Place of Meeting

California Alumni Center
Lake Tahoe

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Lake Tahoe March 22, 23 and 24, 1964

Sunday Evening, March 22 (Meeting starts at 7:00 p.m.)
Monday, March 23 (Meeting from 9:00 a.m. to 5:00 p.m.)
Tuesday, March 24 (Meeting starts at 9:00 a.m.)

1. Approval of Minutes of February 1964 Meeting (sent 3/10/64)

2. Administrative matters, if any

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

Bring to Meeting: Printed pamphlet containing Uniform Rules of Evidence (you have a copy)

Report of New Jersey Supreme Court Committee on Evidence (you have a copy)

Loose-leaf binder containing Uniform Rules of Evidence as Revised to Date (you have this)

Loose-leaf binder containing New Evidence Statute as Revised to Date (you have this)

Approval for printing

Tentative Recommendation on Expert and Other Opinion Testimony

Memorandum 64-16 (sent 3/13/64)

Article III. Presumptions

First Supplement to Memorandum 64-8 (sent 3/10/64)

Memorandum 64-18 (sent 3/13/64)

Memorandum 64-19 (enclosed)

Review of Existing Statutes not Affected by URE

Research study (enclosed)

Memorandum 64-20 (enclosed)

First Supplement to Memorandum 64-20 (enclosed)

Review of Title 11. (Hearsay Evidence) of New Evidence Statute

Memorandum 64-17 (enclosed)

MINUTES
MINUTES OF MEETING

OF

MARCH 22, 23, and 24, 1964

Tahoe Alumni Center

The regular meeting of the Law Revision Commission was held at the Tahoe Alumni Center, Tahoe City, California, on March 22, 23, and 24, 1964.

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

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
Joseph A. Ball
James R. Edwards
Angus C. Morrison, ex officio

Messrs. John H. DeMoully, Joseph B. Harvey, and Jon D. Smock of the Commission's staff were also present. Professor Ronan E. Degnan, the Commission's research consultant on the URE study, was present for the meeting.

Minutes of February 1964 Meeting. The Commission approved the Minutes of the February 1964 meeting as submitted.

Future Meetings. Future meetings of the Commission are now scheduled as follows:

April 23-25	San Francisco
May 21-23	Los Angeles
June 18-20	San Francisco
July 23-25	Los Angeles (U.S.C.)

UNIFORM RULES OF EVIDENCE

(ARTICLE II. JUDICIAL NOTICE)

The Commission considered the rules relating to judicial notice, revised to effectuate the policy decisions made at the February meeting. The following actions were taken:

RULE 9

The Commission approved this rule without change.

RULE 9.5

After an extended discussion, the Commission approved the text of this rule without change, but directed the staff to include in the Comment to this rule a discussion regarding the burden on the party requesting that judicial notice be taken to persuade the judge both as to the propriety of taking judicial notice of a matter specified in subdivision (2) of Revised Rule 9 and as to the tenor of the matter to be noticed.

RULE 10

The Commission approved deleting from subdivision (2)(c) of this rule the requirement that extrinsic information be in writing and added to this subdivision a requirement that "such information and its source shall be made a part of the record in the action or proceeding . . . ."

The remainder of this rule was approved without change.

RULE 10.5

The Commission approved this rule without change.

RULE 11

The Commission approved this rule without change.

RULE 12

The Commission approved the substance of subdivision (2) of this rule but directed the staff to restate the subdivision in three separate sentences, reading substantially as follows:

> (2) The reviewing court shall judicially notice each matter specified in Rule 9 that the judge was required to notice under Rules 9 and 9.5. The reviewing court may judicially notice any matter specified in subdivision (2) of Rule 9 and has the same power as the judge under Rule 10.5. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

The Commission agreed to delete paragraph (b) from subdivision (3) of this rule, and to add a subdivision (4) to read substantially as follows:

> (4) In determining the propriety of taking judicial notice of a matter specified in subdivision (2) of Rule 9, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action or proceeding, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action or proceeding, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

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

(ARTICLE III. PRESUMPTIONS)

The Commission considered Memorandum 64-18 and the tentative recommendation relating to presumptions (March 13, 1964, draft). The following actions were taken:

Basic scheme of presumption rules.

