

Place of Meeting
State Bar Building
601 McAllister
San Francisco

FINAL AGENDA
for meeting of
CALIFORNIA LAW REVISION COMMISSION

San Francisco July 19 and 20, 1963

The meeting will start at 9:30 a.m. on July 19 and will end at 4:00 p.m. on July 20.

1. Minutes of June meeting (sent 7/3/63)
2. Administrative matters
 - Memorandum No. 63-36 (sent 7/9/63)(Stanford Research Contract for 1963-64 fiscal year)
3. Report on 1963 legislative program
4. Procedure to be followed in study of URE
 - Memorandum No. 63-31 (sent 7/10/63)
5. Study No. 34(L) - Uniform Rules of Evidence
 - Privileges Article--Rules 23-40
 - Materials in loose-leaf binder (including research study) (you have this)
 - Tentative Recommendation on Privileges Article (sent 7/9/63)
 - Memorandum No. 63-32 (comments on tentative recommendation (sent 7/13/63)
 - Memorandum No. 63-33 (amendments and repeals of existing statutes and adjustments in tentative revision of URE Privileges Article (sent 7/13/63)
 - Supplement to Research Study (amendments and repeals of existing statutes and scope of various privileges) (sent 7/13/63)

File

MINUTES OF MEETING

OF

JULY 19 and 20, 1963

San Francisco

The regular meeting of the Law Revision Commission was held in San Francisco on July 19 and 20, 1963.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.

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

Messrs. John H. DeMouly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Minutes of June Meeting.

The minutes of the June meeting were approved.

Future meetings of the Commission.

Future meetings of the Commission have been scheduled as follows:

August 22 (evening), 23 and 24	Los Angeles
September 23 and 24	San Francisco
October 17 (evening), 18 and 19	Los Angeles

Note that the date of the August meeting has been changed.

Recommendation and Study on the Marital "For and
Against" Testimonial Privilege (sent 7/13/63)

Recommendation and Study on the Dead Man Statute
(sent 7/13/63)

Professor Chadbourn's study--"Memorandum In Re Incorporating
Rule 7, subdivisions (b), (d) and (e) and Rules 23-40
in the California Codes" (sent 7/13/63)

- Memorandum No. 63-34 (Procedure in ruling on claim of
privilege)(enclosed)

Authentication and Content of Writings--Rules 67-72

Materials in loose-leaf binder (including research study)
(you have these)

Research Study

Memorandum No. 63-20 (continued from last meeting)

Memorandum No. 63-37 (to be sent)

Presumptions Article--Rules 13-16

Materials in loose-leaf binder (including research study)
(enclosed)

Research study (enclosed)

Memorandum No. 63-35 (to be sent)

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ADMINISTRATIVE MATTERS

Stanford Research Contract.

The Commission considered Memorandum No. 63-36 containing a staff recommendation that the Commission enter into a research contract with Stanford University in the amount of \$1,000. The approved budget contains \$5,000 for such contract.

A motion was unanimously adopted that the Chairman be authorized to execute an agreement on behalf of the Commission with Stanford in the amount of \$1,000, such agreement to contain the terms outlined in Memorandum No. 63-36.

1963 Legislative Program.

The Executive Secretary reported that the Governor has signed S.B. 42, 43, 44, 45, 47, 483 and 484. S.B. 46 was killed at the request of the Commission. S.B. 499 has not yet been signed. S.B. 71 was killed by the Assembly Judiciary Committee. S.B. 129 was passed, but has not yet been signed.

Evening Meetings the Day Before Regular Two-Day Meetings.

A motion was unanimously adopted that the Commission meet for three hours in the evening on the day before each scheduled two-day, Friday and Saturday meeting. This schedule is to begin with the August meeting and is to be followed for each future meeting. This action was taken in order to avoid holding three-day meetings. Any administrative matters are to be disposed of at the evening meeting, and administrative matters not disposed of at that time are to be deferred until the next meeting. The review of minutes is to be completed at the evening meeting. In addition, to the extent

possible, the review of materials to determine that Commission action has been accurately included in the materials will be completed at the evening meeting. This will permit the two-day meeting to be devoted to consideration and discussion of new matters.

Research Consultant on Study No. 34(L) - Uniform Rules of Evidence.

A motion was unanimously adopted that the Commission employ a research consultant to prepare additional research studies on the Uniform Rules of Evidence, such consultant to be selected by the Chairman with the advice of the staff, that his compensation be fixed by the Chairman with the advice of the staff, and that the Chairman be authorized to execute an agreement with such consultant covering such research.

