May 14, 1958
(Revised 7/15/58)

SUMMARY OF ACTION TAKEN ON VARIOUS OF THE UNIFORM RULES OF EVIDENCE BY LAW REVISION COMMISSION AND NORTHERN AND SOUTHERN SECTIONS OF STATE BAR COMMITTEE TO STUDY UNIFORM RULES OF EVIDENCE.

Rule 8

1. As proposed:

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.

2. Action of Commission:

Not yet considered.

3. Action of Northern Section:

Has not yet considered Rule itself but approved Professor Chadbourn's proposal to add following at end of Rule: "In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege."

4. Action of Southern Section:

Not yet considered.

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Rule 19

1. As proposed:

Prerequisites of Knowledge and Experience. As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

2. Action of Commission:

Has not considered Rule as proposed. In connection with consideration of opening paragraph of Rule 63, proposed to add following paragraph to Rule 19:

As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

3. Action of State Bar Committee:

Did not consider Rule itself. Disapproved amendment proposed by Commission.

4. Action of Northern Section:

Approved first two sentences of Rule as proposed. Disapproved last two sentences.

5. Action of Southern Section:

Considered Rule as proposed preliminarily and referred to Messrs. Patton and Selvin for redraft.

Rule 20

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Evidence Generally Affecting Credibility. ~~Subject to Rules 21 and 22~~ Except as otherwise provided in Rules 21 and 22 or any other of these Rules, for the purpose of impairing or, when the credibility of the witness has been attacked, supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

3. Action Northern Section:

Found rule acceptable in principle except for inclusion of words "or supporting"; would limit supporting evidence to cases where credibility has been attacked. Referred Rule 20 to Mr. Baker to draft an amendment or a separate rule to cover admissibility of evidence to support the credibility of a witness.

4. Action Southern Section:

Not yet considered.

1. As proposed:

> Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

2. Action of Commission:

Discussed but final action not taken.

3. Action Northern Section:

Proposed following as substitute for first sentence:

> Evidence of the conviction of a witness of a misdemeanor, or of a felony not involving dishonesty or false statement, shall be inadmissible for the purpose of impairing his credibility.

Made several suggestions for changes in second sentence; referred to Mr. Baker to draft revision.

4. Action Southern Section:

Not yet considered.

1. As proposed:

Further Limitations on Admissibility of Evidence Affecting Credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a) by divided vote.

Concluded subdivision (b) unclear and referred to Mr. Baker to redraft for clarification.

Approved subdivision (c) with amendment to insert "reputation for" after "than".

Approved subdivision (d).

4. Action Southern Section:

Not yet considered.

Rule 45

1. As proposed:

> Discretion of Judge to Exclude Admissible Evidence. Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

2. Action of Commission::

> Approved insofar as applies to Rules 20 and 22.

3. Action of Northern Section:

> Not yet considered.

4. Action of Southern Section:

> Not yet considered.

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Rule 62

1. As proposed:

See "Action of Northern Section."

2. Action of Commission:

Not yet considered except that has approved subdivision (1).

3. Action of State Bar Committee:

a) Approved all but paragraph numbered (6) as proposed with modifications as shown:

Definitions. As used in Rule 63 and its exceptions and in Rules 64, 65 and 66 ~~the following rules~~,

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's own senses.

(4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(5) "State" includes the District of Columbia.

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant,

Rule 62 (cont.)

or (b) disqualified from testifying to the matter, or (c) dead or unable to be present to testify at the hearing because of ~~death or~~ then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the ~~place of~~ hearing ~~because~~ and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such proponent ~~party~~, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship, or expense~~, and that the probable importance of the testimony is such as to justify the expense of taking such deposition~~.

b) Decided that the paragraph of Rule 62 numbered (6) should be approved subject to such revision as may be necessary to conform it to final action taken on subdivisions (13) and (14) of Rule 63.

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Rule 63

1. As proposed:

Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

2. Action of Commission:

Approved but in connection therewith recommended following addition to Rule 19:

[Same as one set forth on page entitled "Rule 19"]

3. Action of State Bar Committee:

Approved.

