(34) Memorandum No. 2(1961) 1/3/61

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges Article)

Attached to this memorandum (pink pages) 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). It should be noted that Paragraph (10) does not apply to a defendant in a criminal case. This paragraph is a provision that relates to comment on and the effect of the exercise of the privilege against self-incrimination by a party to a civil action or proceeding or by a non-party witness in any action or proceeding.

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;

Memorandum by Commissioner Selvin (EXHIBIT I, attached blue sheets);

Memorandum by Mr. Gustafson in Response to Commissioner Selvin's Memorandum (EXHIBIT II, attached green sheets);

Memorandum by Mr. Gustafson entitled "Memorandum in Opposition to Proposed Section 1868.2 of the Code of Civil Procedure." (You have this).

Discussion of Paragraph (10). At its December 1959 meeting the Commission directed the staff to revise Rule 25(10) to state the existing law. Paragraph (10), in accordance with this instruction, purports to

restate the present law of this State. It has been drafted with the assistance of our research consultant, Professor James Chadbourn.

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.*

As Commissioner Selvin points out in his memorandum attached hereto as Exhibit I (blue pages), Calhoun and Snyder held that the use of evidence of the assertion of the privilege against self-incrimination by the defendant in a criminal case as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions. Although the court went out of its way to overrule Kynette and Wayne -- two cases where evidence of prior exercise of the privilege had been admitted for the limited purpose of impeaching the defendant -- the court did not overrule or cast doubt on the holdings in the civil cases. It is true that the court disapproved language in the Keller case -- but an examination of that case discloses the following language which is in accord with Kynette and Wayne: "Even in criminal cases in this state this type of admission is allowed to impeach the credibility of a witness." So far as the defendant in the criminal case is concerned, it would appear that under Calhoun and Snyder, evidence of a prior claim of the privilege against self-incrimination by the defendant is not admissible for any purpose -- neither to draw an inference as to his guilt nor to cast doubt

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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, only 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.

upon his credibility. This is not to say, however, that our Supreme Court will overrule the Fross and Nelson cases. In the Fross case the court distinguished between the party in a civil case and the defendant in a criminal case, saying that the privilege was not intended to protect the party from civil liability. Nelson relied on Fross to extend this to a non-party witness -- i.e., a person who was neither the party in a civil case nor the defendant in a criminal case. Insofar as Kynette saw no distinction between a party in a civil case or a non-party witness and the defendant in a criminal case, the court was wrong and it has since been so demonstrated.

Commissioner Selvin has indicated that it is his view that Fross and Nelson are no longer the law in California. See Exhibit III, attached (yellow pages).

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 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 Rule 39. See the revised rule and the explanation thereto.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Revised 1/3/61
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 [~~,~~] :

[~~(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~~]

(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

matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some [~~other person or a~~] corporation, partnership, [~~or other~~] 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 other~~] 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 voluntaily 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 1/3/61
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. The Commission has deleted this 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."

(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

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

intended to fulfill." Paragraph (10) continues this rule in effect. 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 and paragraph (10) so provides. 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) also continues this rule in effect.

Revised 8/29/60
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 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

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

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

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.

Privileged 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.

Revised 8/29/60
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[,] :

(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.

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.)

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

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.

EXHIBIT I

Memorandum from H. F. Selvin

Subject: U. R. E. - rule 25(10)

To avoid repetition, at the next meeting at which rule 25(10) is considered, of what must be, by this time, a boring discourse, I am putting my thoughts on the subject into writing for your leisurely and, I hope, favorable attention.

I start with some pretty obvious considerations. Every privilege tends to suppress material evidence. It is only when the evidence would be otherwise admissible that a privilege comes into effective or necessary operation. Yet, we retain various of the privileges in the law because, I assume, their social value is felt to outweigh the occasional or even frequent instance when justice miscarries because of the inability to have material evidence admitted. Unless that is so there is no justification for any privilege.

Consistently enough, and with only one exception, we seek to preserve this value by providing in rule 39 that no presumption or inference may be drawn from the fact that a privilege is exercised. That is a necessary and desirable corollary of recognizing a privilege at all. Without it exercise of a privilege could and in most instances would be more detrimental to the holder than would be disclosure of the information sought to be made inviolate by the privilege.

