

7/15/63

Memorandum 63-34

Subject: Study No. 34(L) - Uniform Rules of Evidence (Privileges)
Rule 8

Rule 8 deals generally with preliminary determinations by the judge. In this regard, it deals with the preliminary determinations he must make in regard to the existence of privileges. Therefore, before consideration of the privileges article is completed, it is desirable to consider Rule 8 insofar as it relates to the subject of privileges. Attached are three exhibits:

Exhibit I (Rule 8)

Exhibit II (Rule 37.5)

Exhibit III (Rule 37.7)

Exhibit I contains Rule 8 as revised to include a provision relating to privileges. Exhibit II contains a revision of proposed Rule 37.5 which was offered for the Commission's consideration by Professor McDonough at the April meeting. Exhibit III contains Rule 37.7, which the staff recommends in the event Rule 37.5 is approved.

Rule 8 in its entirety will not be considered at this time. It will be considered only to the extent that it deals with privileges.

Revised Rules 26, 27, 27.5 and 28 all contain an exception for certain communications relating to crimes and either torts generally or frauds. Each rule provides that the exception applies "if the judge finds from evidence apart from the communication itself that there is reasonable ground to believe" the communication was made for the proscribed purpose.

No other provision in the privileges article requires the judge to make the necessary determination "from evidence apart from the communication itself." It is difficult to understand, therefore, why the requirement is stated explicitly in this provision. The lack of an explanation is apparent from the comment to Revised Rule 26 on page 32. After stating the provision's requirement, the comment says:

Actually, he[the judge] must make all rulings on the applicability of the privilege or the exceptions thereto on the basis of evidence apart from the communication itself. Under either the URE or existing law, the judge may not compel revelation of the communication asserted to be privileged in order to determine whether or not it is privileged, for such a coerced disclosure would itself violate the privilege. Nonetheless, it seems desirable to emphasize the requirement in connection with this paragraph.

The comment notwithstanding, it seems quite undesirable to emphasize the requirement in connection with this paragraph, for the statement of the requirement here creates uncertainty as to the requirement generally.

The staff suggests, therefore, that the words "judge finds from evidence apart from the communication itself" be deleted. The policy involved can be expressed by an amendment to Rule 8, adding the following paragraph:

The judge may not require disclosure of information claimed to be subject to a privilege in order to determine whether or not such information is privileged.

Exhibit I, attached, contains Rule 8 as revised to include this provision.

Commissioner McDonough has raised the question whether the rule forbidding disclosure to the judge is desirable as a policy matter. At the April meeting, he submitted a draft rule designed to permit the judge to inquire into the nature of the privileged information. His draft has been modified to a certain extent by the staff and is attached as

Exhibit II. The proposed rule is numbered 37.5 because it relates only to privileges and, hence, should appear in the privileges article.

The minutes say in regard to this proposal:

The reason for the proposal is that, under existing law, the judge is virtually forced to rely upon the witness's claim of privilege alone. The judge can ask questions skirting around the edge of the matter in order to determine whether the claim is bona fide or not, but in many cases he cannot know for sure because he cannot get to the matter itself until he has overruled the claim of privilege. By that time, of course, it is too late if he is wrong. Under existing procedure it is extremely difficult for the judge to perform his duty with any degree of accuracy in regard to those privileges where he is supposed to weigh the necessity for secrecy against the need for information. Then, too, since the judge is almost forced to rely upon the claim of privilege, fraudulent claims of the privilege--that is, claims of privilege where no privilege exists or where an exception to the privilege exists--frequently must be upheld because there is no practical way to attack them.

If the policy is approved, should it be limited to the communications privileges?

If Rule 37.5 is approved, the staff recommends that Rule 37.7 (Exhibit III) be approved to cover the problem in nonjudicial proceedings.

Inasmuch as Rule 8 states the functions of the judge, the staff also recommends that the phrase "if the judge finds", which appears throughout the privileges article, be shortened to "if".

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

RULE 8. PRELIMINARY INQUIRY BY JUDGE

When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

The judge may not require disclosure of information claimed to be subject to a privilege in order to determine whether or not such information is privileged.

EXHIBIT II

RULE 37.5 RULING UPON PRIVILEGED COMMUNICATIONS

Whenever a privilege is claimed to refuse to disclose, or to prevent another from disclosing, a communication, the judge shall first attempt to determine whether or not the communication is subject to the claim of privilege as provided in Rule 8 without requiring disclosure of the communication itself. If the judge is unable to decide the question without requiring disclosure of the communication itself, he may require the person from whom the disclosure is sought or the holder of the privilege, or both, to disclose the communication itself out of the presence and hearing of all persons except the holder of the privilege and such other persons as the holder is willing to have present. If the judge determines that the communication is subject to the claim of privilege, neither the judge nor any other person present may ever disclose, without the consent of the holder, what was disclosed in regard to the communication in the course of the proceedings in chambers. A person who makes a disclosure prohibited by this section is guilty of a misdemeanor. Neither a disclosure prohibited by this section nor other evidence obtained as a result of such disclosure is admissible in any action or proceeding.

EXHIBIT III

RULE 37.7. RULING UPON PRIVILEGED COMMUNICATIONS IN NONJUDICIAL PROCEEDINGS

If a privilege is claimed in a proceeding not conducted by a court, whether or not the information sought to be disclosed is subject to the claim of privilege shall be determined without requiring disclosure of the information claimed to be privileged.

No person shall be held in contempt for failure to disclose information claimed to be privileged unless a court has determined that the information sought to be disclosed is not subject to the claim of privilege. In a proceeding brought to compel a person to disclose information claimed to be privileged, or in a proceeding where a person is charged with contempt for failure to disclose information claimed to be privileged, the judge shall determine whether the information is subject to the claim of privilege in accordance with Rule 37.5.