

Memorandum No. 63-11

Subject: Study No. 34(L) - Uniform Rules of Evidence
(Rule 37--Waiver of Privilege)

This rule is discussed at pages 138 to 144 of the Study. The comments of the Northern Section of the State Bar Committee are attached hereto as Exhibit I (pink pages).

The Northern Section of the State Bar Committee has substantially disapproved of the Commission's revision of Rule 37. The section would revise the rule to read as follows:

RULE 37 WAIVER OF PRIVILEGE

Subject to Rule 38 a person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter under Rules 26-36, inclusive, waives his privilege with respect to that matter if the judge finds that he or any other person, while the holder of the privilege, has, without coercion and with the knowledge of his privilege, made a disclosure of any part of the matter or consented to such a disclosure made by anyone.

This revision seems to raise the following issues:

1. Is it necessary or desirable to include a separate sentence spelling out how consent to disclosure may be given?
2. Is it desirable to eliminate the words "without coercion and with the knowledge of his privilege"?
3. Is subdivision (2) necessary or desirable? Does it express a rule which would be applied anyway under the URE Rule.

Comment: The analysis of the State Bar Committee appears

unsound. The results specified in subdivision (2) would not flow from URE Rule 37 because it says, "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 . . . any other person while the holder of the privilege has . . . made disclosure of any part of the matter or consented to such a disclosure made by anyone." This language seems to say that a disclosure by any holder waives the privilege. It is difficult to see how the Section concluded that "the rule would follow without these additions."

3. Should Rules 31-36, inclusive, be excluded from the operation of Rule 37?

Comment: Each separate privilege expressed in Rules 31-36 should be considered individually in connection with this problem. See the discussion on pages 76, 77 and 78 of the Revised Rules--sent to you with Memorandum 63-1.

The Commission will note that New Jersey enacted a provision in its Rule 37 very similar to subdivision (3) of Revised Rule 37.

Respectfully submitted,

Joseph B. Harvey,
Assistant Executive Secretary

MINUTES OF MEETING
OF
NORTHERN SECTION OF
COMMITTEE TO CONSIDER
UNIFORM RULES OF EVIDENCE

The Northern Section of the Committee met at the office of Heller, Ehrman, White & McAuliffe on Tuesday, April 17, 1962, at 4:30 P.M.

There were present the following:

Messrs. Bates, Erskine, Liebermann, Pattee and Baker.

There were absent the following:

Messrs. Lasky and Martin.

Mr. Baker reported on Rule 37 which provides for waiver of the privileges under certain conditions. Subdivision (a) of this rule provides that the privilege is waived if the holder contracts with anyone not [?] to waive the privilege. So far as the privilege against self-incrimination is concerned this may be unconstitutional under Article I, Section 13 of the State Constitution. Attention was called to the fact that the Law Revision Commission in its revision of this rule has eliminated subdivision (a) as applied to all privileges. The members of the Committee present were of the view that no third party should be enabled to take advantage of an unexecuted contract to waive the privilege. The action of the Law Revision Commission in eliminating subdivision (a) was therefore approved. Mr. Bates, however, expressed the view that perhaps the rule should be

revised in order to make certain that a contract to waive the privilege was valid as between the parties to the contract. After consideration the Committee was of the view that this would be unnecessary.

Mr. Baker then called attention to the fact that the Law Revision Commission has eliminated application of Rule 37 to the privilege against self-incrimination by specifically limiting the rule to the privileges under Rules 26-30. So far as subdivision (b) of Rule 37 is concerned with respect to the self-incrimination privilege it appears to be the weight of authority and the rule in California that testimony willingly given in one prior proceeding does not operate to waive the privilege at the time of the trial. Whether this is based upon the Constitution is not clear. Chadbourn thinks that it might be. Based upon this the Committee agreed with the action of the Law Revision Commission in eliminating the self-incrimination privilege from the operation of Rule 37.

The next subject of discussion was subdivision (b) of Rule 37 and the Committee's attention was called to the fact that the Law Revision Commission has broken this subdivision down into two separate subdivisions, one dealing with disclosure and one dealing with consent to disclosure. The subdivision dealing with disclosure specifies disclosure in actions or proceedings or otherwise. The subdivision dealing with consent specifies how consent may be given. It was further noted that the Law Revision Commission's revision would eliminate the words "without coercion and with the knowledge of his privilege."

The Committee concluded that this language should be retained and that in any event the proposed revision of the Law Revision Commission added little if anything to the original URE rule. The Committee therefore voted to adopt subdivision (b) of the URE rule as originally drafted.

Mr. Baker then called the attention of the Committee to the fact that the Law Revision Commission has added three new proposed sections to the rule which in effect would preserve: (1) the right of one spouse to claim the privilege where the other spouse has waived it; (2) the right of one client to claim the privilege where another client of a lawyer retained in common by both has waived the privilege; and (3) the right of one guardian to claim the privilege where another guardian has waived it. The soundness of the latter provision seemed most dubious in view of the fact that the guardians in the end only represent one person. With respect to the other additions it was felt that the rule would follow without these additions. The Committee felt that every possible situation which may arise cannot be covered in one set of rules and that it is not proper to guess at every such possible situation. Accordingly the Committee disapproved the addition of these three subdivisions. It was then noted that the Commission would eliminate application of Rule 37 to Rules 31-36, inclusive, on the ground that Rule 37 has no application to the privileges provided in Rules 31-36 since each of these rules specifies when the privilege is available and when it is not. The Committee could find nothing in

Rules 31-36 which had anything to do with waiver and therefore found the reasoning of the Commission difficult to follow with the result that the Committee disapproved the elimination of the application of Rule 37 to Rules 31-36. The result of the foregoing is that the Committee would approve Rule 37 in the following form:

"Subject to Rule 38 a person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter under Rules 26-36, inclusive, waives his privilege with respect to that matter if the judge finds that he or any other person, while the holder of the privilege, has, without coercion and with the knowledge of his privilege, made a disclosure of any part of the matter or consented to such a disclosure made by anyone."

Whereupon the meeting adjourned.

LAWRENCE C. BAKER
Chairman of the Northern Section