the Uniform Rule "in support of such privilege" is somewhat ambiguous.

\*(Special provisions are included in revised Rule 25(10) and revised Rule 23(3) to preserve the existing California law as to the right to comment on and to draw inferences from the exercise of the privilege against self-incrimination.)

(Rule 39)

The revised rule states that the jury should be instructed "that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in such action or proceeding."

Reference to Rule 25(10)

A reference to paragraph (10) of Rule 25 is included in revised Rule 29. Rule 25(10) permits the court and counsel to comment on the exercise of the privilege against self-incrimination, permits the trier of fact to consider the exercise of the privilege by a non-party witness as bearing on the credibility of the testimony of the witness and permits the trier of fact to draw any reasonable inference from the exercise of the privilege by a party to the action or proceeding.

Reference to privilege not to testify.

Rule 39 refers to a privilege not to testify or to prevent another from testifying in the action. Rule 23 is the only privilege rule which provides a privilege not to testify and Rule 39 does not apply to Rule 23. Thus, the reference to a privilege not to testify or to prevent another person from testifying in the action has no application because none of the privileges covered by Rule 39 permit a person to refuse to testify in an action or proceeding but go to the exclusion of testimony on a matter that is privileged. Thus, the phrase ", either in the action or" has been deleted from Rule 39 and other consistent adjustments made therein.

It is noted, however, that it may be necessary to restore the deleted language if the Commission incorporates the so-called marital "for and against" testimonial privilege in the Uniform Rules. The Uniform Rules

(Rule 39)

provide no such privilege. But by virtue of Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, not to have his spouse testify either for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

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.

EXPLANATION OF RULE 40 (EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE)

Uniform Rule 40 states the existing California law. The Commission approves this rule. When the court erroneously recognizes an asserted privilege of a non-party or a party, the adverse party may complain on appeal because proper evidence has been kept from the jury. On the other hand, there seems to be no reason why either party to an action should have a ground for complaint when the infringement of the privilege of a non-party results in a fuller fact disclosure than the party desires. Yet, where a party is the owner of the privilege and it is wrongfully disallowed, the party must be allowed to predicate error on the erroneous admission of the privileged evidence or the privilege will be destroyed.

A new sentence is added to Rule 40 to indicate when a witness who is not a party may predicate error on a ruling disallowing a claim of privilege. In connection with this new sentence it is noted that under Rules 26, 27 and 29, as revised by the Commission, a lawyer, physician or priest is authorized under certain circumstances to claim the privilege.