Date of Meeting: June 13-14, 1958

Date of Memo: June 6, 1958

Memorandum No. 7

Subject: Study # 34(L) Uniform Rules of Evidence

Attached is a copy of Mr. Gustafson's Memorandum on subdivision 6 of Rule 63.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Date of Meeting: June 13-14, 1958

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Memorandum submitted by Mr. Roy A. Gustafson

Subject: Rule 63(6) of the Uniform Rules of Evidence.

> Rule 63. 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:...
>
> (6) 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;...

Professor Chadbourn recommends adoption of the Rule, but suggests that the word "reasonably" in the last phrase be stricken.

I propose an entirely different solution. I would omit (6) entirely and incorporate such of its features as are desirable as a proviso to (7). The latter subdivision would then read as follows:

> (7) 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;

Rule 63 bars all hearsay except as permitted by the subdivisions of that Rule. It had been my understanding in going through these Rules that evidence admissible under any subdivision could come in notwithstanding that it does not meet the requirements of some other subdivision. If this is true, (6) serves no purpose whatever. Any statement admissible under (6) is necessarily an admission of a party admissible under (7). (7) has no limitations excluding admissions "under compulsion" or "involuntarily" made. That my understanding is correct seems to be borne out by (10) wherein it is provided that declarations against interest are admissible "subject to the limitations of exceptions (6).

Professor Chadbourn points out that (7) is codified in California by C.C.P. § 1870(2). He further points out that C.C.P. § 1870(2) "is a general statutory declaration that admissions are admissible. The special rules developed herein respecting confessions and mere admissions are judicially-created exceptions to or qualifications of Section 1870(2)." We are dealing then in two separate subdivisions with exactly the same subject matter. I think this is wholly unnecessary and that it would be in the interests of simplification and clarity to deal with the subject matter in one subdivision of Rule 63.

I have several objections to (6), but before stating them I should like to state the matters with which I am in agreement with (6) and Professor Chadbourn.

I agree with Professor Chadbourn that (6) has no effect on the corpus delicti doctrine requiring defendant's admissions and confessions to be corroborated by independent evidence. Neither does my proposal.

I agree with (6) and Professor Chadbourn that there should be no "distinction between involuntary confessions and involuntary admissions short of confessions so far as screening for admissibility is concerned." Elsewhere I have noted one situation in particular where this distinction now causes confusion. (Gustafson, Have We Created a Paradise for Criminals? 30 So. Calif. L. Rev. 1, 29 [1956]) My proposal likewise eliminates the distinction between a confession and an admission.

I agree with Rule 8, taken together with Rule 63(6), which makes admissibility of evidence solely a function of the trial judge and not the jury. Professor Chadbourn's views coincide with mine as elsewhere expressed. (Gustafson, supra at 7.) My proposed addition to (7) is in accord. [It should here be pointed out that Rule 8 should be amended. The word "confession" should be eliminated and the words "statement of a defendant in a criminal case" or some such language should be substituted.]

I object to (6) and to Professor Chadbourn's approval insofar as it attempts to "spell out" the reasons for excluding a defendant's statement.

(6) requires a showing that the defendant "was conscious and was capable of understanding what he said and did." Professor Chadbourn says that "California is in accord." There is no need to codify this particular Rule and perhaps by so doing exclude some other instance where the statement should be equally inadmissible.

(6) requires that the statement be excluded if the defendant was "induced to make the statement under compulsion". Professor Chadbourn admits that this new phrase is "a flexible concept". He likens it, however, to the present California Rule requiring a "free and voluntary" confession. I think they are different concepts. It seems to me that (6) could be interpreted so as to preclude a statement by the defendant when he was a witness in a civil case or before the grand jury or before a coroner's inquest at a time when no criminal charges were pending against him. He may have been subpoenaed to appear in such a proceeding and in the course of being questioned, he may have made answers which would be relevant to the criminal proceeding later instituted. It is certainly arguable that he made those statements "under compulsion". I see no valid reason for injecting this possible confusion in the field of law.

(6) excludes a defendant's statement if he was "induced to make the statement...by infliction or threats of infliction of suffering upon him or another". Professor Chadbourn says that this "humane restriction is, of course, likewise applicable under California law."

