Place of Meeting

State Bar Building
1230 West Third Street
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles — January 23, 24, and 25, 1964

Thursday evening, January 23 (meeting starts at 7:00 p.m.)

Friday and Saturday, January 24 and 25 (meeting starts at 9:00 a.m. each day)

1. Minutes of December meeting (sent 1/9/64)

2. Administrative matters
   Memorandum 64-5 (sent 1/6/64)

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

   Bring to Meeting: Printed Pamphlet containing Uniform Rules of Evidence
   Report of New Jersey Supreme Court Committee on Evidence (this has a blue cover--you have a copy)
   Loose-leaf binder containing Uniform Rules of Evidence as Revised to Date (you have this)

   Approval for Printing

   Tentative Recommendation on Witnesses

   Memorandum 64-1 (sent 1/15/64)

   Determination of Policy

   Article III. Presumptions

   Memorandum 64-2 (sent 1/6/64)
   First Supplement to Memorandum 64-2 (sent 1/15/64)
   Second Supplement to Memorandum 64-2 (enclosed)
   Third Supplement to Memorandum 64-2 (to be sent)

Approval for Distribution to State Bar Committee

Tentative Recommendation on General Provisions

Memorandum 64-3 (enclosed)
Memorandum 64-6 (discussion of Rule 8) (enclosed)

Tentative Recommendation on Valuation of Property

Memorandum 64-4 (sent 1/9/64)
Pamphlet - Evidence in Eminent Domain Proceedings

file

MINUTES OF MEETING

OF

JANUARY 23, 24, AND 25, 1964

Los Angeles

The regular meeting of the Law Revision Commission was held in Los Angeles on January 23, 24, and 25.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman
Hon. Alfred H. Song (Jan. 23 and 24)
James R. Edwards
Sho Sato
Herman F. Selvin
Thomas E. Stanton, Jr.

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

Messrs. John H. DeMoully, Joseph B. Harvey, and Jon D. Smock of the Commission's staff also were present. Messrs. Robert Carlson and Norval Fairman of the Department of Public Works were present on January 24 when the tentative recommendation on valuation of property was discussed.

Minutes of December 1963 Meeting. The Commission deferred approval of the Minutes of the December 1963 meeting until the February 1964 meeting. Some Commissioners reported that they had not received copies of the Minutes of the December 1963 meeting.

Future meetings. Future meetings are scheduled as follows:

February 28 and 29	San Francisco
March 22-24	Lake Tahoe
April 23-25	Los Angeles
May 21-23	Los Angeles
June 18-20	San Francisco

The first day of each three-day meeting will be held between 7:00 and 10:00 p.m.

ADMINISTRATIVE MATTERS

Research Contract on Sovereign Immunity. The Commission considered Memorandum 64-5. This memorandum contained a staff suggestion that a research contract be made with Professor Van Alstyne to prepare a report on the necessary amendments to the 1963 legislation to correct technical defects.

After discussion, a motion was made by Mr. Stanton, seconded by Mr. Sato, and unanimously adopted that the Commission enter into an agreement in the amount of $500 with Professor Van Alstyne to prepare a report on the necessary amendments to the 1963 sovereign immunity legislation to correct technical defects therein. The Chairman was authorized to execute the agreement on behalf of the Commission.

Staff salaries. The Executive Secretary reported that the State Personnel Board has approved a two-step pay increase in the salaries for the Administrative Trainee, Associate Counsel, and Assistant Executive Secretary. These are automatic increases and no Commission action is necessary to put them into effect.

Salaries for exempt positions are fixed by the Department of Finance and the new salary ranges for exempt classes as approved by that department provide for a two-step increase in the salary for the position of Executive Secretary. However, Pay Roll Letter # 63-13 (December 31, 1963) provides in part:

> In order for the new salary ranges for exempt classes to become effective as approved by the Department of Finance, it will be necessary that they be established by the legally designated salary fixing authority (Appointing power).

Mr. Stanton moved, Mr. Keatinge seconded, and the Commission unanimously determined that the salary for the Executive Secretary be fixed in accordance

with the new salary ranges for exempt positions approved by the Department of Finance.

Obtaining cooperation of interested persons in URE study. The Executive Secretary reported on his efforts to obtain the cooperation of interested persons in the URE study. The Commission suggested that a written report on this matter be prepared and distributed to the members of the Commission as soon as the decisions of the various interested persons are made known.

