Memorandum 63-46
Subject Study 34(L)

Uniform Rules of Evidence, Article I

General Provisions

You will receive with this memorandum a revised set of Rules 1 through 8 of the URE. These rules have been redrafted in compliance with the Commission's instructions at the last meeting. We have appended comments to some of the rules which will be the comments ultimately placed in the tentative recommendation when it is adopted. You should review not only the rules themselves, but the comments as well.

Rule 1.

At the August meeting, the Commission disapproved Subdivisions (1) and (2). These subdivisions appear in Rule 1 in strike-out type. The Commission deferred consideration of the remainder of Rule 1 until after presumptions have been considered.

We do not propose to consider Rule 1 at the present time. But your attention is directed to Subdivision (14), which the staff proposes to add to carry out the Commission's instructions in regard to Rule 2.

Rule 2.

The staff was directed to revise Rule 2 to make clear that the rules apply in the Supreme Court, the district courts of appeal, the superior courts, the municipal courts, and justice courts, and in proceedings in those courts conducted by a judge, master, referse or similar officer. Drafting of the rule in accordance with these instructions was simplified

by defining "court" in Rule 1 to include the named courts and by excluding from the definition a grand jury. The terms "court commissioner" and "referee" were picked up out of the Code of Civil Procedure, Sections 259, 259 a, and 638-644.

Rule 3.

The staff was asked to consider whether Rule 3 could be framed as an additional remedy in a case where there has been a demand for admissions under Code of Civil Procedure Section 2033 and an equivocal response. The rule has been redrafted in the light of this instruction.

The rule seems unnecessary, however, in the light of Sections 2033 and 2034. Section 2033 provides: "A denial shall fairly meet the substance of the requested admission, and when good faith requires that the party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder." For failure to make a denial that "fairly meets" the substance of the requested admission, Section 2034 provides that the court may order that the fact be deemed admitted for the purpose of the action. This procedure seems superior to that provided in Rule 3. Sections 2033 and 2034 were adopted for the precise purpose of permitting the parties to establish without proof matters concerning which there is no bona fide dispute. The procedure is not expensive and there seems to be no reason why parties should not be expected to comply with it.

If Rule 3 as revised is approved by the Commission, the staff suggests that its provisions be incorporated in Code of Civil Procedure Section 2034 when these rules are finally codified.

Rules 4 and 5.

The Commission instructed the staff to consider whether these rules fully express existing California law concerning when an objection or offer of proof is unnecessary.

We have found no cases that would qualify the statement of the rule in Rule 4. The language of Rule 4 has been revised in accordance with the Commission's instructions at the August meeting. Neither it nor Rule 5, however, have been approved.

Rule 5 has been considerably revised in order to reflect exceptions found in California cases to the requirement of an offer of proof. The authorities are cited in the comment.

Rule 6.

Rule 6 was approved in its revised form at the August meeting.

Rule 7.

Rule 7 appears as it was modified and approved at the August meeting.

In preparing comments to the various rules, we have become aware of the fact that there is nothing in the URE specifically making irrelevant evidence inadmissible. Whenever we state in a comment that irrelevant evidence is inadmissible, we have no rule to cite as authority. The Code of Civil Procedure, on the other hand, provides specifically that irrelevant evidence is inadmissible. C.C.P. § 1868. Although it is probably unnecessary, the Commission might consider amending Rule 7(f) to read that "All evidence is admissible", providing elsewhere that evidence that does not have a tendency in reason to prove any matter in dispute between the parties is inadmissible.

Rule 8.

The Commission asked the staff to redraft Rule 8 to make clear that the judge's function is different when he is ruling on questions of competency and when he is ruling on questions of relevancy. We have compiled with the Commission's request. Subdivisions (2) and (3) have been added to the rule to indicate the nature of the judge's function and the scope of review exercised by the trier of fact. The language of Subdivision (2) is based in large part on the language we added to Rule 67 to accomplish the same purpose. You should compare, however, the language of Rule 8 as approved by the New Jersey Supreme Court Committee on Evidence. The New Jersey version of Rule 8 makes a distinction between rulings on competency and rulings on relevancy in much the same fashion that the revised Rule 8 does. The New Jersey version, however, preserves the existing law (which is the existing California law) permitting the trier of fact to review the judge's determination concerning the admissibility of a confession. Under our Rule 8 as it presently reads, the judge could determine the admissibility of the confession as an absolute matter, but the jury would be permitted to consider the circumstances in which the confession was made on the question of credibility. The jury would be free to disbelieve the confession. The New Jersey version has another subdivision that has no counterpart in our rule. Subdivision (5) of the New Jersey Rule 8 provides that the trial judge's determination of some matters of fact in regard to evidentiary rulings may be reviewed de novo by the appellate courts.