Inconsistently, however, we not only fail to erect the same safeguard around the so-called self-incrimination privilege, we go farther by making it certain that exercise of the privilege will be legally and practically detrimental to the one who exercises it. I

find no justification, either in logic or policy, for that treatment of the matter. Without meaning any disrespect to those who disagree with me, I believe that treatment to be the product of an emotional reaction to the kind of people who, in widely publicized hearings or investigations dealing with what is today a burning issue, have invoked the privilege. I believe it also to be, in part, the product of the lawyer's besetting sin of putting a tag on a concept and thereafter constructing all thinking on the subject within the area defined by the words used on the tag. The "self-incrimination" tag attached to this privilege immediately suggests that the protected information if disclosed would incriminate. Yet, the history of the struggle that brought the privilege into the law shows that it is really a privilege against testimonial compulsion; and that it was and is the device by which it was sought to prevent the continuance in England and the adoption in this country of those barbaric and even bloody practices which for so long disfigured criminal justice at the common law. It is merely a recognition of the fact that in our system no man should be compelled to give evidence of any fact, however insignificant or harmless in itself, that may be used against him as part of a chain of proof in a criminal prosecution. Resort to the privilege, therefore, is neither necessarily nor always an inferential admission of guilt, any more than, as we properly recognize, is resort to one of the other privileges an

inferential admission of an adverse fact. I shall attempt to demonstrate this in a moment.

The importance of the self-incrimination privilege in our society is shown, I should think, by the fact that it is the only one of the privileges that, in the federal system, in California, and in many other states, is created and preserved in a constitution rather than in a statute or merely in the case law. I claim for it, therefore, a standing at least equal in dignity to that of the other privileges; and I can see no reason why, having granted it by constitutional mandate, we should sap its vitality by a rule of evidence.

The incongruity of our proposed action is demonstrated, at least to my satisfaction, by a consideration of these hypothetical cases -- hypothetical in respect of the use of the privilege, but the first two of which are based on or suggested by factual situations that arose in cases with which I am familiar:

1. Attorney - client: The case is a will-contest. The contestants claim that will was forged by its proponent. The testator was an elderly, nearly blind man who died after an operation in a private hospital. The will was typed and was in excellent legal form. It bore the admittedly genuine signature of the testator. The claim of the contestants was that the testator signed a blank sheet of paper upon the representation that it was a consent to his then impending operation, and that the text was later typed in above that signature. It was felt that to conform

the length of the text to the space available over the signature, the forger must have previously prepared the text; and since the suspected forger was neither a lawyer nor particularly literate, it was quite likely that he had engaged a lawyer to prepare a form. There was no suggestion that the lawyer was a knowing accomplice. Investigation showed that the suspected forger had visited a lawyer's office a day or so before the testator signed. Now, suppose the lawyer is called as a witness and asked to divulge the communications between himself and the proponent. The objection of privilege would be made and sustained. Under rule 39 no presumption of inference adverse to the proponent could be drawn. The justification for that result would be, first, that the privilege should not be impaired by making its invocation the practical equivalent of a disclosure; and, second, that the privilege may have been invoked for various reasons supplying no logical basis for the adverse inference, e.g., (a) the communications related to other matters which the client desired, as was his right, to keep confidential; or (b) the communications related to a will but not the will in question -- a difference that a jury in the course of a long trial might not fully appreciate; or (c) the communications were harmless but the proponent's lawyer was one of those who believe in making the road as rough as possible for the opponent by invoking every objection to admissibility that is available. No doubt, the privilege could have been invoked because disclosure would have been fatal to the proponent's case -- but we do not think this sufficiently likely to permit the inference; otherwise we would not have rule 39.

2. Physician - patient: X. is on trial for manslaughter as the result of a hit-and-run collision. The police believe from the circumstances that X. was injured in the collision. They locate a doctor who was consulted by X. the day following the collision. The doctor is called as a witness and asked questions designed to produce testimony that he treated X. for an injury of the sort that could have been or that he was told by X. had been suffered in the kind of collision involved. An objection on ground of privilege would no doubt be sustained. Here, again, no adverse inference may be drawn. The justification, once more, is the necessity of not impairing the privilege, and the fact that there may have been other reasons for claiming the privilege, e.g., (a) X. was treated for a loathsome disease -- a fact he does not want disclosed; or (b) he was treated for a traumatic injury, not in fact suffered in the collision, but which the jury might infer was suffered there; or (c) he too is represented by the play-it-the-hard way lawyer.