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

(ARTICLE I. GENERAL PROVISIONS)

The Commission considered Memorandum 64-3 and Memorandum 64-6. The following actions were taken:

Rule 1.

The introductory clause was revised to read:

As used in these rules, unless the context otherwise requires:

Some of the defined terms are used not in the defined sense. The context, however, indicates the meaning intended in such places.

Rule 1(1).

The definition of "evidence" was revised to read substantially as follows:

> "Evidence" means testimony, documents, or other things that are offered to prove the existence or nonexistence of a fact in a judicial proceeding.

Rule 1(2).

Rule 1(2) was revised to read substantially as follows:

> "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact.

The word "material" was deleted because it is ambiguous. It is sometimes used to describe facts that are disputed or are in issue, and it is sometimes used to describe matters that are of substantial significance. Textwriters frequently use "immaterial" to refer to facts not in issue, while practicing lawyers frequently use "immaterial" to refer to facts that are of no substantial consequence or unimportant. The staff was

asked to consider whether Rule 7 should be amended to require that evidence be material in order to be admissible. Rule 45 is to be considered, too, for it may provide sufficiently for the exclusion of evidence that is of no substantial consequence.

Rule 1(3).

Rule 1(3) was revised to read substantially as follows:

> "Proof" is the effect of evidence, that is, the establishment of a fact by evidence.

The staff was also directed to substitute the word "evidence" for the word "proof" in Rule 1(8). The revised definition conforms to the existing definition in C.C.P. § 1824 and is more accurate than the URE definition, which merely defines "proof" to be all of the evidence.

Rule 1(4).

The URE definition of "burden of proof" was approved. The staff was directed to add a provision to the subdivision indicating that "burden of proof" means "burden of proof by a preponderance of the evidence" unless a heavier burden of proof is specifically required.

Rule 1(5).

The words "sufficient to avoid" were substituted for "when necessary to avoid the risk of". The staff was directed to consider whether to substitute another term for "peremptory finding" or to explain its meaning more fully in the comment. The staff was also directed to consider whether references to a nonsuit and a judgment under C.C.P. § 631.8 as well as references to the admission or exclusion of evidence should be added to the references to directed verdict and peremptory finding.

Rule 1(6).

Rule 1(6) was approved.

Rule 1(7).

The clause, "unless some other is indicated by the context of the rule where the term is used", was deleted as unnecessary in light of the change made in the introductory clause of Rule 1. Subdivision (7) was then approved.

Rule 1(8).

The second sentence was revised to read:

> A ruling on the admissibility of evidence implies whatever supporting finding of fact is prerequisite thereto. A separate or formal finding is unnecessary unless required by statute.

Rule 1(9).

Rule 1(9) was deleted as unnecessary. The word "guardian" is only used in the privilege rules, and each place it is used the text makes clear that a conservator is included.

Rule 1(10).

Rule 1(10) was revised to read substantially as follows:

> "Judge" includes a court commissioner, referee, or similar officer, authorized to conduct and conducting a judicial proceeding or hearing.

Rule 1(11).

The reference to "a jury" was moved to the end of the subdivision in order to make clear that the phrase modifying "judge" does not modify "jury" also. As revised, the subdivision was approved.

Rules 1(12)-(13).

Rules 1(12)-(13) were approved.

Rule 1(14).

Rule 1(14) was approved after changing "and" to "but".

Rules 2-7.

Rules 2-7 were previously approved.

Rule 8(1).

The phrase "or the existence of a privilege" was restored in the second line of the subdivision. The phrase "as provided in this rule" was added after "judge" in the fifth line of the subdivision.

In the last sentence of the subdivision, "hearing" was substituted for "presence and hearing".

Rule 8(2).

The words "If evidence is admissible if relevant and its relevance is subject to a condition, or" were sticken. The staff was directed to consider redrafting the subdivision to make specific cross references to the personal knowledge and authentication rules.

Rule 8(3).

The last sentence was made a separate subdivision (4).

Rule 8 generally.

A motion was made but did not carry to make the standard of admissibility "evidence sufficient to sustain a finding" for all evidence, with the further requirement that the judge's determination is final. Rule 8 was then approved as amended at the meeting. The principle approved

was that subdivision (3) prescribes the operating procedure in determining the admissibility of evidence in all cases except in those instances where the revised rules specifically require that the preliminary condition of admissibility be shown by evidence sufficient to warrant a finding, i.e., Rule 19 (personal knowledge) and Rules 67 and 68 (authentication).

Tentative Recommendation.