(6) excludes a defendant's statement if the defendant was

"induced to make the statement...by prolonged interrogation under such circumstances as to render the statement involuntary." I object first of all to the use of the word "involuntary". A statement consists of words and it is impossible to force words from a person in the sense that a person can be physically forced, for example, to lie down. I think that a "coerced" statement is more likely what was intended and this is the word which has been used in more modern cases. More fundamental, I object to singling out "prolonged interrogation" as a ground for excluding statements. As Professor Chadbourn admits, California cases have emphasized the point that protracted questioning, in and of itself, is not alone ground for exclusion. While it is true that (6) bars prolonged interrogation only "under such circumstances as to render the statement involuntary", I am afraid that the emphasis will be on the prolonged interrogation. California courts recognize that "[q]uestioning serves a social purpose in solving crime." (People v. Thompson 133 Cal. App.2d 4 [1955].) The great Mr. Justice Jackson pointed out that decisions excluding statements obtained by prolonged questioning mean that "the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested." (Watts v. Indiana 338 U.S. 49 [1949].) He further states: "The suspect at first perhaps makes an effort to exculpate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood.... The duration of an interrogation may well depend on the temperament, shrewdness and

cunning of the accused and the competence of the examiner.... [I]f interrogation is permissible at all, there are sound reasons for prolonging it."

(6) excludes a defendant's statement if he was induced to make the statement "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 persor whom the accused reasonably believed to have the power or authority to execute the same." Again, this is present California law.

My principal objection to (6) is that except for the last ground of exclusion, the probable falsity of the statement is not a requisite for exclusion of the statement. This is a startling change from California law and is not noted by Professor Chadbourn in the text, but only in footnote 3. I think this is a wholly indefensible and unnecessary departure from present law.

I cling to the fast disappearing notion that the principal object of a trial is to ascertain the truth. Consequently, I object to the exclusion of truthful evidence unless there are strong policy reasons which demand that the evidence be excluded. With respect to statements of a defendant, the only strong policy reason for excluding them is if they were obtained unfairly. The United States Constitution requires exclusion in that situation. Rochin v. California 342 U.S. 165 (1951), says: "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are

inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." As Professor Paulsen says (The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 429 [1954]): "[A] conviction will be reversed when the confession was obtained by methods which themselves offend due process; here no inquiry into probable falsity is relevant." As I understand the Uniform Rules of Evidence, the drafters did not purport to express in the Rules themselves the various constitutional limitations to which the Rules are subject. The entire body of Rules must be read in the light that they are subject to existing constitutional requirements. Since no statement of the defendant obtained by a method which is constitutionally obnoxious may be admitted in any event, why try to spell out detailed situations in the Rules?

I believe that we should be attempting to state reasons, other than constitutional ones, for the exclusion of evidence. It thus seems to me that untrustworthiness of a statement by the defendant should be the only reason to exclude it. My proposal embodies that concept. The California law to date, I believe, excludes statements by defendants only when made under such circumstances that they are likely to be untrue. In fact, even a statement likely to be untrue will not be held to have been erroneously admitted if the truth of the statement is actually corroborated by other evidence. The supreme court in People v. Castello 194 Cal. 594 (1924), said that "where physical facts and circumstances...corroborate [involuntary]

confessions of guilt the reason of the rule which would otherwise exclude involuntary confessions to this extent ceases to exist." As late as People v. Burwell 44 Cal.2d 16 (1955), the supreme court of California was unaware that there is any other ground for excluding statements of a defendant: "The test in determining whether statements amounting to a confession may be properly admitted in evidence without a denial of fundamental rights appears, by the latest expression of the [United States] Supreme Court, to be one of trustworthiness."

I repeat that my proposal would exclude all untrustworthy statements without the vice of attempting to specify in detail the circumstances which render a statement untrustworthy and without the vice of excluding trustworthy statements obtained "by prolonged interrogation" or other means which do not "offend the community's sense of fair play and decency." Two Rules of exclusion (statements likely to be false because of the circumstances under which made and statements obtained by methods constitutionally obnoxious) are enough. The added hodgepodge in (6) does nothing but create confusion.

Dated: June 3, 1958

ROY A. GUSTAFSON