3. Priest-penitent: A defendant in a criminal case is known to be a communicant of a church whose practice includes the confessional. The priest of the parish in which the defendant resides is called and asked questions designed to produce testimony that the defendant confessed the crime of which he is accused. The privilege is claimed and upheld. Rule 39 precludes drawing of an adverse inference, even though, if the facts were known, it would appear that the claim of privilege was motivated by the

fact that just such a confession had been made. On the other hand, the inducing cause may have been (a) a desire to prevent disclosure that, not the crime in question, but some other sin (perhaps not even amounting to a crime) had been confessed; or (b) a conscientious belief that the confessional is sacred and should remain inviolate in all circumstances.

The case of the self-incrimination privilege is not different in principle from these examples. The claim of privilege may have been made for any of a number of reasons supplying no logical basis for the adverse inference, e.g., (a) to prevent disclosure of the commission of some offense other than the one with which the holder is charged; or (b) to prevent disclosure of a fact, harmless and innocent in itself, which together with evidence of other facts (the nature and extent of which the holder may not fully know) will fashion a circumstantial case against the holder; or (c) a conscientious belief that constitutional rights are and should be inviolable; or (d) a belief that the prosecution should make out a case independently of the testimony or testimonial conduct of the defendant.

As the Supreme Court has said: [Grunewald v. U.S., 353 U.S. 391, 421]

> "...Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men. Griswold, The Fifth Amendment Today, 9-30, 53-82. 'Too many, even those

who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.' Ullmann v. United States, 350 US 422, 426, 100 L ed 511, 518, 76 S Ct 497, 53 ALR2d 1008. See also Slochower v Board of Higher Education, 350 US 551, 100 L ed 692, 76 S Ct 637, when, at the same Term, this Court said at pp. 557, 558: 'The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'"

If, notwithstanding all this, the inference is permitted to be drawn the defendant would be entitled to dispel it by showing his real reason for claiming the privilege. That, however, is of little, if any, benefit to him; for such a showing would almost always result in the direct or at least indirect disclosure of the information sought to be protected by the privilege.

The current decisional trend is against rule 25(10). The latest California cases of which I am aware are People v. Calhoun, 50 Cal.2d 137 and People v. Snyder, 50 Cal.2d 190. In Calhoun the prosecution introduced evidence, as part of its case-in-chief, that the defendant when called before the grand jury and queried about matters related to the subject-matter of the indictment against him claimed the self-incrimination privilege 47 times. The admission of that evidence was held prejudicially erroneous because "no implication of guilt can be drawn from a defendant's relying on the constitutional guarantees of article I, section 13,

of the Constitution of the Sate of California . . ."

In Snyder, it was held prejudicially erroneous to admit evidence that the defendant, as a witness in the Calhoun trial, had refused to testify on the ground of self-incrimination. It was also held to be error to instruct the jury that the refusal to testify, along with all other facts, could be considered in determining the guilt or innocence of the defendant. Contrary cases -- People v. Kynette, 15 Cal.2d 731, and People v. Wayne, 41 Cal.2d 814, among others -- were overruled.

I realize that neither Calhoun nor Snyder directly settles the question whether such evidence and the adverse inference to be drawn therefrom would be admissible to impeach a defendant who had testified at his trial; or the question whether in a civil proceeding the evidence and inference would be admissible. To my mind, however, they clearly foreshadow a result against admissibility when those two questions do arise; because, as the Court said in Snyder, the "use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions . . ." (Emphasis mine) That intent is just as effective and controlling in a civil case as in a criminal case, and in respect of impeachment as well as in respect of affirmative evidence.

In Calhoun our court approvingly cited Grunewald v. U. S., 353 U. S. 391. There, the defendant testified at his trial to facts consistent with innocence. He was cross-examined about having claimed the self-incrimination privilege before the grand jury when asked

questions directed to those facts. The trial jury was instructed that his claim of privilege could be taken "only as reflecting on his credibility, and that no inference as to guilt or innocence could be drawn therefrom . . ." The court as a whole agreed that no implication of guilt could be drawn from the claim. A majority of the Court held that permitting the cross-examination for purposes of impeachment was error because in the special circumstances of the case the defendant's "claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence . . . . For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach . . . ." The Chief Justice, and Mr. Justices Black, Douglas and Brennan agreed with the majority in the above, but added that they did not rest their concurrence on the special circumstances of the case. Their view was:

> ". . . I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.
>
> "It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation

of a privilege deemed worthy of enshrinement in the Constitution . . . ."

