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9/10/63

Memorandum No. 63-31

Subject: Procedure to be Followed in Study of Uniform Rules of Evidence

From time to time the Commission has agreed on various aspects of the procedure to be followed in the study of the Uniform Rules of Evidence. This memorandum has been prepared in response to the direction of the Commission at the June 1963 meeting. The memorandum summarizes previous decisions of the Commission and presents some policy questions for Commission decision.

SUMMARY OF PROCEDURE TO BE FOLLOWED IN STUDY OF URE

1. Preparation of tentative recommendations. The Commission will prepare tentative recommendations covering each article of the URE. Each tentative recommendation will also indicate the existing statutes that need to be amended or repealed to conform to the tentative recommendation. The tentative recommendation contains comments under each rule and under each existing statute section that indicate why the URE provision or existing statute has been changed and how the provisions recommended by the Commission compare with existing law. Where existing law is to be changed, either by a proposed rule or by amendment or repeal, the comment indicates the reason for the change. This is the form followed in the tentative recommendation on the Hearsay Article and the form we propose to follow in the tentative recommendation on the Privileges Article.

Before publishing a particular tentative recommendation, we will review the comments of the State Bar Committee. We have sent mimeographed materials (including various selected memoranda prepared for the Commission)

to the State Bar Committee. We have sent to the Committee tentative recommendations in various stages of preparation. We have provided the State Bar Committee with mimeographed copies of the research studies on the URE. In some cases, the State Bar Committee has reviewed particular URE rules before they have been considered by the Commission, and the Commission has considered the comments of the Committee at the time the Commission considered the rule. As far as the Commission is concerned, the procedure has worked well in the past and the staff proposes no change. (We are somewhat concerned about the reaction of the State Bar Committee when the Committee discovers that we have entirely rewritten our previous revision of the Privileges Article. The Committee may believe that it has completed its work on that Article.) The Commission and the State Bar Committee were able to reach complete agreement on the Hearsay Article before that tentative recommendation was published.

We do not plan to send mimeographed materials to other groups for review. We will send them the printed pamphlets containing the tentative recommendation (and the research study).

2. Publication of tentative recommendations. Some time ago the Commission decided that it will publish a series of pamphlets containing tentative recommendations on portions of the URE study. Each pamphlet will contain the portion of the research study pertinent to the tentative recommendation in that pamphlet. Each pamphlet will be similar in form to the one already published on Hearsay Evidence.

The Commission decided to publish the various tentative recommendations in this form in order to permit publication of portions of the material as soon as each portion is finished. This makes it possible for the staff

to meet the various publication deadlines by spreading the work over several years, rather than publishing all the material just before the 1965 legislative session. In addition, it provides interested persons with the tentative recommendations and portions of the research study in a convenient, easy to handle, up-to-date form at the earliest possible time. This will result in a saving in time that would otherwise be required to mimeograph and collate mimeographed material and in a saving in postage. Much of the research study is incomplete and not up-to-date; it would need to be retyped before it could be mimeographed for distribution.

In addition to publishing pamphlets containing the tentative recommendations and research studies, the Commission decided to publish each tentative recommendation (without the research study) in a separate pamphlet. This publication does not have a blue cover, and it is inexpensive to produce since it is merely press overrun of a portion of the material printed for the larger pamphlet. We provide a copy of the tentative recommendation in this form free of charge to any interested persons who request one.

3. Distribution of tentative recommendations for comments. As soon as the printed pamphlet on a particular URE article is available for distribution we would send a copy free of charge to each member of those groups we have requested to review the tentative recommendations. This matter is covered below since it presents policy decisions for Commission determination. We would set a deadline for comments at the time we distribute the printed pamphlets.

We also suggest that a press release be sent to the legal newspapers to advise all interested persons that the Commission is engaged on this

study and has tentative recommendations available for comment.

4. Review of existing statutes in Part IV of Code of Civil Procedure. After we have completed our study of the various articles of the URE, we will need to review the existing statutes in Part IV of the Code of Civil Procedure (relating to evidence) to determine whether they should be retained, amended or repealed. We will, of course, previously have determined what action should be taken on those sections that cover matters covered by the URE rules as revised by the Commission.

In making this review, the staff suggests that we take a very conservative view on recommending changes. We should eliminate obsolete and unnecessary provisions and revise provisions that make no sense. We might, for example, eliminate the Dead Man Statute since we have already studied that. You will recall, also, that the Commission has already recommended revision of the provisions of the existing statute relating to refreshing memory--even though the URE does not cover that problem. But the staff does not believe that it will be possible to consider each existing statute in the detail that we have considered the URE provisions. For example, the staff recommends that no changes be made in the Discovery Statute (other than those necessary to conform it to our URE provisions).