The draft recommendation first defines a "presumption" (Rule 13). It then provides that presumptions are conclusive or rebuttable and classifies the rebuttable presumptions as either affecting the burden of proof or affecting the burden of producing evidence (Rule 13.5). The remaining rules set forth the conclusive presumptions (Rule 14), the criteria for determining the classification of the rebuttable presumptions (Rules 15 and 15.5), the classification of several specific presumptions (Rules 15 and 15.5), and certain guides for handling inconsistent presumptions (Rule 16).

The rebuttable presumptions are classified as Morgan presumptions (Rule 15) if they are based upon policy considerations, and are classified as Thayer presumptions if they seem to be based only on probability and the need to expedite the determination of issues (Rule 15.5).

The Commission approved the basic scheme of the proposed rules. The listing of additional specific presumptions should continue until as many as can be identified have been classified.

Rule 13.

Rule 13 was approved as proposed. "A presumption is not evidence" was added to the URE language of Rule 13 to overcome the holding in Smellie v.

Southern Pacific Company, 212 Cal. 540 (1931).

Rule 13.5.

Rule 13.5 was passed over until action was taken on the remaining rules.

Rule 14.

This rule as drafted was Code Civ. Proc. § 1962 without change. Action was deferred until Professor Degnan's study is considered on the question.

Rule 15.

Subdivision (1) was approved.

Subdivision (2) was approved to the end of the sentence ending with the word "others". The remainder of the subdivision was made a separate subdivision. The additional subdivision is to begin with words stating in substance, "Included in the presumptions affecting the burden of proof are the following:"

The first sentence of paragraph (a) was modified to read:

> That a child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is a legitimate child of that marriage.

Paragraph (a) was then approved.

Consideration of paragraphs (b) through (j) in detail was deferred.

Rule 15.5.

Subdivision (1) was approved.

The staff was directed to remove subdivision (2) from Rule 15.5 and to draft a new provision indicating that statutes stating that proof of one fact is "prima facie evidence" of another are to be construed as creating

either presumptions affecting the burden of proof or presumptions affecting the burden of producing evidence in accordance with the criteria set forth in Rules 15 and 15.5.

The staff was directed to redraft the second sentence of subdivision (3) to list the criteria for Thayer presumptions in tabular form. The language indicating that the presumed fact may be "logically inferred" is to be changed to indicate that there must be high probability of the presumed fact.

The specific presumptions are to be listed separately. They should not be listed in subdivision (3). The presumption of receipt from proof of mailing is to be added to those listed as Thayer presumptions.

Rule 16.

Rule 16 was not approved. Under the scheme approved by the Commission there appears to be little, if any, need for the provision. The rule may be considered again in the future if a problem appears that cannot be solved under the other rules.

Allocation of burden of proof.

The staff was directed to draft a statute allocating the initial burden of proof for such "presumptions" as innocence, due care, and sanity. As a general drafting principle, Morgan presumptions should be drafted as allocations of the burden of proof wherever it appears feasible to do so. The staff should consider whether the presumption of consideration for a written contract should be stated as a presumption and not merely as an allocation of the burden of proof.

Repealed presumptions.

The Commission approved the addition of proposed Rule 13.7 stating that certain matters, heretofore considered presumptions, are not presumptions. The rule is to be modified to state that inferences may be drawn in appropriate cases, that the repeal of the presumptions does not affect the inference drawing process.

Form of recommendation.

The staff was directed to redraft the tentative recommendation in the form of a statute that might be enacted as part of the Code of Civil Procedure. The format of the URE is not to be followed. The URE rules should be stated (perhaps in strikeout type) at the beginning of the recommendation together with a commentary indicating why the URE rules are disapproved. In this format, each kind of presumption can be placed in a separate article and each individual presumption in a separate section. The proposed statute should incorporate the material on burden of proof being developed by Professor Degnan.

The format of the URE was abandoned to simplify the drafting of the new presumption provisions. There need be no long, complex rules. Instead, short sections can be used. The provisions on burden of proof can be incorporated in a statutory format more readily than they can in the URE format.

