6/11/63

Memorandum No. 63-12 First Supplement

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

Memorandum No. 63-12 suggests that the existing wording of subdivision (3) of Rule 39 (referred to in 63-12 as subdivision (4)--the rule has been renumbered since preparation of the memorandum), is too broad in that it permits inferences to be drawn from the exercise of the privilege against self-incrimination in civil cases.

This supplement is presented to suggest that the language of subdivision (3) be modified to read:

(3) In a civil action or proceeding, the failure of a party to explain or to deny by his testimony any evidence or facts in the case against him on the ground that such testimony would tend to incriminate him may be commented upon by the court and by counsel and may be considered by the court or the jury.

The foregoing draft is intended to avoid the problems pointed out in Memo 63-12 in connection with the existing draft. The above language is drawn from the Constitution itself; however, the Constitution does not have the qualifying language "on the ground that such testimony would tend to incriminate him." The language clearly states that it is the party's failure to explain or deny the evidence against him, not his exercise of the privilege, that may be commented upon and considered. Unfavorable inferences, if any, may be drawn only from the evidence against the party--not from the exercise of the privilege.

This proposed draft will repeal, in effect, Nelson v. Southern Pacific Company, 8 Cal.2d 648 (1937), which held that a prior invocation of the

privilege could be shown for impeachment purposes. The draft of subdivision (3) now appearing in Rule 39 retains the Nelson rule. But, as the discussion in Memo 63-12 indicates, the case seems out of harmony with the Supreme Court's most recent expositions of the meaning of Article I, Section 13 and may no longer declare the law anyway.

Respectfully submitted,

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