Preparation of the comment to Rule 8 has been deferred until the language of the rule has been substantially agreed upon.

Respectfully submitted,

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ARTICLE I. GENERAL PROVISIONS

RULE 1. DEFINITIONS.

~~[(1)--"Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.~~

~~(2)--"Relevant evidence" means evidence having any tendency in reason to prove any material fact.]~~

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a sui juris person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(11) "Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(12) "Verbal" includes both oral and written words.

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

(14) "Court" means the Supreme Court, a district court of appeal, superior court, municipal court or justice court, and does not include a grand jury.

RULE 2. SCOPE OF RULES

Except [~~to the extent to which they may be relaxed by other procedural rule or~~] as otherwise provided by statute, these rules [~~shall~~] apply in every proceeding, both criminal and civil, conducted by [~~or under the supervision of~~] a court* in which evidence is introduced, including proceedings conducted by a court commissioner, referee or similar officer.

COMMENT

By Rule 2, these rules of evidence are expressly made applicable only in proceedings conducted by California courts. The rules do not apply in administrative proceedings, legislative hearings, or other proceedings unless made applicable by some statute or rule so providing. Some statutes do provide that these rules will be applicable to a certain extent in proceedings other than court proceedings. For example, Government Code Section 11513 provides that a finding in an administrative proceeding under the Administrative Procedure Act may be based only on evidence that would be admissible over objection in a civil action. Penal Code Section 939.6 provides that a grand jury, in investigating a charge, "shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." Rule 22.5 of these rules, as recommended by the Commission, makes the rules of

* "Court" is defined in Rule 1 to mean "the Supreme Court, a district court of appeal, a superior court, a municipal court or a justice court, and does not include a grand jury."

evidence relating to privileges applicable in all proceedings of any kind in which testimony can be compelled to be given. An administrative agency may, for reasons of convenience, adopt these rules or some portion of them for use in its proceedings. But, in the absence of any such statute or rule, Rule 2 provides that these rules will have force only in court proceedings.

The preliminary phrase has been revised in recognition that some statutes will make these rules applicable in proceedings other than court proceedings as well as relax their provisions.

RULE 3. EXCLUSIONARY RULES NOT TO APPLY TO UNDISPUTED MATTER.

If ~~[upon the hearing there is no bona fide dispute between the parties as to a material fact,]~~ the admission of any fact is requested under Section 2033 of the Code of Civil Procedure and the denial does not fairly meet the substance of the requested admission, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

COMMENT

URE Rule 3 is designed to facilitate proof of facts concerning which there is no bona fide dispute, but concerning which a party refuses to stipulate their existence. The enactment in California of Sections 2033 and 2034 of the Code of Civil Procedure, which provide for pretrial requests for admissions and impose sanctions for improper failure to make the requested admissions, has minimized the need for URE Rule 3. The rule does provide, however, a desirable at-trial procedure for proving facts not in dispute to supplement the pretrial procedures for establishing such facts.

The rule has been revised to eliminate the requirement that the judge find there is "no bona fide dispute". Where the parties refuse to stipulate, it would be extremely difficult for a judge to determine whether the dispute is actually bona fide. In lieu of requiring the judge to find the dispute is not bona fide, the revised rule requires the judge to find that there has been a request for admissions and an equivocal response. The substituted

language requires a finding of a more readily ascertainable fact. As revised, Rule 3 provides an at-trial remedy for failure to comply with Section 2033 in addition to the pretrial remedies provided in Section 2034. The revised rule thus compels a party to make some pretrial effort to settle the undisputed issues through the use of the procedures provided for that purpose instead of waiting for the trial and attempting to persuade the judge that the dispute over the issue is not bona fide.

RULE 4. EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE.

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record an objection to or a motion to strike the evidence timely [~~interposed~~] made and so stated as to make clear the specific ground of the objection or motion, and (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or findings.

COMMENT

Clause (a) of Rule 4 will codify the well-settled California rule that a failure to make a timely objection to, or motion to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See Witkin, California Evidence (1958) 732-34. Rule 4 will also codify the related rule that the objection or motion must specify the ground for objection, a general objection is insufficient. Witkin, California Evidence 732-41.

Clause (b) of Rule 4 reiterates the requirement of Article VI, Section 4 1/2 of the California Constitution, that a judgment may not be reversed nor may a new trial be granted on account of an error unless the court believes "that the error complained of has resulted in a miscarriage of justice."

