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Place of Meeting

State Bar Building
1230 West Third Street
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles June 20, 21 and 22, 1963

The meeting will start at 9:30 a.m. on June 20 and will end at 4:00 p.m. on June 22, 1963.

1. Minutes of April meeting (sent 5/8/63)

2. Fix dates of August and September meetings

3. Report on 1963 legislative program

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

Privileges Article

Materials in loose-leaf binder (you have this)
Tentative Recommendation on Privileges Article (enclosed)
Memorandum No. 63-29 (enclosed)
Memorandum No. 63-30 (enclosed)

Memorandum No. 63-7 (Rule 27.5) (Continued from last meeting)
Memorandum No. 63-8 (Rule 28)
Memorandum No. 63-9 (Rule 29-36)
Memorandum No. 63-25 (Rules 34 and 36)
Memorandum No. 63-10 (Rule 36.5)
Memorandum No. 63-11 (Rule 37)
Memorandum No. 63-12 (Rules 38-40)
xMemorandum No. 63-26 (Rule 40.)

Pamphlet of Special Commission on Insanity and Criminal Offenders (you have this)

Authentication and Content of Writings

Materials in loose-leaf binder (you have this)
Memorandum No. 63-20

File

MINUTES OF MEETING

OF

JUNE 20, 21 and 22, 1963

Los Angeles

The regular meeting of the Law Revision Commission was held in Los Angeles on June 20, 21 and 22, 1963.

Present: Herman F. Selvin, Chairman (June 21 and 22)
John R. McDonough, Jr., Vice Chairman
Joseph A. Ball
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.

Absent: Hon. James A. Cobey
Hon. Pearce Young
Angus C. Morrison, ex officio

Messrs. John H. DeMoully, Joseph B. Harvey (June 20 and 22), and Jon D. Smock of the Commission's staff were also present. Prof. James H. Chadbourn, the Commission's research consultant on the Uniform Rules of Evidence, was present on June 20, 1963.

Minutes of the April Meeting.

The minutes of the April meeting were approved.

Future meetings of the Commission.

Future meetings of the Commission have been scheduled as follows:

July 19-20, 1963	San Francisco
August 16-17, 1963	Los Angeles
September 23-24, 1963	San Francisco
October 18-19, 1963	Los Angeles

ADMINISTRATIVE MATTERS

Termination of research contracts.

The executive secretary reported that the authority to pay had expired on the Commission's contract with Professor Herbert L. Packer of the Stanford Law School for a study on habeas corpus proceedings and post conviction remedies and on the Commission's contract with Professor J. Keith Mann of the Stanford Law School for a study on the rights of a putative spouse. Both consultants would prefer not to go ahead with the studies. On motion of Commissioner Sato, seconded by Commissioner Edwards, the Commission approved the termination of both contracts and authorized the Chairman to execute the necessary agreements terminating both contracts and relieving both the Commission and the consultants of their obligations under the contracts.

The executive secretary also reported that authority to pay under two additional contracts will expire on June 30, 1963. The contracts involved are a contract with Professor Orrin Evans of the U.S.C. Law School for a study of the doctrine of mutuality of remedy in actions for specific performance and a contract with Professor Stephan J. Riesenfeld of Boalt Hall for a study relating to attachment, garnishment and execution. Neither study has been completed. The Commission's anticipated work load is so large that it is unlikely that any attention could be given to either study in the near future even if it were completed. The executive secretary was instructed to contact both Professor Evans and Professor Riesenfeld to determine how much work has been invested in the studies and what the attitude of each would be in regard to terminating the contract and continuing the study. Upon receiving the executive secretary's report on the attitude of each, the Commission will decide what to do in regard to terminating the contracts and continuing the studies.

1963 LEGISLATIVE PROGRAM

The executive secretary reported on the bills that were introduced on the recommendation of the Commission.

S.B. No. 71 relating to discovery in eminent domain proceedings passed the Senate but was rejected by the Assembly Judiciary Committee. The committee members believed that the bill was detrimental to property owners.