These cases fairly represent the present trend. So far as the earlier cases are concerned I should say, as the Supreme Court has said, that "the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it . . . ." [Sei Fujii v. California, 38 Cal.2d 718, 728.]

EXHIBIT II

Memorandum from Roy A. Gustafson September 19, 1960

Subject: U. R. E. - rule 25(10)

I received a memorandum from Herman Selvin on this subject and I do not think it should go unanswered. While I do not know what the discussion was at the August meeting, I would like to make some comment in case similar comments have not already been made at the August meeting.

I am enclosing a copy of a memorandum I prepared about two and a half years ago. While it pertains principally to another subject, the matter of inferences to be drawn from exercise of the privilege against self-incrimination is also treated. I am too lazy to redo the memorandum to confine it to the subject of rule 25(10).

Herman says that we are being inconsistent if we prohibit the drawing of an inference from the exercise of some privileges and permit it when the privilege against self-incrimination is exercised. I disagree. There is to me a vast distinction between the privilege against self-incrimination and all other privileges.

Let us take the examples given in Herman's memorandum. They are attorney-client privilege, physician-patient privilege and priest-penitent privilege. The basic purpose of these privileges is to encourage communications between two persons who stand in a particular relationship. Our law wants to assure the parishioner that he can without fear confess even horrible deeds to his priest. The principal purpose for which the parishioner goes to his priest is to discuss these highly person problems about which the

parishioner wants no one else to know. Similarly, representation of a client by an attorney would be greatly impaired if the client were not guaranteed that what he tells the attorney is in utmost confidence. A patient who goes to a physician also often discloses information which he does not want anyone else to know. However, the principal purpose of going to a physician is not to discuss extremely confidential matters, but to receive treatment for illness or injury. In this respect there is a difference between the physician-patient relationship and the other two relationships. This is recognized in our law where we say that in a criminal case, the privilege does not apply. The value to society of convicting criminals is more important than preserving the confidence of communications between patients and physicians. (In this respect, the illustration on page 5 of Herman's memorandum is out of place. He says that where X is on trial for manslaughter and the physician is asked what X told him when he visited him, an objection to the question "on ground of privilege would no doubt be sustained." This is not true. The objection would be overruled.)

With respect to the attorney-client and priest-penitent privileges, Herman suggests that invocation of a privilege to prevent testimony is not necessarily done because the testimony will be adverse to the person whose communication is in question. Certainly that is true. The client may have confided to the attorney a matter entirely different from that which the lawyer for a party suspects and the client certainly may desire that the different matter be kept strictly confidential. The same thing is true of the priest-penitent situation. However, all of this is completely immaterial to whether any inference

may be drawn from the exercise of the privilege. The reason is that the privilege is not confined to communications that may reflect discredit or do harm to the communicator if revealed. It extends to all communications, good or bad. It is the relationship alone which gives rise to the privilege and once that relationship is shown to exist, the communications are confidential entirely apart from what they might disclose. Consequently, one cannot draw an inference from the refusal to disclose any communication that the communication dealt with a particular subject or that the communication was of a particular fact being sought by the examiner.

Completely different is the privilege against self-incrimination. This is not dependent at all upon the status and relationship of two persons. It has nothing to do with communications. The sole ground for invoking the privilege is that a truthful answer to the particular question asked will disclose a fact which does, or tends to, incriminate the witness. I refer to my enclosed memorandum for further discussion of this proposition. Herman says that the privilege may be exercised because of "a conscientious belief that constitutional rights are and should be inviolable." That is not a proper ground for exercise of the privilege. Unless the answer would, or would tend to, incriminate the witness, he must answer regardless of what he may think about constitutional rights. Herman further says that the privilege may be exercised because of "a belief that the prosecution should make out a case independently of the testimony or testimonial conduct of the defendant." I don't understand how this reason has any bearing in the light of our present law. The prosecution cannot call the defendant as

a witness. If the defendant is a witness in a criminal case, it is by reason of his own choice and no privilege remains for him to exercise with respect to matters about which he testifies. As to matters about which he does not testify, our law prohibits inquiry of him. Perhaps Herman was thinking of a situation where defendant in the present criminal case has exercised the privilege in a prior proceeding. This, however, is already taken care of by our law which, as I have pointed out in my memorandum and as Herman points out, prohibits use of the prior exercise of the privilege as affirmative evidence of guilt in the present case.

