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Place of Meeting

State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

October 17, 18 and 19, 1963

October 17 (meeting starts at 7:00 p.m. and continues to 10:00 p.m.)

- 1. Minutes of September meeting (sent 10/8/63)
- 2. Administrative matters (if any)
- 3. Study No. 34(L) - Uniform Rules of Evidence

Bring to meeting: Report of the New Jersey Supreme Court Committee on Evidence (this has a blue cover--you already have received a copy)

Loose-leaf binder containing Uniform Rules of Evidence as revised to date (to be handed out at meeting)

Witnesses (Article IV--Rules 17-22)

Memorandum 63-48 (enclosed)

Judicial Notice (Article II--Rules 9-12)

Materials in binder (sent 10/1/63)

Memorandum 63-49 (sent 10/1/63)

Research study (sent 10/1/63)

October 18-19 (meeting starts at 9:00 a.m. each day)

Presumptions (Article III--Rules 13-16)

Materials in binder (you have these)

Memorandum 63-47 (in your binder)

Research Study (in your binder)

Expert and Other Opinion Testimony (Article VII--Rules 56-61)

Materials in binder (to be sent)

Memorandum 63-50 (to be sent)

Research Study (to be sent)

General Provisions (Article I--Rules 1-8)

Materials in binder (you have these)

Memorandum 63-46 (in your binder)

Research Study (in your binder)

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MINUTES OF MEETING

of

OCTOBER 17, 18 and 19, 1963

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on October 17, 18 and 19, 1963.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
James R. Edwards (October 18 and 19)
Richard H. Keatinge (October 17 and 18)
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, ex officio

Absent: Hon. James A. Cobey
Hon. Pearce Young
Joseph A. Ball

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present. Professor Ronan E. Degnan of the School of Law, University of California at Berkeley, the Commission's consultant on Study No. 34(L), was present on October 17 and 19, 1963.

Minutes of the September Meeting.

The minutes of the September meeting were approved.

Future Meetings of the Commission.

Future Meetings of the Commission are scheduled as follows:

November 20 (Wednesday evening), 21 and 22 (Thursday and Friday)--San Francisco

December 19-21--(Place to be determined)

The Commission also determined to meet at Lake Tahoe during Easter Vacation. The staff is to poll the members of the Commission to provide Commissioner Sato with information so that he can make reservations.

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

(Article IV. Witnesses)

The Commission considered Memorandum 63-48 and the attached portion of the tentative recommendation relating to Witnesses. The following actions were taken:

Rule 19.5.

This rule was deleted because it was limited to cases of physical impossibility and might have been construed to limit the powers a trial judge now has. Although there are no California cases so holding, the staff believes that a judge has the power in California to order stricken testimony that is inherently improbable. Under existing California law, a judge may grant a nonsuit, directed verdict, or judgment notwithstanding a verdict, or may give an instruction on the establishment or nonestablishment of a particular fact, when evidence is inherently improbable. The deletion of Rule 19.5 will leave the matter of striking inherently improbable testimony to case law.

Rule 19.

The Commission considered the staff suggestion that the first subdivision of Rule 19 be revised. After considering the matter, the Commission approved subdivision (1) in the form set out in the Tentative Recommendation dated October 1, 1963. No revision of subdivision was considered necessary because subdivisions (1) and (4) (when read together) indicate that an objection that a witness does not have personal knowledge is timely if made when the witness proposes to testify to a particular matter and it has not previously been shown that the witness has personal knowledge. Where the lack of personal knowledge first becomes apparent on cross-examination, a motion

strike the testimony would be timely. In any case, the judge may receive testimony conditionally under subdivision (4).

Distribution to State Bar Committee.

The tentative recommendation is to be revised in view of the deletion of Rule 19.5 and then sent to the State Bar Committee for comments.

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

(Article III. Presumptions)

The Commission considered Memorandum 63-47 and Professor Chadbourn's study relating to presumptions. The various theories of presumptions were discussed.

The Commission decided to abandon the California rule that a presumption is evidence. No agreement was reached on whether to approve the Thayer theory of presumptions, the Morgan theory, or the theory espoused by Justice Traynor in Speck v. Sarver, 20 Cal.2d 585, 590 (1942).

The staff was directed to analyze about a dozen representative statutory presumptions in the light of the various theories and to present them to the Commission at the next meeting.

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

(Article II. Judicial Notice)

The Commission considered Memorandum 63-49. The following actions were taken.

General Scheme of Judicial Notice (Rule 9).

The general scheme of Rule 9 was approved.

Rule 9 is Exclusive List.