The research contemplated is indicated in Memorandum No. 63-31.

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

PROCEDURE TO BE FOLLOWED IN STUDY OF URE

The Commission considered Memorandum No. 63-31.

General Procedure.

The Commission approved the procedure set out on pages 1-6 of the memorandum.

Research Consultant.

The Commission approved employment of an additional research consultant on this study. Professor Chadbourn is no longer available to attend our meetings; he has joined the Harvard Law Faculty. See page 3 of these Minutes for motion on employment of additional consultant.

Obtaining Comments on Tentative Recommendations.

The Commission approved the staff recommendation that comments be solicited from the groups listed on Exhibit IV of Memorandum No. 63-31 and also from the California Association of District Attorneys and County Counsels. It was pointed out that Fitz-Gerald Ames is now a judge and the new Chairman of NACCA should be contacted instead of Mr. Ames. The Executive Secretary indicated that the Association of Los Angeles Municipal Judges was planning to appoint a committee to consider the Commission's tentative recommendation.

The Commission approved sending a form letter to each local bar association in California indicating that the Commission is planning to recommend a revision of the California law relating to evidence. The letter would indicate that the Commission would appreciate receiving comments on the tentative recommendations from local associations willing to undertake to review the tentative recommendations.

The Commission approved the distribution of a press release to the legal newspapers.

Charges for Commission Publications.

The Commission approved the general policy that publications be sold if the cost of the publication justifies charging \$2.50 or more.

Deadlines in Study of Uniform Rules of Evidence.

The Commission adopted the following deadlines and the following order of consideration of articles of the Uniform Rules of Evidence:

<u>Subject Matter</u>	<u>Tentative Recommendation Approved for Printing</u>	<u>Tentative Recommendation Available in Printed Form</u>	<u>Comments Reviewed</u>
Article VIII-- Hearsay	Approved	Now available	March 1964
Article V--Privileges	September 1963	January 1, 1964	April 1964
Article IX-- Authentication	October 1963	January 1, 1964	March 1964
Article I--General Provisions	November 1963	March 1, 1964	May 1964
Article VI--Extrinsic Policies	December 1963	March 1, 1964	May 1964
Article IV--Witnesses	January 1964	May 1, 1964	July 1964
Article III-- Presumptions	February 1964	May 1, 1964	July 1964
Article II--Judicial Notice	March 1964	June 1, 1964	August 1964
Article VII--Expert and Other Opinion Testimony	April 1964	July 1, 1964	August 1964

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<u>Subject Matter</u>	<u>Tentative Recommendation Approved for Printing</u>	<u>Tentative Recommendation Available in Printed Form</u>	<u>Comments Reviewed</u>
Review of existing Code provisions	March 1964 (ready to distribute in mimeographed form)		September 1964 (State Bar Comments)
Final Recommendation	Approval for print- ing--September 1964 Ready to print-- October 1, 1964	<u>Pamphlet--</u> available in printed form January 1965 <u>Preprinted bill--</u> available November 1, 1964	

PRIVILEGES ARTICLE.

The Commission considered Memoranda 63-32, 63-33 and 63-34 and the tentative recommendation relating to privileges. The following actions were taken:

Tentative Recommendation.

The Commission indicated that it would be desirable to include some brief citations of authority in the comments to the various rules to support statements made concerning the existing law. Such citations would be particularly desirable in the final recommendation. The staff was asked to include some citations of authority in the tentative recommendation relating to authentication so that the practicability of including citations in the tentative recommendations might be determined.

The staff was also asked to adopt some method of designating paragraphs for ease of reference. Numbering the paragraphs might be used, or headings and subheadings might be used.

The commissioners gave the staff copies of the recommendation with suggestions on language for the staff to consider.

Page 4. It was pointed out that the last sentence that begins on page 4 is somewhat inaccurate in that the comments under the rules do not explain the major considerations underlying the Commission's recommendations if they are in accord with the URE or existing law.

Page 6. A motion was made to list in subdivision (2) of Rule 23 examples of the kinds of acts that a defendant can be compelled to do without violating his privilege to refuse to testify. The motion contemplated listing the acts mentioned in the subdivisions of Rule 25. The motion lost.