The staff was authorized to send the recommendation to the State Bar Committee for comment and directed to bring the matter back at the next meeting for further consideration.

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

(ARTICLE III. PRESUMPTIONS)

The Commission considered Memorandum No. 64-2 and the supplements thereto. The following actions were taken:

The staff explained the definitions of the suggested presumption categories. It was suggested that in drafting the statutes the principles applicable to each category should be stated first with a list of the presumptions fitting within each category following.

The following terms were coined for the purpose of classifying presumptions.

Morgan presumption: A presumption that imposes the burden of proof upon the party against whom it operates. If it operates against a defendant in a criminal case, his burden is merely to create a reasonable doubt. Consideration is to be given to drafting the provisions relating to these presumptions without using the word "presumption"; instead, the provisions might refer only to the burden of proof as to the particular issue.

Thayer presumption: A presumption that imposes upon the party against whom it operates the burden of producing evidence. When evidence sufficient to warrant a finding of the nonexistence of the presumed fact is introduced, the presumption disappears from the case. Consideration is to be given to drafting the provisions relating to these presumptions without using the word "presumption"; instead, the provisions might refer only to the burden of producing evidence as to the particular issue.

Statutory inference: Merely a codified permissible inference. The Commission decided not to codify any inferences because it considered the singling out of certain inferences to be specified by statute to be unwise inasmuch as the vast majority of permissible inferences are not given statutory recognition. Specification of some inferences by statute would seem to give them undue importance.

The following presumptions were then classified:

C.C.P. § 1963-1. That a person is innocent of crime or wrong. This was classified as a Morgan presumption. The staff was directed to draft it in terms of burden of proof instead of in terms of presumption. The section would not appear with the presumptions in the code, but would appear with the sections dealing with burden of proof. Commissioner Stanton voted "No."

C.C.P. § 1963-2. That an unlawful act was done with an unlawful intent. This provision is to be repealed. It has not been applied where specific intent is an issue. Moreover, it is meaningless: the unlawful intent must be assumed or proved initially in order that the act giving rise to the presumption may be considered unlawful.

C.C.P. § 1963-3. That a person intends the ordinary consequences of his voluntary act. The presumption is unnecessary since intent may be inferred from the commission of the act and the surrounding circumstances. It is also misleading, for instructions based on it are erroneous in specific intent cases. Hence, the presumption is to be repealed. Commissioner Stanton voted against the repeal.

C.C.P. § 1963-4. That a person exercises ordinary care for his own concerns. This was classified as a Morgan presumption. It is to be drafted as an assignment of the burden of proof on the issue and not as a presumption.

C.C.P. § 1963-5, -6. That evidence willfully suppressed would be adverse if produced; that higher evidence would be adverse from inferior being produced. These two presumptions are to be repealed. The matter covered by subdivision 6 is covered by C.C.P. § 2061-7, relating to instructions to the jury. Section 2061 should be amended so that its language clearly covers the situation mentioned in subdivision 5, above, also.

C.C.P. § 1963-7. That money paid by one to another was due to the latter. The word "paid" was changed to "delivered" and the presumption was then classified as a Thayer presumption.

C.C.P. § 1963-8. That a thing delivered up by one to another belonged to the latter; 9. That an obligation delivered up to the debtor has been paid. Common law: That an obligation possessed by the creditor has not been paid. These presumptions were classified as Thayer presumptions.

C.C.P. § 1963-10. That former rent or installments have been paid when a receipt for latter is produced. The word "former" was changed to "earlier" and the word "latter" was changed to "later". The presumption was then classified as a Thayer presumption.

C.C.P. § 1963-11. That things which a person possesses are owned by him. This presumption was classified as a Thayer presumption.

C.C.P. § 1963-12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his

ownership. This presumption was classified as a Thayer presumption, but the clause relating to "common reputation" was deleted as inaccurate.

Common law: That the owner of the legal title to property is also the owner of the full beneficial title. This was classified as a Morgan presumption which must be overcome by clear and convincing evidence. The classification supports the public policy underlying the statute of frauds and parol evidence rule.

C.C.P. § 1963-14. That a person acting in a public office was regularly appointed to it. This was classified as a Morgan presumption. In the comment to the provision, mention should be made of the de facto officer doctrine which will not be affected by this presumption.

C.C.P. § 1963-15. That official duty has been regularly performed. A motion was made to classify this presumption as a Thayer presumption. The motion was not acted on and the matter was passed over and will be considered in connection with § 1963-33 (that the law has been obeyed).