It was agreed that Rule 9 is an exclusive list of those facts and matters of which courts may take judicial notice. This is in contrast to the existing California statute which does not contain an exclusive list of the facts and matters of which courts may take judicial notice. Rule 9 should contain a provision to make clear that it is an exclusive list.

Decisional, Constitutional and Public Statutory Law of California and the United States.

These are to be included under subdivision (1) of Rule 9. Note that the New Jersey language--"the decisional, constitutional and public statutory law" is to be substituted for the URE language in this provision and in comparable provisions.

Decisional, Constitutional and Public Statutory Law of Sister States and Territories and Jurisdictions of the United States.

These are to be included under subdivision (1) of Rule 9.

Rules of Court of California and Federal Courts.

These are to be included under subdivision (1) of Rule 9.

Rules of Court of Sister States and Territories and Jurisdictions of United States.

These are not to be mentioned in Rule 9. The text of such rules will not be easily accessible and will very seldom, if ever, be relevant to a California proceeding.

Certain Regulations of California and Federal Agencies.

Regulations referred to in Government Code Section 11384 (State of California Agencies) and in 44 U.S.C. § 307 (Federal Agencies) are to be included under subdivision (1) of Rule 9.

Regulations of California and Federal Government Which Are Not Covered Under Subdivision (1) and Regulations of Other States, Territories and Jurisdictions of the United States.

These are to be included under subdivision (2) of Rule 9. Note that some regulations of the United States and California are included under subdivision (1).

Private Acts and Resolutions.

"Resolutions and private acts of the Congress of the United States and of the Legislature of this State and of every other state, territory and jurisdiction of the United States" are to be included under subdivision (2) of Rule 9.

Ordinances.

"Ordinances of governmental subdivisions and agencies of the United States, of this State, and of every other state, territory and jurisdiction of the United States" are to be included under subdivision (2) of Rule 9.

Official Acts of the Legislative, Executive and Judicial Departments of California and of the United States.

This was added to subdivision (2) of Rule 9. This is taken from Code of Civil Procedure Section 1875. The Commission declined to extend this category to include sister states.

Court Proceedings and Records.

"Records of the court in which the action is pending or of any other court of this state or any of the federal courts" should be added to subdivision (2) of Rule 9.

Flores v. Arroyo, 56 Cal.2d 492 (1961) indicates that this provision states existing law in California (at least so far as res judicata is concerned).

The Commission declined to include records of courts of other states. This decision was made because of the difficulty of obtaining authentic evidence of records of courts of other states having sloppy record keeping systems. It was believed that the more formal procedure required for sister state court records would provide more opportunity to demonstrate the defects, if any, in the record keeping.

Foreign Law.

Our 1957 amendment on law of foreign countries is to be retained without substantive change. (It was noted that this was enacted upon recommendation of the California Law Revision Commission.) The 1957 amendment is to be incorporated into the revision of the URE article on Judicial Notice. For example, Rule 9, subdivision (2)(b), was revised to read "law of foreign countries and political subdivisions of foreign countries" to conform to the 1957 amendment.

Pick up note from Chadbourn's study justifying the 1957 amendment.

Indisputable Facts and Propositions Universally Known.

These are to be included under subdivision (1) of Rule 9.

Indisputable Facts Locally Known.

This category--paragraph (c) of subdivision (2) of Rule 9--was deleted. To the extent that judicial notice should be taken, paragraph

(d) of Rule 9(2) is broad enough to cover all matters that would otherwise be covered under paragraph (c). To the extent not covered under paragraph (d), proof should be made by evidence introduced at the trial. Otherwise, the Supreme Court on review would have difficulty in determining whether the trial judge properly judicially noticed a matter of local general knowledge. Thus, for example, local matters of "common notoriety" known to members of the local community will be a matter of proof by evidence. The elimination of this category will require that a witness be sworn and testify concerning matters of "common notoriety" within the community, with opportunity for cross-examination and rebuttal.

Verifiable Facts.

This category of facts and propositions--Rule 9(2)(d)--was approved after it was revised to read in substance as follows:

specific facts and propositions [~~of generalized knowledge~~]
not reasonably subject to dispute which are capable of
immediate and accurate determination by resort to [~~easily~~
~~accessible~~] sources of reasonably indisputable accuracy.

"Legislative Facts."

Determining the constitutionality of statutes and determining what the rule of law should be in a novel case involve "notice of legislative facts" by the trial or appellate court.

In view of the difficulty of stating in statutory form the process of "notice of legislative facts," the Commission determined not to add a provision on this matter to the Uniform Rules. The comment to Rule 9 is to contain language to disavow any intent to disapprove of or to limit the principle of notice of legislative facts.

Rule 9--Subdivision (3).