The Commission considered whether Rule 23--which grants a defendant in a criminal case a privilege to refuse to testify--should be applicable to other kinds of proceedings but concluded that the privilege should be granted only to the defendant in a criminal prosecution.

Page 9. The staff was directed to revise the last clause of Rule 24, which defines "incrimination," to make clear that immunity must be under both the law of the United States and the law of California.

The Commission then considered whether the word "disclosed" that was previously deleted should be put into the rule again. The deletion of the word tends to imply that the claimant of the self-incrimination privilege need not disclose any of the surrounding circumstances that indicate the need for invocation of the privilege. The word was deleted to avoid an implication that other links in a chain of evidence connecting the claimant with a crime must be disclosed before the privilege may be claimed to refuse to disclose another link in the chain. To resolve the ambiguity, the Commission directed the staff to substitute a rule similar to that adopted in New Jersey. The New Jersey statute is:

Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another state or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

In drafting a comparable version, the policy decisions previously made by the Commission are to be followed, for example, the decision that a matter is not incriminating if it incriminates only under the law of another state.

Page 11. The words "which he may claim" were deleted from the preliminary language of Rule 25 and the words "if he claims the privilege" were inserted after "incriminate him" in the fourth line of the rule. The change was made to conform the language of the rule to the language of most of the other rules.

Page 12. A motion to make the privilege against self-incrimination unavailable to public officers and employees insofar as matters they are required to report or record are concerned failed to carry. The staff was directed to point out in the comment to Rule 25 that a provision making the privilege inapplicable in such a situation was in the original URE and was deleted by the Commission. The Commission then revised subdivision (6) of Rule 25 by substituting "an office, occupation, profession or calling" for "a business, calling or profession" in order to make clear that the subdivision applies to records required to be kept by public officers and employees.

Page 13. The words "which incriminates him" were deleted from subdivision (8) of Rule 25 and the last four lines of the rule were revised to read:

testifies in an action or proceeding before the trier of fact with respect to a matter does not have the privilege under this rule to refuse to disclose in such action or proceeding anything relevant to that matter.

The change was made to eliminate the ambiguities arising out of the use of the words "transaction which incriminates him".

Page 18. In the second line of subdivision (1)(a) of Rule 26, the words "this State and any other" were deleted and the article "a" was substituted. This will permit a defined term "public entity" to be used throughout the rules to designate all public entities.

Page 20. Subdivision (4)(b) of Rule 26 was amended by inserting "deceased" before "client." A conforming change is to be made in Rule 27.

Subdivision (4)(c) of Rule 26 was amended to read:

(c) As to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

Page 35. The words "including information obtained by an examination of the patient" were removed from the third and fourth lines of subdivision (1)(a) of Rule 27 and inserted between "information" and "transmitted" in the second line of the subdivision.

Page 36. The Commission directed the staff to revise Rule 27 so that it will be inapplicable in quasi-criminal administrative proceedings. The privilege will then be unavailable in nonjudicial proceedings in the same kind of cases where it is unavailable in judicial proceedings.

Page 37. The word "who" was substituted for "all of whom" in subdivision (4)(b) of Rule 27.

Page 38. Subdivision (4)(c) of Rule 27 was revised to conform to the change made in the comparable subdivision in Rule 26.

The Commission directed the staff to make appropriate changes in the rules to make clear that the privilege is unavailable in administrative proceedings as well as judicial proceedings where the patient tenders the issue of his condition.

Page 53. The word "accused" was changed to "defendant" in subdivision (j).

Page 54. The staff was asked to point out in the comment to Rule 27.5 that the nature of the illness and the treatment require the patient to disclose to the psychotherapist the most intimate details of his personal life and, hence, for treatment to be effective it is important that there be no deterrent to full disclosure.

Page 56. The Commission discussed the lack of an exception for commitment proceedings in Rule 27.5. It was pointed out that the Governor's Special Commission on Insanity and Criminal Offenders had recommended an exception for commitment proceedings and that the psychiatric associations communicating with the Commission had also recommended an exception for commitment proceedings. A motion to create a limited exception for commitment proceedings that would permit the psychotherapist to testify if he has determined that the patient is in need of such care and treatment was defeated. The Commission asked the staff to communicate with those psychiatrists and organizations that wrote to the Commission in regard to the privilege generally and to ask them about the problems that might be involved in making the privilege applicable or inapplicable in commitment proceedings.