In preparing a schedule for work on this project, it does not appear that we could publish a tentative recommendation on the amendments and repeals we believe should be made of existing statutes not affected by the URE. We will, of course, clear these with the special committee of the State Bar and the final recommended amendments and repeals will be published in our final pamphlet in this series.

5. Interim hearings by legislative committees on tentative recommendations. We hope to be able to obtain extensive interim hearings on the tentative recommendations as soon as they are available in printed form. These hearings would be held during the next 14 months, and we would take the legislative reaction to the tentative recommendations into account at the time we formulate our final recommendation. We used the same procedure on the sovereign immunity package to acquaint members of the legislature with the problems, to "smoke out" opposition, and to obtain legislative reaction.

6. Preparation of New Code of Evidence. After we have reviewed the comments on the tentative recommendation and have completed our review of the existing statutes in Part IV of the Code of Civil Procedure, we will prepare a new code of evidence. This new code of evidence will supersede Part IV of the Code of Civil Procedure. It will include the revised URE rules (with appropriate statute section numbers assigned to the various rules), together with such additional sections of existing law as the Commission determines are to be included in the new code of evidence. All of these provisions will be placed in a logical order in the new evidence code.

7. Publication of Final Recommendation. When we have completed work on the new code of evidence and have obtained the comments of the State Bar (and if time permits, the comments of others), we will publish the Final Recommendation. This pamphlet will not contain any research studies--they will all be printed with the tentative recommendations previously published. The pamphlet will contain the new code as proposed by the Commission. Each section will have a comment that indicates whether the proposed section changes

existing California law. Where a change is recommended, the comment will indicate the reason for the change. The comment may contain material that will be helpful to a court in interpreting the section. The comment will not, however, indicate how the provision differs from the URE.

We would plan to have the proposed legislation printed in the form of a preprinted bill and would use the same type in printing our Final Recommendation. This would save a substantial amount of money, but will require that we have the bill ready to print in November 1964.

8. Hearings on Preprinted Bill. We hope to be able to obtain extensive hearing time in December 1964 and January 1965 for hearings on the preprinted bill. We used this same procedure on the sovereign immunity package and it made it possible to reduce the time required for hearing the bills during the session. Unless we are able to have exhaustive interim study by the appropriate legislative committees, we fear that the proposed code of evidence will be referred to interim study because there will not be time during the 1965 legislative session to consider it.

STAFF RECOMMENDATIONS

I. The Staff recommends that we employ a research consultant to prepare additional research studies, that his compensation be \$1,500 (plus necessary travel expenses), and that the Chairman be authorized to execute an agreement with a consultant to be selected at the July meeting.

Professor Chadbourn has completed his research study and has been paid in full. The staff contemplates that each portion of the study will need to be supplemented on the average by one-third in order to bring it up-to-date and to cover matters not covered in the study as submitted. We do not believe that we can expect Professor Chadbourn to do this, although we expect him to review the additional material and the revisions we have made and will make. The revision and supplementing of the research study, together with the work in connection with the printing of the pamphlets containing the study, will require considerable staff effort. We anticipate that we will be able to do this with our present staff, although we believe that we will need to request substantial additional funds to cover printing during the fiscal year beginning on July 1, 1964.

The staff believes that we will need a new research consultant to assist us on the URE project. There are two reasons. First, we need a research study of the existing provisions of Part IV of the Code of Civil Procedure (Evidence)--a study that will advise us whether each section should be retained, revised or repealed. There are approximately 260 sections in Part IV of the Code of Civil Procedure. To some extent, Professor Chadbourn has already discussed some of these sections in his study of amendments and repeals of inconsistent sections. But there are

many other provisions that we must consider if we are to prepare a new evidence code.

Second, we need a new research consultant because we believe that he would be of assistance to us in our consideration of the various problems we must solve in our work on the URE. There may be specific research tasks that he could undertake, and his expert advice would be helpful on matters where no additional research is required. You will recall that Professor Chadbourn has joined the Harvard Law School Faculty and will no longer be able to attend our meetings.

Unfortunately, we do not have any significant amount of funds in the budget for compensation of a research consultant. We will need all the money we have in various budget categories to pay for the printing of our reports on the URE. We could perhaps spare \$1,500 (maximum) for employment of a consultant on this project. In view of the amount of work that we anticipate we will expect the research consultant to produce, we do not believe that this is generous. We will, of course, pay his travel expenses which will also come from our present budget. (In connection with our financial problems, it should be noted that our annual budget is now in excess of \$110,000.)

