

Current Memoranda

Memorandum No. 63-21

3/11/63

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

Subdivision (6) of Rule 25 has been revised to reflect the action of the Commission at the February meeting. The pages reflecting the changes are being sent to you with this memorandum. They are page 6 as revised 3/11/63 and page 11 as revised 3/11/63. The language of new subdivision (6) appears on revised page 6. The explanation for the revision appears on page 11. Please review the suggested language and the reasons given for the revision so that you may revise them, if necessary, and approve them.

The new language of subdivision (6) is intended to express the precise holding of the Shapiro case and follows language that was suggested by the Commission as a guide to the staff at the February meeting. The exception now seems somewhat anomalous. Apparently the privilege against self-incrimination will protect private records in all proceedings except where the government is seeking the records for the specific purpose of incrimination. It is difficult to understand why the "self-incrimination" privilege should protect these records in all situations except the one in which the self-incrimination privilege would seem to be most pertinent. It would seem that if the self-incrimination privilege does not protect the documents when they are sought for incrimination purposes, that privilege would not protect them anywhere. The exception seems to say that the privilege against

self-incrimination will not protect the documents when they are sought for the purpose of incrimination but it will protect the documents when they are sought for some other purpose.

The Commission wanted the exception stated in subdivision (6) worded as it is so that private records would not be subject to exposure to other private persons merely because some governmental regulation required the record to be kept. The self-incrimination privilege may be an inadequate tool to protect private records from such exposure. There may be many reasons other than the possibility of incrimination which would cause a person to resist exposure of his records to other individuals. The trade secrets privilege in Rule 32 is designed to provide such protection. There are statutory privileges--such as the privilege for copies of tax returns, the privilege for certain vehicle reports, etc.--which serve the same function. Instead of designing the self-incrimination privilege to perform a function it is not designed to perform, the Commission might wish to broaden the trade secrets privilege or to draft a new privilege designed to protect the privacy of required records as against exposure to anybody except for the purpose for which the records are required to be kept.

For example, the California case of Paladini v. Superior Court, 178 Cal. 369 (1918), involved a fishing licensee whose records were sought by the State Market Director. Paladini asserted the privilege against self-incrimination because he said that the records might be used as a basis for revoking his fishing license. Apparently, he was unable to point out any way in which the records might incriminate him, so he asserted that revocation of his license should be considered

as a criminal punishment. The Supreme Court of California held that Paladini could not assert the privilege against self-incrimination a license revocation proceeding is not a criminal prosecution. As there was no other possibility of prosecution on the basis of the records, Paladini had no privilege against self-incrimination to protect his records. Yet, if required records deserve protection against third parties not concerned with the enforcement of the law requiring the records to be kept, Paladini's records would seem to be as deserving of protection as are anyone else's. Therefore, it is suggested that subdivision (6) be ended after the words "to be open to inspection" and that, if you wish to protect required records from other types of disclosure, the following rule be added somewhere in the privileges article:

The owner of any record required by law to be kept and to be open to inspection for the purpose of aiding or facilitating the supervision or regulation by a public entity of a business, calling or profession has a privilege, which may be claimed by him or his agent or employee, to refuse to obey an order made by a court to produce such a record for use as evidence or otherwise unless such order is made in an action or proceeding brought in aid of such supervision or regulation.

Such a rule would protect corporate records required by law to be kept as well as privately owned records. If reliance is placed on the self-incrimination privilege only, corporate records cannot be protected because corporations do not have a privilege against self-incrimination.

Respectfully submitted,

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