The sovereign immunity bills passed the Senate. As passed, the bills contained amendments to which the Commission objected. S.B. No. 42 was amended to create an immunity for injuries by or to inmates of prisons or mental hospitals, S.B. No. 43 was amended to permit a claim to be presented after the 100-day limit expired only if the entity was estopped to set up the claims statute, and S.B. No. 46 was amended to provide that entities are subject to ownership liability for motor vehicles only when the vehicle involved is owned for a proprietary, not a governmental, purpose. These amendments were deleted in the Assembly Judiciary Committee, but the amendments to S.B. No. 42 and S.B. No. 46 were again put into the bills in Assembly Ways and Means. S.B. No. 43 was left without the objectionable amendment, but the provision permitting late presentation of a claim where the failure to present the claim was due to mistake, inadvertence, surprise or excusable neglect was amended to provide that an entity may prevent late presentation if it shows that it would be "prejudiced." The amendment relieves the entity of the burden of showing that it would be "unduly prejudiced."

A question was raised whether the Commission should withdraw its recommendation from S.B. No. 46 because the amendment will codify the governmental-proprietary distinction as a basis for determining government's ownership liability for injuries caused by motor vehicles. During the discussion, Senator Cobey called on the telephone and indicated the bill could be killed. The Commission directed that the bill be dropped.

The Legislature created a joint legislative committee to study the revision of the Penal Code. The bill creating the committee indicates that the committee may call on the Law Revision Commission to do portions of the study. The committee was created to do the revision because some of those involved believe the Commission to be impractical and without public representation among its membership. No decisions have been made as yet on the extent to which the Commission should participate in the Penal Code revision program. The decision to create the joint legislative committee has, in effect, deferred the decision on the extent of the Law Revision Commission's participation.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (PRIVILEGES ARTICLE)

The Commission considered Memoranda 63-7, 63-8, 63-9, 63-10, 63-11, 63-12, 63-25, 63-29, and 63-30. The following actions were taken:

Tentative Recommendation

The Commission discussed the tentative recommendation prepared by the staff and individual commissioners submitted copies with suggested modifications to the staff. The Commission directed the staff to prepare a memorandum setting forth the procedure to be followed by the Commission in preparing its recommendations in regard to evidence for submission to the Legislature.

It was pointed out that the tentative recommendation in regard to hearsay has been distributed, but no comments have been received. A suggestion was made that letters should be sent to those from whom comments are desired requesting comments and setting a deadline for receipt of comments. The suggestion was made that local bar associations should be solicited for comments upon the recommendations. The staff was asked to prepare recommendations as to how widespread interest in and study of the Commission's recommendations may be obtained.

A suggestion was also made that the evidence recommendations be sent to legal newspapers for printing in the manner that the preliminary sovereign immunity recommendations were printed.

Rules 26, 27 and 27.5.

The Commission approved subdivision (4)(i) of Rule 27.5 which creates an exception for information the psychotherapist or patient is required by law to report.

The Commission considered language to extend the privilege to communications made in the presence of family members and other persons present because of their interest in and concern for the welfare of the patient. In Rule 27.5(1)(a), the words "other than the spouse, parent or child of the patient" were substituted for "other than those with an interest in the matter." Commissioner Stanton voted against the motion.

In Rule 26(1)(b), the words "with an interest in the matter" were stricken and the words "who are present to further the interest of the client in the consultation" were substituted for the stricken words. The change made in Rule 27.5(1)(a) was then reconsidered. A motion was then approved to conform Rules 27 and 27.5 to the change approved in Rule 26. Commissioners Stanton and Edwards voted against the motion.

The language proposed by the staff to carry out the Commision's decisions in regard to subdivision (4)(j) of Rule 27.5 was approved. The language proposed by the staff to carry out the Commission's policy decision in regard to subdivision (5) of Rule 27.5 was considered, and the subdivision was deleted from the rule. A similar change was made in Rule 27.

Subdivision (5) of Rule 26 was then considered. It was pointed out that the subdivision as drafted does not require that there be litigation between the joint clients. The staff was directed to revise the subdivision so that the joint client exception applies only in civil litigation between the joint clients or their successors.

Third-party therapist privileges.

The Commission disapproved the privileges that were created for third parties who communicate to physicians and psychotherapists in order that the physician or psychotherapist might treat a patient.

New rule--judge may allow privilege on own motion.

The Commission considered whether third persons present at a confidential communication should have a right to assert the privilege. The Commission instructed the staff to place in the URE at an appropriate place a provision indicating that the judge, on his own motion, may claim a privilege for an absent holder.

Rule 28.

The word "grounds" in the third line of subdivision (2)(a) was changed to "ground".

In subdivision (2)(b), the staff was asked to reconsider the necessity for "another or others" in view of the rule that the singular includes the plural.

Subdivision (2)(c) was revised to refer to "an action or proceeding brought by or on behalf of a spouse in which the spouse seeks to establish his competence."