We probably will not print the study on the existing sections not affected by the URE. We will use portions of the study as comments to those sections where we are proposing to change existing law. This means that the consultant will not have the professional benefits that result from a publication of his work. On the other hand, we would list the consultant, together with Professor Chadbourn, as a research consultant to the Commission on this project. To the extent that we publish any material he prepares, we will give him any credit we can.

II. The Staff recommends that we attempt to obtain comments from selected groups, that we request local bar associations to study the tentative recommendations and give us comments, and that we make every effort to advise interested persons we are making this study.

We distributed our printed pamphlet containing the tentative recommendation and research study on Hearsay Evidence to approximately 437 persons. More than 200 of these persons were judges. See Exhibit III--green sheet--for summary of complimentary distribution. We did not receive a single comment as a result of this distribution.

It is apparent that we will need to make a specific written request to representative groups if we wish to receive comments. Exhibit IV--pink page--contains a list of representative persons. We have prepared letters requesting these groups to send us comments. If there is no objection to the groups listed, the chairman can sign the letters and we will see that they are mailed. We will provide these groups with a reasonable number of copies of the tentative recommendations and research studies (in printed form) free of charge.

At the last meeting, it was suggested that we might wish to contact local bar associations and request that they study our tentative recommendations. There are conflicting considerations to be taken into account in determining whether this action should be taken. On the one hand, the more persons who review the tentative recommendations with some care the more likely it is that particular "bugs" will be discovered. In addition, persons who participate in such a review may be convinced of the general desirability of the adoption of a new code of evidence. On the other hand, we should be able to reach an agreement on the new code of evidence with the State

Bar. Certainly, we will have the support of the State Bar with perhaps a few areas of controversy. Should we risk the prospect of having individual bar associations take a different view toward the final product? We know that the State Bar Committee consists of competent and reasonable persons; we have no knowledge of the persons who will be determining the position of the local bar associations. Moreover, when we ask for comments we must consider them and may be required to justify our rejection of suggestions. We may make substantial changes in tentative recommendations as a result of the comments we receive; but persons who review the tentative recommendations may form an adverse opinion of the new evidence code that we will be unable to change even though we have removed the objectionable features. All things considered, however, the staff believes that even though we may not create any substantial additional support for the new evidence code by having our tentative recommendations reviewed by local bar associations, we may be able to eliminate some "bugs" by obtaining this additional review.

We have contacted the State Bar and will soon receive a list of more than 100 local bar associations. Unless the Commission objects, we plan to send a form letter to each one advising them that we are making the study and indicating that we would appreciate receiving their comments on our tentative recommendations if they are willing to undertake to review them.

The staff believes that we should make every effort to advise interested persons we are making this study. Exhibit V--gold page--is a copy of a proposed press release we plan to send to each legal newspaper and to the State Bar Journal. We will send the press release to the legal newspapers with a letter suggesting the desirability of printing the tentative recommendations.

III. The Staff recommends that a work schedule be established for the evidence study and that the Commission meet this schedule, holding three-day meetings if we fall behind schedule.

It should be apparent that the preparation of tentative recommendations covering the various articles of the URE will require a rather strict set of deadlines if we are to complete this project for the 1965 legislative session. In connection with these deadlines, it must be kept in mind that it takes time to print a publication after the Commission has authorized it to be printed. The schedule must also allow time for interested persons to study the material and to submit comments. Finally, the work must be scheduled so that it is possible to schedule staff work on a basis that will permit the staff to maintain the schedule.

Exhibit I (blue sheet attached) is a summary of the deadlines recommended by the staff. We believe we must meet these deadlines if we are to finish this project for the 1965 legislative session. Note that after we complete work on the Privileges Article, we need to complete work on one tentative recommendation each month. We believe this is possible since the Hearsay Article and Privileges Article are the two longest articles in the rules.

Exhibit II (yellow sheets) is a work schedule showing what must be accomplished at each meeting for the next 18 months. We must keep up with this schedule month by month if we are to complete work on this project in time for the 1965 legislative session. As soon as we fall significantly behind the schedule, the Commission will have to begin to meet three days a month or hold meetings more often than once each month if it wishes to complete this project on schedule.

The staff believes that the Commission cannot consider any substantial additional assignments for recommendation to the 1965 legislative session

However, we believe that we should make a recommendation on moving expenses in eminent domain proceedings and one on liability of public entities for operation and ownership of public vehicles. We do not believe either of these will take any significant amount of time.