Note: It was the view of the State Bar Committee that consideration should be given to the desirability of stating affirmatively at an appropriate point in the Rules (possibly in Rule 7) that the following kinds of evidence are not excluded by Rule 63:

1) Extrajudicial statements not offered to prove the truth of the matter stated.

2) Non-verbal conduct not intended by the actor as a substitute for words - i.e., as a communication.

Revision
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Subdivision (1), Rule 63

1. As proposed:

(1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

2. Action of Commission:

Disapproved; proposed substitute, to read:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further:

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
(b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or
(c) The statement concerns a matter as to which the witness has no present recollection.

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have

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Subdivision (1), Rule 63 (cont.)

been admissible if made by him while testifying and provided further:

(a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or

(b) The statement is offered following an attempt to impair his testimony as being recently fabricated or when his testimony has been impeached by evidence of a prior inconsistent statement and the statement is one made prior to the alleged fabrication or prior inconsistent statement and is consistent with his testimony at the hearing, or

(c) The statement concerns a matter as to which the witness has no present recollection and is a writing which (i) was made by the witness himself or under his direction, (ii) was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory, and (iii) is verified by the witness as having been true and correct when made.

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Subdivision (2), Rule 63

1. As proposed:

(2) Affidavits. Affidavits to the extent admissible by the statutes of this State;

2. Action of Commission:

Proposed following substitute:

(2) To the extent otherwise admissible by the statutes of this State:
(a) Affidavits.
(b) Depositions.
(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

3. Action of State Bar Committee:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed following new subdivision 2.1:

(2.1) To the extent admissible by the statutes of this State:

(a) Depositions taken in the action in which they are offered.

(b) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

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Subdivision (3), Rule 63

1. As proposed:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

2. Action of Commission:

Proposed following as substitute (part of substance having been incorporated in Commission substitute for Subdivision (2):

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

(a) The testimony is offered against a party who offered it in his own behalf on the former occasion or against the successor in interest of such party, or

(b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

(c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(3) Depositions and Prior Testimony in Another Proceeding. ~~If the judge finds that the declarant is unavailable as a witness at the hearing and~~ Subject to the same limitations and objections as though the declarant were testifying in person, testimony given under oath or affirmation as a witness in another ~~action~~ proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or in a deposition taken in compliance with law in ~~another action~~ such a proceeding, ~~is admissible in the present action~~ provided the judge finds that the declarant is unavailable as a witness at the hearing, and when:

~~(a)~~ (i) ~~The~~ Such testimony is offered against a party who offered it in evidence on his own behalf ~~on the former occasion~~ in the other proceeding or against the successor in interest of such party, or

~~(b)~~ (ii) In a civil action, the issue is such that the adverse party ~~on the former occasion~~ in the other proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the ~~action~~ proceeding in which the testimony is offered, or

~~(c)~~ (iii) In a criminal ~~action~~ proceeding the present defendant was a party to the ~~prior action~~ other proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the ~~action~~ proceeding in which the testimony is offered; provided, however, that the testimony given at a preliminary hearing in the ~~prior action~~ other proceeding is not admissible.

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Subdivision (4), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modifications as shown:

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the judge finds that the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

3. Action of State Bar Committee:

Proposed following as substitute:

(4) Spontaneous Statements. If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved, a statement (a) which the judge finds was made spontaneously and while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains, and was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

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Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery:

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(5) Dying Declarations. A statement by a decedent ~~person unavailable as a witness because of his death~~ if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, ~~and that it was made~~ voluntarily and in good faith, and ~~while the declarant was conscious of his impending death and believed~~ in the belief that there was no hope of his recovery.

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Subdivision (6) , Rule 63

1. As proposed:

See "Action of Northern Section."

2. Action of Commission:

Disapproved; substituted amendment of subdivision (7).

3. Action of State Bar Committee:

Approved as proposed with modification as shown:

(6) Confessions. In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same, or (c) under such other circumstances that the statement was not freely and voluntarily made;

Note: At its meeting of July 11 and 12 in San Francisco the State Bar Committee did not discuss specifically whether the word "reasonably" should be deleted from clause (b)

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Subdivision (7), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

(7) Confessions and Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement; provided, however, that if the statement was made by the defendant in a criminal proceeding it shall not be admitted if the judge finds, pursuant to the procedures set forth in Rule 8, that the statement was made under circumstances likely to cause the defendant to make a false statement.