Pages 58-59. The words "in confidence" were restored in subdivision (1) of Rule 28 and subdivisions (2)(h) and (2)(i) were deleted. The staff was asked to add a provision that the proponent of evidence claimed to be privileged under Rules 26-29 has the burden of showing that the communications were not made in confidence.

Subdivision (d) of Rule 28 is to be revised to make clear that the exception only extends to communications offered in evidence by a party spouse. Another exception is to be added for litigation between the spouses or between one of the spouses and a person claiming under a deceased spouse by testate or intestate succession or by inter vivos transaction.

The Commission directed the staff either to revise Rule 28 or to draft a new rule to express the substance of the Commission's 1956 recommendation on the marital testimonial privilege.

Page 62. The staff was asked to include a fuller explanation for the limiting of the exception in subdivision (2)(a) of Rule 28 to communications relating to a "crime or fraud."

Page 65. The word "another" was substituted for "the priest" in subdivision (2) of Rule 29 so that the privilege may be asserted against eavesdroppers.

Page 70. The staff was directed to add some discussion to the comment on the policy involved in recognizing a privilege for trade secrets. Some reason should appear for recognizing some species of exclusive ownership of trade secrets that are not already protected by patent or copyright.

Page 71. Rule 33 was disapproved. So far as military secrets and secrets relating to international relations are concerned, federal law provides adequate protection. Secrets of the State and local entities are given adequate protection by Rules 34 and 36.

Page 73. The informer privilege is to be stated as a different rule, Rule 36, so that separate reactions may be obtained to the official information privilege and the informer privilege.

In subdivision (1)(c) of Rule 34, the definition of "public entity in this State" is to exclude the State itself. Specific reference to the State should be made wherever it is needed in the rule.

Page 74. Subdivision (2)(b) of Rule 34 was revised to read:

Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that it be disclosed in the action or proceeding.

The Commission then directed the staff to revise subdivision (2)(b) of Rule 34 to make clear that the interest of the public in the outcome of the pending proceeding is not to be considered in determining the public interest in keeping official information secret.

The staff was directed to modify subdivision (3) of Rule 34 so that it applies not only in criminal proceedings but in civil proceedings that are disciplinary in effect. The statement of the judge's duty under the subdivision was revised to require the judge to "make such order or finding of fact adverse to the people of the State as is appropriate upon any issue in the case to which the privileged information is material."

Rule 36 (pages 3 and 4 of Exhibit I, Memo 63-32). In subdivision (2), the words "unless such identity has already been disclosed" were deleted and the words "not open or theretofore officially disclosed to the public" were substituted.

Subdivision (2) is to be revised to permit the government, or some person properly authorized, to claim the privilege. The privilege may be exercised

to prevent disclosure by those persons who receive the information in an official capacity or in an authorized manner. Conforming changes are to be made in Rule 34.

The comment is to explain that unlike the URE rule, which permitted anyone to claim the privilege, the revised rule permits only the government whose information is sought to invoke the privilege.

Rules 34 and 36, as amended, were then approved. Commissioner McDonough voted against the motion to approve the rules, and Commissioner Keatinge abstained.

Page 82. The Commission directed the staff to revise Rule 36.5 to refer to a person entitled to claim the privilege instead of a holder of the privilege.

In the first line of the rule, the word "shall" was substituted for "may". Rule 36.5 was then approved.

Page 91. The staff was directed to revise the comment to state that it is not clear whether Rule 39 limits the right to comment on the exercise of the privilege in civil cases. Fross v. Wotton may stand for the proposition that inferences from the claim of privilege itself may be drawn, and if so, Rule 39 will change the rule.

Page 93. Proposed Rule 40.1 was passed over until the repeal and adjustment of existing statutes could be considered.

Adjustments of Existing Statutes

The Commission considered Memorandum No. 63-33 and the supplemental research study on the application of privileges in nonjudicial proceedings.

The basic preliminary question presented was whether the existing privilege

statutes apply to nonjudicial proceedings. It was concluded that the law is uncertain, but it appears that in practice such privileges are recognized in nonjudicial proceedings. It was also noted that the Administrative Procedure Act makes privileges applicable in proceedings governed by that Act.

The Commission adopted the substance of the New Jersey Rule--that as a general rule the privileges contained in the tentative recommendation apply whenever testimony may be compelled. In distributing the tentative recommendation to various state and local administrative agencies, it should be specifically pointed out that the privileges article applies to administrative proceedings. It should be suggested that it be reviewed with a view to determining whether additional exceptions are justified in particular types of administrative proceedings.