IV. The Staff recommends that we charge for publications that are produced in connection with the URE study only if the cost of the publication is in an amount that would justify charging \$2.50 or more.

The Commission decided to make a charge for the Hearsay Evidence pamphlet. This pamphlet is being sold for \$5.00 a copy (plus tax). We have distributed numerous copies free of charge to persons who are assisting us on this project. The charge for the publication is intended to discourage persons who have no real need for the publication, but who will want a copy if it is free. We do obtain some funds that are deposited in the General Fund and improve our relations with the Department of Finance by making a charge for large publications. See Exhibit III (green pages) for a list of persons who received free copies of the Hearsay Evidence pamphlet.

We also plan to charge for the Privileges pamphlet. The charge will be based on the cost of the pamphlet.

We would charge for the other pamphlets only if the cost of the publication justifies making a charge. If we do not charge for the pamphlet, we need to print additional copies to meet the increased demand for the pamphlet.

For publications for which we make a charge, we will have a press overrun so we can provide copies of the tentative recommendation (without the research study) on a complimentary basis.

We would like Commission approval of a general policy on this matter so that we do not have to take meeting time on each publication to determine whether there should be a charge. We will also have to consider the desires of the Department of Finance and the State Printing Department. We will need substantial funds in our budget for 1964-65 for printing and we believe we should charge for publications costing \$2.50 or more.

EXHIBIT I

DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE

SUBJECT MATTER	Tentative recommendation approved for printing	Tentative recommendation available in printed form	Comments reviewed
Article VIII--Hearsay	approved	now available	March 1964
Article V--Privileges*	September 1963	Jan. 1, 1964	April 1964
Article IX--Authenticat- tion*	October 1963	Jan. 1, 1964	March 1964
Article III--Presump- tions	November 1963	March 1, 1964	May 1964
Article I--General Provisions	December 1963	March 1, 1964	May 1964
Article VI--Extrinsic Policies	January 1964	May 1, 1964	July 1964
Article II--Judicial Notice	February 1964	May 1, 1964	July 1964
Article IV--Witnesses	March 1964	June 1, 1964	August 1964
Article VII--Expert and Other Opinion Testimony	April 1964	July 1, 1964	August 1964

Review of existing statutes in Code of Civil Procedure Part on Evidence	March 1964 (not to be printed)	Review Comments of State Bar Committee September 1964
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Final Recommendation-- New Part of Code of Civil Procedure relating to Evidence	Approval for printing Sept- ember 1964 meeting--Ready to print October 1, 1964	Pamphlet-- available in printed form January 1965 Preprinted bill-- available Nov. 1, 1964?
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*research study set in type

EXHIBIT II

SCHEDULE OF WORK ON UNIFORM RULES OF EVIDENCE

July 1963 Meeting

Finish work on Tentative Recommendation on Article V--
Privileges

Continue work on Article IX--Authentication and Content of
Writings

Begin work on Article III--Presumptions

August 1963 Meeting

Finish work on Tentative Recommendation on Article IX--
Authentication and Content of Writings

Continue work on Article III--Presumptions

Begin work on Article I--General Provisions

September 1963 Meeting

Final approval for printing--Tentative Recommendation
on Article V--Privileges (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article III--
Presumptions

Continue work on Article I--General Provisions

Begin work on Article VI--Extrinsic Policies

October 1963 Meeting

Final approval for printing--Tentative Recommendation on
Article IX--Authentication and Content of Writings
(Consider State Bar Comments)

Finish work on Tentative Recommendation on Article I--
General Provisions

Continue work on Article VI--Extrinsic Policies

Begin work on Article II--Judicial Notice

November 1963 Meeting

Final Approval for printing--Tentative Recommendation on
Article III--Presumptions (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article VI--
Extrinsic Policies

Continue work on Article II--Judicial Notice

Begin work on Article IV--Witnesses

December 1963 Meeting

Final approval for printing--Tentative Recommendation on
Article I--General Provisions (Consider State Bar
Comments)

Finish work on Tentative Recommendation on Article II--
Judicial Notice

Continue work on Article IV--Witnesses

Begin work on Article VII--Expert and Other Opinion Testimony

January 1964 Meeting

Final approval for printing--Tentative Recommendation on
Article VI--Extrinsic Policies (Consider State Bar
Comments)

Finish work on Tentative Recommendation on Article IV--
Witnesses

Continue work on Article VII--Expert and Other Opinion
Testimony

Start review of existing statutes in Code of Civil
Procedure Part on Evidence

February 1964 Meeting

Final approval for printing--Tentative Recommendation on
Article II--Judicial Notice (Consider State Bar Comments)