3. Action of State Bar Committee:

Rejected modification proposed by Commission and approved as proposed in Uniform Rules of Evidence with modifications as shown:

(7) Admissions by Parties. Except as provided in exception (6), as against himself a statement by a person who is a party to the action in his individual or representative capacity ~~and if the latter, who was acting in such representative capacity in making the statement.~~

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Subdivision (8), Rule 63

1. As proposed:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with insertion of "matter" after "subject" in (a).

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Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

3. Action of State Bar Committee:

Approved (a) and (c).

Disapproved (b) and proposed, in lieu thereof, the following as subdivision 9.1:

(9.1) Admissions of Co-conspirators. After proof by independent evidence of the existence of the conspiracy and that declarant and the party against whom the statement is offered were both then parties to the conspiracy, against his co-conspirator, the statement of a conspirator in furtherance of the common object of the conspiracy and prior to its termination.

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Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(10) Declarations Against Interest. ~~Subject to the limitations of Exception (6) a statement made by a~~ Except as against the accused in a criminal proceeding, if the declarant ~~who~~ is unavailable as a witness ~~which~~ and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the ~~assertion~~ statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another ~~or created such risk of making him an object of hatred, ridicule or social disapproval in the community~~ that a reasonable man in his position would not have made the statement unless he believed it to be true.

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Subdivision (11), Rule 63

1. As proposed:

(11) Voter's Statements. A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

2. Action of Commission:

Disapproved.

3. Action of State Bar Committee:

Disapproved.

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Subdivision (12), Rule 63

1. As proposed:

(12) Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view of treatment, and relevant to an issue of declarant's bodily condition;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved; then determined to reconsider insofar as precludes declarations relating to declarant's donative intent at a prior time (cf. Williams v. Kidd 170 Cal. 631). Referred to Messrs. Baker, Kaus, Kadison and Selvin for further study and report.

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Subdivision (13), Rule 63

1. As proposed:

(13) Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved; would substitute an exception embodying the present California Business Records as Evidence Act, subject to such textual modification as may be necessary to conform to the Uniform Rules of Evidence.

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Subdivision (14), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

(14) Absence of Entry in Business Records. Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

3. Action of State Bar Committee:

Approved as modified by Commission subject to such textual modification as may be necessary to conform to subdivision (13) as eventually approved.

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Subdivision (15), Rule 63

1. As proposed:

(15) Reports and Findings of Public Officials. Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions 15 and 16 which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

Disapproved; will consider Commission redraft.

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Subdivision (16), Rule 63

1. As proposed:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions (15) and (16) which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

No final action taken; will consider new subdivision to be prepared by Commission.

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Subdivision (17), Rule 63

1. As proposed:

(17) Content of Official Record. Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved on understanding that Rule 68 will be amended as proposed by Professor Chadbourn (Re latter, believes amendment to Rule 68(d) should read "and is not an office of the United States Government.")

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Subdivision (18), Rule 63

1. As proposed:

(18) Certificate of Marriage. Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved in substance; suggests form be changed as follows:

(18) Certificate of Marriage. Subject to Rule 64 a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies, and
(b) the certificate was issued at that time or within a reasonable time thereafter.

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Subdivision (19), Rule 63

1. As proposed:

> (19) Records of Documents Affecting an Interest in Property. Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

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Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

(20) Judgment of Previous Conviction. Evidence of a final judgment adjudging a person guilty of a felony to prove, against such person, any fact essential to sustain the judgment;

3. Action of State Bar Committee:

Disapproved.

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Subdivision (21), Rule 63

1. As proposed:

(21) Judgment against Persons Entitled to Indemnity. To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved in present form; Messrs. Hayes and Patton to redraft for Committee's further consideration.

(Revised 7/15/58)

Subdivision (22), Rule 63

1. As proposed:

(22) Judgment Determining Public Interest in Land. To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

2. Action of Commission:

Approved

3. Action of State Bar Committee:

Approved.