It was pointed out that the words "from evidence apart from the communication itself" in subdivision (2)(a) state a procedural requirement that, under existing law, is applicable to all foundational findings that a judge must make in regard to privileges; hence, to make the procedural requirement explicit only in connection with this exception may be undesirable, for it implies the procedural requirement does not apply to other foundational

findings. Commissioner McDonough pointed out that Professor Chadbourn regards the requirement as unnecessary and undesirable and that the suggestion made at the last meeting requiring disclosure to the judge in camera for the purpose of foundational findings may be a desirable procedure. The entire problem, including the reference to the foundational requirement in subdivision (2)(a), was deferred to be taken up in connection with Rule 8.

A question arose as to the meaning of the URE words "in confidence" in subdivision (1). A motion was approved to delete the words "in confidence" and to direct the staff to draft language indicating that the privilege applies to any communication made during the marital relationship except those made within the presence of third parties or made for further communication to others. The view was expressed that these exceptions describe the situations in which the courts have held communications to be non-confidential and, hence, not within the privilege. Commissioners Stanton and Sato voted "No." They opposed the motion on the ground that the specific language will tie the hands of the courts in dealing with the problem of confidentiality and that the courts have not had any demonstrable difficulty in determining what is "in confidence" in the past. Moreover, the language may broaden the privilege although there is no demonstrated need for such broadening. [Wigmore states that marital communications must be in confidence, but communications between spouses are presumed confidential. The presumption may be rebutted. "Commonly, the presence of a third person within hearing will negative a marital confidence; so, too, the intended transmission of the communication to a third person. But fixed rules are scarcely possible." 8 Wigmore (3d. ed. 1940) 642-3. Other examples of marital communications held non-confidential are gathered in the footnotes on pp. 642-8.]

The staff was asked to consider redrafting the parenthetical expression in subdivision (1) "or his guardian or conservator when he is incompetent."

A motion was approved to extend the marital communications privilege to protect marital communications that have been overheard by third parties without the knowledge and consent of either of the spouses. The purpose of the revision is to protect marital communications from surreptitious eavesdropping, while permitting evidence of a marital communication to be admitted if one of the spouses has permitted the communication to be revealed to third parties. Voting "No" were Commissioners Edwards, Selvin and Stanton. The Commissioners voting against the motion indicated that the way to protect against electronic eavesdropping is to extend the Cahan rule to civil cases, not to create a new rule of privilege. The purpose of the marital privilege is sufficiently served if both parties know that the other cannot be compelled to reveal their private communications--no greater encouragement is given to marital communications by the elimination of the eavesdropper exception.

An exception for proceedings under the Juvenile Court law was added to subdivision (2).

The word "accused" was changed to "defendant" in subdivision (f). The staff was asked to determine whether the revised subdivision would apply to extraordinary proceedings to attack invalid sentences and to report back to the Commission. If not, a subdivision (g) should be added to cover such proceedings.

The Commission then revised subdivision (f) to apply to any action or proceeding in which a party-spouse seeks to introduce evidence of a

marital communication, thus making the revisions previously made to subdivision (f) unnecessary.

Rule 29.

A motion to disapprove Rule 29 failed.

Subdivisions (b) and (c) were combined to read:

(b) "Penitential communication" means a communication made to a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear such communications, and has a duty to keep them secret.

The revision was made to avoid the necessity for determining the nature of the communication made to the clergyman.

The staff was then instructed to revise subdivision (2) to give the priest a privilege to refuse to disclose a penitential communication even when the penitent has waived. The Commission indicated that the priest should have the right to invoke the privilege to refuse to disclose despite the penitent's waiver because the government should not send the priest to jail for contempt for following the tenets of his church. Voting against the motion were Commissioners Keatinge, Sato and Stanton.

The definition of "penitential communication" was again revised to include the requirement that the communication be made to the priest alone and in the presence of no third persons.

Rule 30.

Rule 30 was deleted. The subject of the competency of evidence of religious belief on the issue of credibility is to be dealt with in connection with Rules 20-22 which deal generally with the question of what evidence is competent on the issue of credibility.

Rule 31.

The words "political election" were deleted and the words "public election where the voting is by secret ballot" were substituted in the interest of clarity.

Rule 32.

Rule 32 was approved as submitted.

Rules 33, 34 and 36.

The Commission considered the redraft of these rules in Memorandum No. 63-25.

A motion to extend the privilege to protect official information of sister states was not approved.