Finish work on Tentative Recommendation on Article VII--
Expert and Other Opinion Testimony

Continue review of existing statutes in Code of Civil
Procedure Part on Evidence

March 1964 Meeting

Final approval for printing--Tentative Recommendation on
Article IV--Witnesses (Consider State Bar Comments)

Complete review of existing statutes in Code of Civil
Procedure Part on Evidence

Consider comments on Article VIII--Hearsay Evidence

Consider comments on Article IX--Authentication

April 1964 Meeting

Final Approval for printing--Tentative Recommendation
on Article VII--Expert and Other Opinion Testimony
(Consider State Bar Comments)

Consider comments on Article V--Privileges

May 1964 Meeting

Consider comments on Article I--General Provisions

Consider comments on Article III--Presumptions

Start work on preparation of new code of evidence

June 1964 Meeting

Continue work on new code of evidence

July 1964 Meeting

Consider comments on Article VI--Extrinsic Policies

Consider comments on Article II--Judicial Notice

Continue work on new code of evidence

August 1964 Meeting

Consider comments on Article IV--Witnesses

Consider comments on Article VII--Expert and Other Opinion
Testimony

Continue work on new code of evidence

September 1964 Meeting

Final approval for printing--pamphlet containing final
recommendation on Uniform Rules of Evidence and new
code of evidence

Bill to be preprinted and same type used in pamphlet

November 1964 Meeting

Review preprinted bill

December 1964 Meeting

Review page proofs of pamphlet containing final
recommendation and proposed legislation

Distribution of URE pamphlet (complimentary)

State Bar Committee on URE	23
State Board of Governors	15
Judges	216
Law Libraries	
In state	36
Out of state	14
Legal Papers and Publications	14
Former Commissioners	5
State Bar	4
State Agencies	
California	40
Other States	10
Courts	14
Law Professors	33
Miscellaneous	13
Total	<hr/> 437

July 10, 1963

EXHIBIT IV

GROUPS TO BE REQUESTED TO COMMENT ON TENTATIVE
RECOMMENDATION

Judicial Council
Ralph N. Kleps
Administrative Director of the Courts
4200 State Building
San Francisco 2, California

Hon. Richard H. Chambers
Judicial Conference for the
9th Circuit
Post Office Box 547
San Francisco 1, California

Mr. Fitz-Gerald Ames, Sr.
Chairman
NACCA Bar Association
335 Hayes Street
San Francisco, California

Mr. Richard Carpenter
Executive Director
League of California Cities
Hotel Claremont
Berkeley, California

George R. Richter, Chairman
California Commission on Uniform
State Laws
458 So. Spring Street
Los Angeles 13, California

Mr. Perry H. Taft
Association of Casualty &
Surety Companies
315 Montgomery Street
San Francisco 4, California

Mr. Jack Merelman
Legislative Consultant
County Supervisors Association
1100 Elks Building
Sacramento 14, California

Chief of Legal Section
Division of Contracts and
Rights-of-Way
Department of Public Works
Sacramento, California

Conference of California
Judges
Room 307, Hall of Justice
850 Bryant Street
San Francisco, California

Hon. Stanley Mosk
Attorney General
Library and Courts Bldg.
Sacramento, California

EXHIBIT V

PRESS RELEASE

LAW REVISION COMMISSION TO RECOMMEND NEW EVIDENCE CODE

The California Law Revision Commission plans to recommend a new code of evidence for enactment at the 1965 session of the Legislature. The new code will be the product of the Commission's seven-year study of the Uniform Rules of Evidence. The Uniform Rules were drafted by the National Conference of Commissioners on Uniform State Laws and were approved by that body in 1953.

A 318 page report on one portion of the study--Hearsay Evidence--was published by the Commission in August 1962. This report, consisting of the Commission's tentative recommendation and a research study, is being sold by the Documents Section of the California State Printing Office, North Seventh Street and Richards Boulevard, Sacramento, California. The report costs \$5.00 plus 20 cents tax.

Reports covering other phases of the evidence study are now being prepared and will be published from time to time during the next 14 months.

The Board of Governors of the State Bar has appointed a special committee to work with the Commission on the evidence project. The Commission also wishes to receive comments on its tentative recommendations from other interested groups and from individual members of the bar. These comments will be considered in formulating the final recommendation.

Copies of tentative recommendations (without the research studies) are being provided free of charge to persons willing to review and comment on them. They may be obtained from the California Law Revision Commission, School of Law, Stanford University, Stanford, California.