(Revised 7/15/58)

Subdivision (23), Rule 63

1. As proposed:

(23) Statement Concerning One's Own Family History. A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved

(Revised 7/15/58)

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

2. Action of Commission:

Approved with following punctuation changes in clause (a) to make clear that clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage: (1) inserted comma after "marriage"; (2) deleted comma after "declared".

3. Action of State Bar Committee:

Approved as proposed to be punctuated by Commission; suggestion made that might be even clearer if redrafted.

Note: The following is a Law Revision Commission Staff proposal for consideration:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and

(a) finds that the declarant was related to the other by blood or marriage or

(b) finds that he the declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family ~~and (b) finds that the declarant is unavailable as a witness;~~

(Revised 7/15/58)

Subdivision (25), Rule 63

1. As proposed:

(25) Statement Concerning Family History Based on Statement of Another Declarant. A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved.

Revised
July 15, 1958

Subdivision (26), Rule 63

1. As proposed:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

Such reputation may be proved only by a witness testifying to his knowledge of such reputation or by entries in family bibles or other family books or charts, by engravings on rings, by family portraits, by engravings on urns, crypts and tombstones, and the like.

(Revised 7/15/58)

Subdivision (27), Rule 63

1. As proposed:

(27) Reputation--Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(27) Reputation -- Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the date or fact of birth, marriage, divorce or death, ~~legitimacy, relationship by blood or marriage, or race-ancestry~~ of a person resident in the community at the time of the reputation; ~~or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;~~

(Revised 7/15/58)

Subdivision (28), Rule 63

1. As proposed:

(28) Reputation as to Character. If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

2. Action of Commission:

Approved with addition of "a person's character or" after "If".

3. Action of State Bar Committee:

Approved as amended by Commission and with further amendment to add "general" before "reputation."

(Revised 7/15/58)

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with amendment as shown:

(29) Recitals in Documents Affecting Property. Evidence of a statement relevant to a material matter: (a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or (b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness;

3. Action of State Bar Committee:

Approved as proposed to be amended by Commission with further modification as shown:

(29) Recitals in Writings ~~Documents Affecting Property~~. Subject to Rule 64, evidence of a statement relevant to a material matter (a) contained in a deed of conveyance or a will or other ~~document~~ writing purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement or (b) contained in a ~~document or~~ writing more than thirty years old when the statement has been since generally acted upon as true by persons having an interest in the matter, provided the writer could have been properly allowed to make such statement as a witness.

Note: Presumably the proviso modifies only clause (b); would this be clearer if clauses (a) and (b) were made subparagraphs?

1. As proposed:

(30) Commercial Lists and the Like. Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

2. Action of Commission:

3. Action of State Bar Committee:

Disapproved as proposed; referred subject matter of subdivisions (30) and (37) to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report. Suggested study should consider, inter alia, whether any subdivision proposed should be made subject to Rule 64.

(Revised 7/15/58)

Subdivision (31), Rule 63

1. As proposed:

> (31) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

2. Action of Commission:

Discussed but did not take final action.

3. Action of State Bar Committee:

See report on subdivision (30)

1. As proposed:

Discretion of Judge under Exceptions (15), (16), (17), (18) and (19) to Exclude Evidence. Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

2. Action of Commission:

Not yet considered.

3. Action of State Bar Committee:

Approved with amendment to refer to subdivision (29).

Rule 65 (Revised 7/15/58)

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Credibility of Declarant. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

3. Action of ~~State Bar~~ Committee:

Did not take final action; referred to Messrs. Baker and Patton to consider whether Rule should be modified as proposed in Patton memorandum on Subdivision (10) of Rule 63, dated June 25, 1958.

(Revised 7/15/58)

Rule 66

1. As proposed:

> Multiple Hearsay. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

2. Action of Commission:

> Approved.

3. Action of State Bar Committee:

> Approved.

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

RULE 68. Authentication of Copies of Records. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state or is an office of the United States government whether within or without this state, and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, or is not an office of the United States government, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular

agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

3. Action Northern Section:

Concurred in Commission action except would make first word in underlined part of (d) "and" instead of "or".

4. Action Southern Section:

Not yet considered.