I agree with Herman that the privilege against self-incrimination may be exercised "(a) to prevent disclosure of the commission of some offense other than the one with which the holder is charged; or (b) to prevent disclosure of a fact, harmless and innocent in itself, which together with evidence of other facts (the nature and extent of which the holder may not fully know) will fashion a circumstantial case against the holder . . . ." (Herman should have cast his illustrations to apply to a witness in a case rather than to a defendant in a criminal case because, for the reason stated above, the whole discussion is inapplicable to a party-defendant in a criminal case.) However, I emphatically disagree with Herman when he says that these reasons for exercising the privilege supply "no logical basis for the adverse inference." It must be remembered that we are talking about any witness except the defendant in a criminal action. When the witness is asked whether he was under the influence of narcotics at the time he purportedly observed the events to which he is testifying and he

invokes the privilege, I think it is perfectly logical to permit the jury to infer that he was. I confess that I am totally unable to conjure up any illustration where exercise of the privilege giving rise to any inference of probative value would more probably be untrue than true. After all, we are dealing only in probabilities and not in invariable conclusions. I challenge Herman to give us some concrete hypothetical situation where exercise of the privilege by a witness more likely, in all situations, is based on a ground which, if known to the trier of fact, would dispel the adverse inference with probative value to which the answer would otherwise give rise.

All I can say about the "decisional trend" evidenced by the Calhoun and Snyder cases is that, as I point out in my memorandum, the trend has absolutely no basis in logic. If we believe that the Supreme Court is about to go down the wrong path, I fail to see why we should make an attempt to get there before the court does.

EXHIBIT III

Memorandum from H. F. Selvin

Subject: U.R.E. Rule 25(10)

In Memorandum 83(1960) it is said that rule 25(10) "purports to restate the present law of this State ...." Fross v. Wotton, 3 Cal.2d 384, and Nelson v. Southern Pacific, 8 Cal.2d 648, are cited in support. With respect, it is submitted that the quoted statement is more dogmatic than is warranted by a realistic analysis of what the Supreme Court actually did in Calhoun and Snyder. Consider:

1. It is clear, at least, in criminal cases that for use as affirmative or independent evidence no inference of guilt may be drawn from exercise of the self-incrimination privilege. That was the exact point decided in Calhoun and Snyder.

2. In Snyder, the Court expressly overruled Kynette and Wayne. [50 Cal.2d at 197.] In each of the two last-named cases evidence of prior exercise of the privilege had been admitted only for the limited purpose of impeaching the defendant who, at his trial, testified to matters consistent with innocence and in respect to which he had previously refused to testify on the ground of self-incrimination. If use of the inference for this limited purpose is substantively or materially distinguishable from use of it as affirmative evidence, there was no need to overrule either Kynette or Wayne; it would have been enough to distinguish them. Since they were expressly overruled it is at least strongly arguable that even use merely for impeachment is no longer permissible in this State.

3. So far as drawing the inference in civil cases is concerned, it will be recalled that in Kynette the Court relied upon Fross and Nelson, saying, "...we see no distinction so far as impeachment is concerned in the rights of witnesses in civil and criminal action [sic], including a defendant who, as here, takes the stand in his own defense ..." [15 Cal.2d at 750.] That there is no substantial difference in principle between use as affirmative evidence and use for impeachment or between civil and criminal cases for either purpose, is shown by the fact that Fross, an affirmative-evidence civil case, and Nelson, an impeachment civil case, were cited to justify the holding in an impeachment criminal case. I suggest, therefore, that the shot that killed Kynette also brought about the demise of the civil cases.

4. The only other case permitting the inference to be drawn that is cited in Memorandum 83(1960) is Keller v. Key System, 129 Cal. App.2d 593 -- in which the discussion of self-incrimination was actually dictum because the witnesses' prior refusal to answer the questions of an investigating policeman had not been grounded on the privilege but upon his employer's instruction to give no more information. In any event, the case was expressly disapproved in Snyder. [50 Cal.2d at 197]

Subject to the provisions of Article I of Amendments to the Constitution of the United States (as included in section 1 of Article XIV of said Amendments) and Article I, section 9, of the Constitution of the State of California, further deponent sayeth not.