Section 688 of the Penal Code was amended to read:

688. No person [~~can be compelled, in a criminal action, to be a witness against himself, nor can a person~~] charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

The deleted language in Section 688 is superseded by Rules 23 to 25.

Section 1323 should be repealed. This section is superseded by revised Rule 23(1), revised Rule 25(7) and revised Rule 39(2).

Section 1323.5 should be repealed. This section is superseded by Rule 23. Rule 23 retains the only effect the section has ever been given--to prevent the prosecution from calling the defendant in a criminal action as a witness. Whether Section 1323.5 provides a broader privilege is not clear, for the meaning of the phrase "persons accused or charged" is unclear. For example,

a witness before the grand jury or at a coroner's inquest is not technically a person accused or charged, and Section 1323.5 would appear not to be applicable to such proceedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under the tentative recommendation, for the previous claim of privilege cannot be shown to impeach the witness in a subsequent civil or criminal proceeding.

Section 2065 of the Code of Civil Procedure was amended to read:

2065. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not ~~[give-an-answer-which-will-have-a-tendency-to-subject-him-to-punishment-for-a-felony;-nor-need-he]~~ give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer to the fact of his previous conviction for a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

The deleted language in Section 2065 is superseded by Rules 24 and 25. This section will probably be repealed in the final recommendation, for the matters concerned by other portions of the section are covered in Rules 7(d), 21 and 22 of the Uniform Rules. The repeal of these other portions of Section 2065 will be considered in the tentative recommendations relating to the pertinent URE Rules.

Subdivision 2 of Section 1881 should be repealed. This subdivision is superseded by Rule 26.

Subdivision 4 of Section 1881 should be repealed. This subdivision is superseded by Rule 27.

Health and Safety Code Section 3197 is to be adjusted to substitute references to Rules 27 and 28 for the references to subdivisions 1 (marital privilege) and 4 (physician-patient privilege) of C.C.P. Section 1881.

Business and Professions Code Section 2904 should be repealed. This section is superseded by Rule 27.5.

Subdivision 1 of Section 1881 should be repealed. This section is superseded by Rule 28 so far as the communications privilege is concerned. As far as the "for or against" privilege is concerned, the Commission determined that its 1956 recommendation should be incorporated into the tentative recommendation on privileges.

Penal Code Section 1322 should also be repealed since it will be superseded by the tentative recommendation when revised to incorporate the substance of the 1956 recommendation.

Penal Code Sections 266h, 266i and 270e should be considered in connection with the marital privilege. Depending on how the testimonial privilege is incorporated in the tentative recommendation, some adjustment may be required. Penal Code Section 270e should be amended to delete the word "existing".

Civil Code Section 250 and Code of Civil Procedure Section 1688 should be considered in connection with the marital privilege. The sections apparently will not require any adjustment.

Subdivision 3 of Section 1881 should be repealed. It is superseded by Rule 29.

No adjustment is to be made in Section 2019 of the Code of Civil Procedure which gives indirect recognition to the trade secret privilege.

Subdivision 5 of Section 1881 should be repealed. This subdivision is superseded by Rules 34 and 36.

Section 1747 of the Code of Civil Procedure should be amended to substitute for the present reference to Section 1881(5) a reference to Rule 34.

Subdivision 6 of Section 1881 should be repealed.

The Dead Man Statute--subdivision 3 of Section 1880 of the Code of Civil Procedure--should be repealed, and a hearsay exception should be created to provide that no written or oral statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding against an executor or administrator upon a claim or demand against the estate of such deceased person. This is in line with the 1957 recommendation of the Commission except that the hearsay exception is more limited than that recommended in 1957.

Distribution of Tentative Recommendation and Other Materials.

It was agreed that the staff should send the tentative recommendation (as revised) to the State Bar Committee for comments. It was also agreed that several sections that have not been approved by the Commission should be sent to the State Bar Committee. These sections deal with (1) whether the tentative recommendation should impliedly repeal existing privilege statutes that are not repealed by the tentative recommendation, (2) whether the judge should be able to require revelation of a confidential communication in order to determine whether it is privileged and (3) whether a special rule should be provided for determining whether a claimed privilege is applicable in a non-judicial proceeding. The two provisions of the tentative recommendation that

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indicate that the judge cannot require revelation of the communication should be indicated as requiring adjustment, depending on what action is taken with respect to whether a communication can ever be required to be revealed.