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

(ARTICLE IV. WITNESSES)

Rule 19.

In connection with the Commission's consideration of Proposed Rule 55.5, the Commission agreed to add an introductory phrase ("in exceptional circumstances") to subdivision (3) of Revised Rule 19 in the Commission's tentative recommendation on the witness' article. Making Revised Rule 19 consistent with Proposed Rule 55.5 is intended to suggest that the discretionary power of the judge to receive conditionally the testimony of a witness subject to his personal knowledge being later supplied in the course of the trial should be sparingly exercised. It was recognized that the judge has discretion to regulate the order of proof but normally should not deviate from the established practice of requiring a witness' personal knowledge to be shown before permitting a witness to testify.

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

(ARTICLE VII. EXPERT AND OTHER OPINION TESTIMONY)

The Commission considered its tentative recommendation on this subject and Memorandum 64-16 relating thereto. The following actions were taken:

GENERAL MATTERS.

The Commission considered the use of some other word or phrase in place of "matter," but determined that the word "matter" more clearly covers the desired scope than any other word.

In light of Revised Rule 8, the Commission approved deleting the phrase "if the judge finds" and words of similar import in every instance where they appear in the revised rules relating to expert and other opinion testimony.

RULE 55.5.

For the purpose of clarification, the Commission agreed to revise subdivision (1) of this rule to read substantially as follows:

> (1) A person is qualified to testify as an expert witness if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

An introductory phrase, reading "in exceptional circumstances," was added to subdivision (3) of this rule to suggest that the discretionary power of the judge to receive conditionally the testimony of a witness subject to his expertise being later supplied in the course of the trial should be sparingly

exercised. It was recognized that the judge has discretion to regulate the order of proof but normally should not deviate from the established practice of requiring an expert's qualifications to be shown before permitting a witness to testify as an expert.

RULE 56

Subdivision (1) of this rule was revised to read substantially as follows:

> (1) If the witness is not testifying as an expert, his opinions are limited to such opinions as (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

The staff was directed to revise subdivision (2) of this rule (a) to incorporate the substance of the New Jersey revision to subdivision (2)(a), and (b) to require that an expert's opinions be based upon his special knowledge, skill, experience, training, or education, and (c) to state that the subject to which the expert's testimony relates must be beyond the competence of ordinary persons.

The staff was directed to revise subdivision (2)(a) or to add to Rule 56 a new subdivision that states the standard to be applied as to when an expert may base his opinion on inadmissible hearsay. The standard to be stated is one of expediency and reliability, the latter to be stated in terms of hearsay of a type ordinarily relied upon by experts in forming an opinion on that subject. The staff was directed to research the existing California law to determine appropriate language to formulate a test designed to restate the existing law.

The substance of URE Rule 56(2)(b) is to be restated in a separate rule which is to state specifically that an expert witness may testify (a) to any matter to the same extent as a nonexpert witness, and (b) to those facts which are within his special expertise and not within the competence of ordinary persons, and (c) as to his opinion on a subject within his special expertise.

The staff was directed to add to the comment to this rule a discussion regarding the use of "opinions" in place of the URE "opinions or inferences." The discussion is to indicate that no change in substance is intended and that the uniform use of "opinion" is intended to cover an opinion, inference, conclusion, or any other subjective statement by a witness.

RULE 57

Subdivision (2) of this rule was revised to read substantially as follows:

> (2) Before testifying in the form of opinion, the witness shall first be examined concerning the matter upon which the opinion is based unless the judge in his discretion dispenses with this requirement.

The purpose of this revision is to change the thrust of the judge's discretion from seemingly dispensing with the requirement of stating the matters upon which the opinion is based in every case to requiring these matters to be stated unless dispensed with. The failure to state such matters is thus made the exception rather than the rule.

RULE 57.5

The Commission disapproved a suggestion to delete the

modifying word "expert" so that this rule could be made applicable to any witness testifying in the form of opinion. Hence, the rule remains confined to persons testifying as an expert.