This subdivision was approved after paragraph (b) was revised to read:

(b) has given each adverse party such notice through the pleadings or otherwise as will ~~[the-judge-may-require]~~ enable ~~[the]~~ such adverse party to prepare to meet the request.

Under the URE rule, the judge apparently is required to determine the type and time of notice to be given in each case. The revision eliminates the requirement that the judge make this initial determination in each case, but retains the requirement that adequate notice be given.

The new language is taken from the 1957 amendment relating to notice of foreign law except that the requirement of the 1957 amendment that the notice be a "reasonable" notice is not made specific under the revised rule.

Rule 10, Subdivision (1).

This subdivision was revised to eliminate matters covered by Rule 9(1).

The subdivision was further revised to read in substance as follows: "Before determining whether to take judicial notice of a matter covered by Rule 9(2), the judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of the matter; and before determining what the noticed matter is, the judge shall afford each party reasonable opportunity to present to him information relevant to the tenor of the matter to be noticed."

Rule 10, Subdivision (2).

This rule was revised to read:

(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) ~~[the-judge-may-consult and-use]~~ any source of pertinent information may be consulted and used, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply.

This subdivision should also be revised to reflect the provision of California law relating to notice of foreign law which requires that the court may resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding.

Rule 10, Subdivision (3).

This subdivision was deleted.

Rule 9 indicates when a judge is required to take judicial notice, and this subdivision adds nothing to Rule 9 so far as when judicial notice is required to be taken (except for the portion providing that judicial notice need not be taken unless adequate information is "possessed by or readily available to the judge" which is inconsistent with Rule 9 (1)).

The net effect of the subdivision is to limit judicial notice to matters covered by Rule 9, and Rule 9 is to be revised to make clear that it is exclusive.

An additional reason for disapproving this subdivision is that it appears to impose a subjective standard for determining whether an item falls within Rule 9.

Rule 10, Subdivision (4).

This subdivision was deleted. It is unnecessary.

Rule 11.

This rule was revised in part to read in substance as follows:

Rule 11. (1) If a matter judicially noticed is other than [~~the common law or constitution or public statutes of this state~~] [all of Rule 9(1) except indisputable facts], the judge shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof.

This revision would exclude matters of law (sister state law, federal law and California law) from the revised rule, but would include indisputable facts as a matter to be indicated for the record. The requirement that the matters to be noted be indicated at the earliest practicable time is imposed to provide the parties with adequate opportunity to try their case in view of the fact noted.

The remaining portion of Rule 11 was approved in substantially the following form:

(2) If [~~the~~] a matter judicially noticed is one which would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of fact to accept as a fact the matter so noticed.

Consideration should be given to inserting "jury" in place of "trier of fact" or "trier of fact other than the judge."

It should be noted in the comment that the matter of instruction of the jury on matters of law is covered by the general provisions of law covering instruction of juries and is not a matter of evidence, and subdivision (2) is limited to instruction on a matter which would otherwise have been for determination by a trier of fact other than the judge.

Revised subdivision (2) states existing law as found in Code of Civil Procedure § 2102.

Revised subdivision (2) is intended to make the judge's determination as to a judicially noticed fact conclusive on the jury.

Rule 12, Subdivision (1).

This subdivision was approved.

Rule 12, Subdivision (2).

This subdivision was eliminated as unnecessary. No similar provision is included in other rules.

Rule 12, Subdivision (3).

This subdivision was deleted, but the Commission approved the substance of the following provision to be added to Rule 12:

Whether or not judicially noticed by the judge, the reviewing court shall judicially notice, in the manner provided by subdivision (2) of Rule 10, any matter specified in Rule 9 when the judge was obliged to notice it; in other cases, the reviewing court may notice such matters in its discretion.

It should be made clear in the comment that the language quoted above requires the reviewing court to take judicial notice, but the court, having noticed the matter, may nevertheless because of other policy considerations decline to apply such law to a case on appeal. Thus, although the appellate court may not refuse to take judicial notice, doctrines of theory of the case, invited error, point not raised below, etc., would be reasons why the appellate court could decline to apply the matter so noticed in a particular case. The Commission by adopting this provision intended to make the provision applicable to matters required to be noticed by the trial judge under subdivision (1) and (3) of Rule 9.

Rule 12, Subdivision (4).

This subdivision was approved.

Amendments and Repeals.

The staff was directed to examine the existing code sections relating to judicial notice and to determine whether the substance of each provision of existing law permitting or requiring judicial notice is included in Rule 9. The comment under existing code sections in the tentative recommendation will indicate where each matter that is judicially noticed under existing law is covered by Rule 9.