RULE 5. EFFECT OF ERRONEOUS EXCLUSION OF EVIDENCE

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless [~~(a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b)~~] the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding and it appears of record that:

(1) The substance, purpose, and relevance of the expected evidence was made known to the judge by the questions asked, an offer of proof, or by any other means; or

(2) The rulings of the judge made compliance with subdivision (1) futile; or

(3) The evidence was sought by questions asked during cross examination.

COMMENT

Rule 5, like Rule 4, reiterates the requirement of the California Constitution that judgments may not be reversed, nor may new trials be granted, on account of an error unless the error is prejudicial. Cal. Const. Art. VI, § 4 1/2.

The provisions of Rule 5 requiring an offer of proof or other disclosure of the evidence improperly excluded have been revised to reflect exceptions

to the rule that have been recognized in the California cases. Thus, an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. Lawless v. Calaway, 24 Cal.2d 81, 91 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination. People v. Jones, 160 Cal. 358 (1911); Tossman v. Newman, 37 Cal.2d 522, 525-26 ("no offer of proof is necessary to obtain a review of rulings on cross-examination").

RULE 6. LIMITED ADMISSIBILITY.

When [~~relevant~~] evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENT

Rule 6 expresses the existing, but uncodified, California law which requires the judge to instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another. Adkins v. Brett, 184 Cal. 252 (1920).

Under Rule 45, as under existing law, the judge would be permitted to exclude such evidence if he deemed it so prejudicial that a limiting instruction would not protect a party adequately and the matter the evidence is admissible to prove can be proved sufficiently by other evidence. See discussion in Adkins v. Brett, 184 Cal. 252, 258 (1920).

The word "relevant" has been deleted as unnecessary. As by hypothesis the evidence is admissible, it must be relevant, for evidence is admissible only if it is relevant.

RULE 7. GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES.

Except as otherwise provided [~~in these Rules~~], by statute (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all [~~relevant~~] evidence having a tendency in reason to prove a fact material to the proceeding is admissible.

COMMENT

Rule 7 is the keystone of the Uniform Rules of Evidence. It abolishes all pre-existing rules relating to the competency of evidence or witnesses. Under the URE scheme, all rules disqualifying persons to be witnesses or limiting the admissibility of evidence must be found, if at all, among the Uniform Rules of Evidence.

The approval of Rule 7, modified as indicated, is recommended in order that the purpose of the URE--to codify the law relating to the admissibility of evidence--might be fully realized. Rule 7 precludes the possiblility that additional restrictions on the admissibility of evidence will remain valid in addition to those restrictions declared in the URE.

The phrase "in these rules" has been changed to "by statute" in order to avoid any implication that the validity of statutory restrictions on

the admissibility of evidence--such as the restrictions on speed trap evidence provided in Vehicle Code Sections 40803-40804--will be impaired by these rules.

The definition of "relevant evidence" found in URE Rule 1 has been substituted for the word "relevant" in clause (f). The substitution permits the removal of the definition of the term from Rule 1 as unnecessary.

RULE 8. PRELIMINARY INQUIRY BY JUDGE.

(1) When the qualification of a person to be a witness, or the admissibility of evidence, [~~or the existence of a privilege~~] is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury.

(2) If evidence is admissible if relevant and its relevance is subject to a condition, or if evidence is stated in these rules to be admissible if there is sufficient evidence to sustain a finding of a condition, the judge shall admit the evidence if there is sufficient evidence to sustain a finding of the condition. In such cases, a contention by the opponent that the condition has not been fulfilled is not an issue for determination by the judge, nor is a finding by the judge that the evidence is admissible to be deemed a finding that the condition has been fulfilled. Evidence offered by the opponent that the condition has not been fulfilled is to be submitted solely to the trier of fact, which shall determine the issue.

(3) Subject to subdivision (2), if the admissibility of evidence is stated in these rules to be subject to a condition

or a finding by the judge of a condition, the judge shall admit the evidence if he is persuaded that the condition has been fulfilled. In such cases, a contention by the opponent that the condition has not been fulfilled is an issue for determination by the judge and not by the trier of fact. In the determination of the issue, exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege. Evidence offered by the opponent that the condition has not been fulfilled is to be submitted solely to the judge and not to the trier of fact. But this rule [~~shall not be construed to~~] does not limit the right of a party to introduce before the [~~jury~~] trier of fact evidence relevant to weight or credibility.