RULE 58

The Commission approved the deletion of this rule in its entirety. Insofar as the rule deals with hypothetical questions, it is covered in the new rule to be drafted relating to what an expert may testify to. Insofar as the second clause of this rule is concerned, it is now superseded by Rule 57(2) as revised.

RULE 58.5

Subdivision (1) of this rule was revised to read substantially as follows:

> (1) Subject to subdivision (2), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to his qualifications and as to the subject to which his expert testimony relates.

This revision is intended to clarify the scope of cross-examination permitted of an expert witness. He should be subject to cross-examination the same as any other witness and, in addition, should be subject to full cross-examination in regard to his qualifications, the reasons for his opinion, the matter upon which the opinion is based, and any other matter falling within the scope of his testimony as an expert.

Subdivsion (2) of this rule was revised to read substantially as follows:

> (2) A witness testifying as an expert may not be cross-examined in regard to the content or tenor of any publication unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion.

RULES 59, 60 AND 61

The deletion of Rules 59 and 60 and the revision of Rule 61 were approved without change.

AMENDMENTS AND REPEALS

The Commission agreed to delete only the second clause in subdivision (9) of Section 1870. Accordingly, subdivision (10) was stricken from this tentative recommendation and, together with the first clause of subdivision (9), repeal of this subdivision will be considered later in connection with the revision of existing code sections.

APPROVAL FOR PRINTING

The Commission approved this tentative recommendation for printing, revised in accord with the decisions noted, subject to the staff's editorial revisions and consideration of suggestions by individual Commissioners.

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

(EXISTING PROVISIONS OF CODE CIV. PROC., PART 4)

The Commission considered Memorandum 64-20 and Part I of Professor Degnan's study insofar as they relate to C.C.P. § 1833, the First Supplement to Memorandum 64-20, and Part II of Professor Degnan's study. The following actions were taken:

C.C.P. § 1833. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

This section is to be repealed. "Prima facie evidence" is used for various purposes in the codes. Sometimes it seems to be used to declare evidence is admissible. Sometimes it is used to express a hearsay exception. Sometimes it seems to be used to give rise to a Thayer presumption. In tax cases, the Supreme Court has held that it gives rise to a Morgan presumption. Thus, the term defined has no fixed meaning. The term as used in the statutes will give rise to either a Thayer or Morgan presumption in accordance with the action taken in regard to draft Rule 15.5 (see minutes relating to presumptions).

C.C.P. § 1867. None but a material allegation need be proved.

This section is to be repealed. The section is based on the obsolete theory that some allegations are necessary that are not material, i.e., essential to the claim or defense (Code Civ. Proc. § 463). The section provides that only the material allegations need be proved. As the section is based on an obsolete pleading theory, it no longer should occupy a place in the code.

C.C.P. § 1868. Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

The Commission first decided to repeal all of the section except the first sentence. The staff was then directed to consider the first sentence of Section 1868, the definition in Rule 1(2) of "relevant evidence", Rule 7, Rule 8, Rule 20, and Rule 45, together with the definition of "material allegation" in Code of Civil Procedure Section 463, and to propose a redraft of the first sentence or some appropriate modification of the other rules so that the statutes as recommended will clearly state that evidence, to be admissible, must be relevant to some fact in dispute between the parties that is of consequence to the disposition of the pending litigation.

C.C.P. § 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

This section is to be repealed. Its statement of what a party must prove is not the law.

C.C.P. § 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

This section is to be repealed and replaced with a statute indicating the factors that the courts should take into account in assigning the

burden of producing evidence. The following, suggested by Professor Degnan, was approved in substance:

> The burden of producing evidence is on that party which by statute or rule of law will lose on the particular issue if no evidence is presented. In the absence of a statute, courts shall assign the burden of producing evidence to the parties, taking into account what is the most desirable result in the absence of of evidence, considerations of fairness and convenience in access to evidence and in eliminating unnecessary proof, and the probabilities of particular results in issues of that nature.

The staff was directed to propose a comparable statute relating to burden of persuasion.