After some further consideration of the rule, the staff was asked to submit three separate rules covering state secrets, official information, and informers so that the policies applicable to each might be separately considered. The staff should consider and report on whether the choices forced upon the government in criminal cases should be imposed upon government in civil cases. Consideration should also be given to the question whether any consequences should flow from the government's exercise of its privilege in litigation between third parties.

Rule 35.

The previous decision to reject URE Rule 35 was reaffirmed.

Rule 36.5.

A motion to approve the draft proposed by the staff, but with a test to be applied by the judge similar to that applied to the governmental informer privilege, failed to carry. A motion to retain the existing law carried. On reconsideration, the Commission then approved a motion to repeal the newsman's privilege entirely.

Rule 37.

Subdivision (1) was revised to include the requirement that the consent to disclosure be made "without coercion" before it constitutes a waiver. The words "a significant part" were substituted for "any part" near the end of the first sentence of subdivision (1).

The last sentence of subdivision (1) was revised to read:

Consent to disclosure is manifested by a failure to claim the privilege in an action or proceeding in which the holder has the legal standing and opportunity to claim the privilege or by any other words or conduct indicating a holder's consent to the disclosure.

Subdivision (2) was approved.

The staff was instructed to include Rule 31--political vote--among the privileges that may be waived by prior disclosure. It was suggested, however, that as a drafting matter, the rules would be clearer if the waiver principle were included in Rule 31 itself and Rule 37 were limited to communications.

Subdivision (3) was revised to read:

(3) A disclosure that is itself privileged under this article is not a waiver of any other privilege.

The Commission approved subdivision (4), but the staff was asked to redraft subdivision (4) in the light of the other changes that were made in Rule 37.

Rule 38.

The comment is to be revised to mention specifically that Rule 38 applies to situations where a judge erroneously overrules a claim of privilege. Rule 37 is also to be mentioned in the comment.

Rule 39.

The Commission disapproved the principle of Nelson v. So. Pacific Co., that a prior claim of the self-incrimination privilege may be used for impeachment purposes. Commissioner McDonough voted against the motion.

Subdivision (3) was then revised to read:

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

Subdivision (2) was then revised by eliminating the words "to the extent authorized under Section 13, Article I of the California Constitution."

As revised, the rule was approved, and the previous draft of subdivision (3) (permitting inferences from privilege claims in civil cases) was disapproved. Commissioners McDonough and Stanton voted against the motion.

Rule 40.

The Commission confirmed its previous action disapproving Rule 40.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (AUTHENTICATION AND CONTENT OF WRITINGS)

The Commission considered Memorandum No. 63-20. The following actions were taken:

Rule 67.

After the word "it" in the second line, the Commission added the words "or secondary evidence of its content". The addition was made to make clear that a document must be authenticated before oral testimony as to its content, or a copy of the document, or other secondary evidence of its content is admissible.

The URE statement of the ancient documents rule was approved as a more desirable rule than present California law. The staff was directed to add language at the end of the rule indicating that a document, when authenticated under the ancient documents rule, is sufficiently authenticated to be received in evidence. The added words will negate the possible interpretation that authentication under Rule 67 conclusively establishes the authenticity of the document.

The Commission requested the staff to submit a report on the effect of authentication of a dispositive instrument such as a deed. The report is to indicate whether authentication of a deed is evidence that it was delivered and operated as a deed or whether authentication merely authenticates the paper and additional evidence must be offered to show that it became operative.

Rule 68.

In subdivision (c), the words "or certified" were added after the word "attested" in order to use the term defined in C.C.P. § 1923. Subdivision (c) was then modified to apply to all documents kept within the United States or within a territory or possession of the United States. Subdivision (d) was amended to apply only to documents kept outside the United States and its possessions.

The staff was directed to add a paragraph similar to that added to the rule by the New Jersey Supreme Court's Committee on Evidence to indicate that the authority of an officer and the authenticity of a seal are established prima facie by the signature of a person purporting to be an officer and a seal purporting to be an official seal. The purpose of the additional paragraph is to make clear that certified copies under Rule 68 are self authenticating and that independent proof of the authority of the authenticating officer is unnecessary.

Rule 68 was then approved as modified.

Rule 69.

Rule 69 was approved as found in the URE.

Rule 70.

In subdivision (1), "by statute" was substituted for "in these rules". Subdivision (1)(a) was then approved.

Subdivision (b) was modified to read:

> (b) That the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.