C.C.P. § 1963-16. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of his jurisdiction. The presumption was revised to apply to all courts of this state or the United States and to all courts of general jurisdiction in any other state or nation. The presumption was classified as a Morgan presumption and will apply only when the action of the court or judge is under collateral attack.

C.C.P. § 1963-17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties. This

presumption was classified as a Thayer presumption. The discussion preceding the Commission action indicated that the presumption might be clarified by rewording it to indicate that the matter correctly determined by the judgment is the ultimate judgment itself and not the underlying facts that were determined by the court in arriving at the judgment.

C.C.P. § 1963-18. That all matters within an issue were laid before the jury and passed upon by them, and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them. This presumption is to be repealed. It has not been applied with any effect in the cases, and it is unnecessary in light of the doctrines of res judicata and collateral estoppel.

C.C.P. § 1963-19. That private transactions have been fair and regular. This presumption is to be repealed as serving no useful function not served already by the presumption against crime or wrongdoing.

C.C.P. § 1963-20. That the ordinary course of business has been followed.

C.C.P. § 1963-28. That things have happened according to the ordinary course of nature and the ordinary habits of life. The presumptions in subdivisions 20 and 28 are both to be repealed. They give presumptive effect to habit or custom evidence. In cases where the habit or custom evidence is strong, a mandatory conclusion (as required by a presumption) might be required; but in many cases, the habit or custom evidence will be equivocal and no mandatory conclusion should be required. Hence, the conclusion to be drawn from such evidence should be left to inference.

C.C.P. § 1963-21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration. This presumption is to

be repealed as the matter is fully covered by the Commercial Code. Under Commercial Code §§ 1201, 3306, 3307, and 3408, the same result is achieved that would be achieved by classifying the above presumption as a Morgan presumption.

C.C.P. § 1963-22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill. This presumption, which operates to require a party claiming to have endorsed an instrument to accommodate anyone other than the maker to carry the burden of proof on the issue, was repealed for the reason that the matter should be left for determination under the terms of the Commercial Code.

C.C.P. § 1963-23. That a writing is truly dated. This was classified as a Thayer presumption. This classification is consistent with the Commercial Code presumptions relating to the dates of commercial paper and securities.

C.C.P. § 1963-24. That a letter duly directed and mailed was received in the regular course of the mail. This presumption is to be repealed on the ground that the underlying inference is strong and there is no need to give it the additional compulsive force of a presumption.

C.C.P. § 1963-25. Identity of person from identity of name. This presumption is to be repealed on the ground that the underlying inference may be strong in some cases and may be weak in some cases and the jury should be free to accept or reject the conclusion of identity of person according to the strength or weakness of the evidence.

C.C.P. § 1963-26. That a person not heard from in seven years is dead. Consideration of this presumption was deferred pending a report from the staff on the Uniform Absence as Evidence of Death Act.

C.C.P. § 1963-27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact. This presumption is to be repealed. It has been mentioned but rarely in the cases, and does not appear to have had any substantive effect on the results.

C.C.P. § 1963-29. That persons acting as copartners have entered into a contract of partnership. This presumption is to be repealed. It has been cited but once, and then in a case where it was not needed.

Common law: That a ceremonial marriage is valid. This presumption was classified as a Morgan presumption because of the strong public policy in favor of the validity of marriages.

C.C.P. § 1963-30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage. This presumption is to be repealed. It gives conclusive effect to reputation evidence. Such evidence may give rise to an inference under some circumstances, but it should not be conclusive in all cases where there is no contrary evidence--as, for example, when the party relying on the presumption should have better evidence of the marriage (if there was one) and has failed to produce it.

C.C.P. § 1963-31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate. This presumption was classified as a Morgan presumption to be overcome only by clear and

convincing evidence. The classification reflects the strong public policy in favor of legitimacy of issue.

C.C.P. § 1963-32. That a thing once proved to exist continues as long as is usual with things of that nature. This presumption is to be repealed. The strength of the inference will vary according to the nature of the thing proved to exist and the surrounding circumstances. It is undesirable, therefore, to add the compulsive force of a presumption to require the same result in every case in which there is no other evidence.

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

The Commission considered Memorandum 64-1 and the Tentative Recommendation relating to Article IV (Witnesses).

The following actions were taken:

Rule 17.

In subdivision (1), it was agreed that the phrase "the judge finds that" should be deleted unless there is a significant reason why this phrase must be retained. See Rule 8 in connection with this problem.

