File

CALIFORNIA LAW REVISION COMMISSION

File: URE--Privileges Article

1/21/63

Memorandum 63-4

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 23-25)

Since the decision to reconsider all the rules on the merits, Rules 23-25 again have been approved by the Commission. The question of permissible comment on the exercise of these privileges and the question of permissible inferences to be drawn from their exercise were deferred for consideration in connection with Rule 39.

At the September 1961 meeting the Commission tentatively approved subdivision (6) of Rule 25 as a substitute for subdivisions (e) and (f) of Rule 25 as proposed in the URE. Subdivision (6) was substituted because of the probable unconstitutionality of the parts of subdivisions (e) and (f) which would compel testimony. The approval of subdivision (6) was subject to further staff research on the extent to which a court can compel testimony and the production of certain records despite a claim of privilege.

In this connection, read the portion of the study relating to the exception in Rule 25(e) that begins on page 31 and the portion of the study relating to the exception in Rule 25(f) that begins on page 34. It seems apparent from

the cases that a person has no privilege in regard to records which the state has required him to maintain and which he has maintained pursuant to such requirement. Thus, in Shapiro v. United States, 335 U.S. 1 (1948), the U.S. Supreme Court considered the extent of an immunity from prosecution which was granted so that evidence could be obtained which otherwise would be privileged. Shapiro was required to, and did, produce certain records which he was required to maintain in connection with OPA regulations. He was prosecuted on the basis of information revealed by the records. He claimed immunity because the records were privileged. The Supreme Court, however, held that the records were not privileged; hence, Shapiro acquired no immunity when he was required to produce them. At page 32 of the study other similar illustrations of this principle are given. The limits of the principle may be somewhat fuzzy. Justice Jackson, dissenting from the decision in the Shapiro case, questioned how far the doctrine might be pushed and stated: "It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today . . . invites and facilitates that eventuality." (335 U.S. at 71.) Nonetheless, the principle seems well established. The dissenting justices in the Shapiro case are all now gone from the court-- Justices Jackson, Murphy, Rutledge and Frankfurter.

It also seems well established that the legislature may validly require persons to make reports, either oral or written, concerning activities which may or may not incriminate them, and may punish them for failure to make such reports even though the failure is based upon the claim of privilege under the fifth amendment. This is not to say, however, that the fifth amendment or any other privilege against self-incrimination does not apply. The person still has the privilege but he may nonetheless be punished for failing to obey the law requiring the report. The rule is set forth by the California Supreme Court in Steinmetz v. Cal. State Board of Education, 44 Cal.2d p. 16(1955). That case involved Government Code Section 1028.1 which requires all public employees, when ordered to do so, to appear before various governmental bodies and to answer under oath questions relating to membership in subversive organizations and advocacy of the overthrow of the government of the United States or of any State. Violation of Government Code Section 1028.1 is declared to be insubordination and requires the dismissal of the employee. Chief Justice Gibson said: "[A] person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure under some circumstances, may amount to self-incrimination. [Citations omitted] A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but

he may be required to choose between disclosing information and losing his employment." In People v. Diller, 24 Cal. App. 799 (1914), and in People v. Fodera, 33 Cal. App. 8 (1917), it was held that the state may make the failure to stop after an automobile accident and to give certain information to others involved in the accident a crime notwithstanding the fact that in some cases a person might not want to disclose such information because it might tend to incriminate him. To be contrasted with this type of report is the type of report which was required by the Los Angeles County ordinance reviewed in People v. McCormick, 102 Cal. App.2d Supp. 954 (1951). That was a Communist registration ordinance that was held unconstitutional. There, the required report would necessarily tend to incriminate the person required to make the report and the court held that the County of Los Angeles could not constitutionally require such reports to be made.

The vice apparent in the original subdivisions (e) and (f) of URE Rule 25 is that they apparently provide that there is no privilege so far as information required to be reported or recorded is concerned, whether or not such information has actually been recorded or reported. Hence, oral testimony concerning such matters can be compelled notwithstanding a claim of privilege. The subdivision substituted by the Commission seems less objectionable since it applies only to the records actually kept pursuant to

a legal requirement. These have been held to be non-privileged. Deleting the URE subdivisions, however, will not change the rule of the Steinmetz and Diller cases. The legislature may still require reports that may or may not incriminate persons and may punish for failure to give the reports. But the privilege will nonetheless still exist.

Respectfully submitted,

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