The Commission considered the objection of the Southern Section that this rule eliminates the requirement of existing law that the witness have the ability to perceive and the ability to recollect in order to be qualified as a witness. It was noted that the requirement of personal knowledge to some extent retains this requirement. The Commission decided not to change Rule 17 as contained in the tentative recommendation.

Rule 18.

No change was made in this rule.

Rule 19.

All references to expert witnesses are to be deleted from this rule and inserted in the tentative recommendation on expert witnesses. Subdivision (1) of Rule 19 is to be revised to make it subject to Rule 56.

After considerable discussion, the Commission determined not to include an express statement that the showing of personal knowledge is "a prerequisite" before the testimony of the witness is admissible.

Rule 19 is to be considered in connection with Rule 8. Rule 8 may need adjustment to indicate that the judge's determination is to be made on the basis of the evidence presented by the party calling the witness, rather than on the basis of the evidence presented by both parties.

Rule 20.

The Commission considered the comments of the Southern Section of the State Bar Committee as set out in Exhibit II and as summarized on pages 3-4 of Memorandum 64-1. After discussion, Rule 20 was revised to read:

> (1) Subject to subdivisions (2) and (3), the credibility of a witness may be attacked or supported by any party, including the party calling him.
> (2) Evidence to support the credibility of a witness is inadmissible unless evidence has been admitted for the purpose of proving that he made a prior inconsistent statement or otherwise attacking his credibility.
> (3) Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

The word "attacked" is to be used instead of "impairing" in the URE rules as revised.

Subdivision (3) of the revised rule is designed to keep collateral matters out of the case.

Rule 21.

The Commission approved this rule as set out in the tentative recommendation after "hearing" was substituted for "presence" in subdivision (1). A similar change should be made in Rule 8.

Rule 22.

No change was made in this rule.

Approval for printing.

The tentative recommendation was approved by a unanimous vote for printing as revised.

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

(ARTICLE VII. EXPERT WITNESSES)

The tentative recommendation on expert witnesses is to be revised to include the substance of the matter deleted from Rule 19 relating to expert witnesses. This matter probably should be inserted in Rule 56.

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

(ARTICLE VII-A. EXPERT TESTIMONY ON VALUE IN EMINENT DOMAIN PROCEEDINGS).

The Commission considered Memorandum 64-4 and the tentative recommendation relating to Article VII-A (Valuation of Property). The following actions were taken:

Conference with Department of Public Works and Attorney General.

The Executive Secretary was directed to contact the office of the Attorney General and to request that a conference be held on this recommendation with that office and the Department of Public Works as soon as possible. The Executive Secretary should determine exactly what objections are made by the Department of Public Works and the office of the Attorney General. After consideration and analysis of these objections, the staff is to make recommendations to the Commission for such changes in the tentative recommendation as are considered necessary.

Bill to be Separate from New Comprehensive Evidence Statute.

It was agreed that the bill on this subject should be separate from the new comprehensive evidence statute.

Since the bill will be separate from the new comprehensive evidence statute it will be necessary to duplicate some of the provisions in the revised Article VII in the bill on valuation in eminent domain proceedings.

Scope of New Statute.

The new statute is to be limited to opinion testimony on value, damage, and benefits in eminent domain proceedings. The letter sending out the tentative recommendation for comments is to indicate that the tentative recommendation is so restricted and to request comments on whether the tentative recommendation should apply to all proceedings for the determination of value of property.

Rule 61.1.

This rule is to be revised to limit the proposed statute to eminent domain proceedings.

Rule 61.2.

In paragraph (b), the word "apply" was changed to "weigh."

Rule 61.3.

The last two sentences of subdivision (b) were revised to read:

> In order to be considered comparable, the sale or contract to buy and sell must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued, but, subject to subdivision (c) of Rule 61.2, the court shall permit the witness a wide discretion in testifying to his opinion as to which sales and contracts to buy and sell the witness believes are comparable.

Rule 61.4.

In paragraph (a), the words "the property might have been taken by that entity by eminent domain" for the words "property may be taken by eminent domain."

Paragraph (b) was deleted and the bill is to contain a section like Revised Rule 52.

Rule 61.5.

This rule must be deleted or revised to reflect the decision to limit the legislation to eminent domain proceedings.

Rule 61.6.

No change was made in this Rule.

Approval for Distribution for Comments.

After revisions have been made to reflect Commission action, the tentative recommendation is to be distributed for comments.