File

REVISED SCHEDULE OF DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE Revised March 2, 1964

Subject Matter	Tentative Recommendation Sent to State Bar Committee	Receive Comments from State Bar Committee	Tentative Recommendation Approved for Printing	Tentative Recommendation Available in Printed Form	General Comments Reviewed	Final Action Taken
Article VIII--Hearsay	Sent	Received	Approved	Available	March 1964 Meeting	April 1964 Meeting
Article IX--Authentication	Sent	Received	Approved	March 15, 1964	May 1964 Meeting	May 1964 Meeting
Article V--Privileges	Sent	Received	Approved	April 15, 1964	July 1964 Meeting	July 1964 Meeting
Article VI--Extrinsic Policies	Sent	Received	Approved	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Article IV--Witnesses	Sent	Received	Approved	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Article II--Judicial Notice	Sent	Received	Approved	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Article VII--Expert and Other Opinion Testimony	Sent	Received (Northern Section)	March 1964 Meeting	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Article I--General Provisions	Sent	April 5, 1964	April 1964 Meeting	June 1, 1964	July 1964 Meeting	July 1964 Meeting
Article III--Presumptions	May 5, 1964 (April Meeting)	June 5, 1964	June 1964 Meeting	Aug. 1, 1964	Sept. 1964 Meeting	Sept. 1964 Meeting

Review of Existing Code Provisions

First Portion of Research Study Received

Begin work on Review of Existing Code Provisions -- March 1964 meeting

Additional portion of Research Study Received -- April 1, 1964

Final Portion of Research Study Received -- May 1, 1964

Complete work on Review of Existing Code Provisions
and prepare tentative recommendation - - - - June 1964 meeting

Tentative Recommendation ready to distribute to
State Bar Committee- - - - - - - - - - - - - July 5, 1964

Receive Comments of State Bar Committee - - - - Sept. 1, 1964

Final Action by Commission - - - - - - - - - - Sept. 1964

Final Recommendation (New Evidence Code and Comments)

Begin work -- July 1964 meeting

Approve for printing -- September 1964 meeting

Ready to print -- October 15, 1964

Pamphlet

Available in printed form -- January 1965

Preprinted Bill

Available -- December 1, 1964

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

Relating to

The Uniform Rules of Evidence

Article II. Judicial Notice

April 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Draft: November 12, 1963
Revised: December 1, 1963
Revised: December 21, 1963
Approved for Printing:
February 1964

LETTER OF TRANSMITTAL

To His Excellency, Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article II (Judicial Notice) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. The Report of the New Jersey Supreme Court Committee on Evidence (March 1963) also was of great assistance to the Commission. Portions of some of the comments in this report are based on similar comments in the report of the New Jersey Committee.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

February 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article II. Judicial Notice

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.[2]

The tentative recommendation of the Commission on Article II of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 9 through 12, relates to judicial notice.

Judicial notice is a substitute for formal proof of matters of law and of facts which everyone knows, or should know, are true. Thus, the process of judicial notice shortens trial time and saves money, for it eliminates the necessity of complying with technical requirements of proof, such as those relating to authentication, expert testimony, best evidence, and the like. In addition, judicial notice promotes rational factfinding; it prevents jurors from erroneously finding as untrue facts which cannot reasonably be disputed.

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1. A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

2. Cal. Stats. 1956, Res. Ch. 42, p. 263.

URE Article II provides a comprehensive scheme for judicial notice. Judicial notice of some matters is mandatory. Other matters may be noticed without a request and must be noticed if requested by a party who gives notice of the request to each adverse party and furnishes sufficient information to the judge. The Uniform Rules provide parties with a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice of a matter and as to the tenor of the matter to be noticed.

Most of California's existing statutory law in regard to judicial notice is found in Section 1875 of the Code of Civil Procedure. This section lists the matters of which "courts take" judicial notice. But the California courts have not considered the section as limiting the extent of their power to take judicial notice and, although Section 1875 does not so provide, the courts take judicial notice of matters of common knowledge which are certain and indisputable. As a result, much of the California law on judicial notice can be found only in judicial decisions.

By way of contrast with the URE scheme, the existing California law is unclear (e.g., it is not clear which matters must be noticed and which matters may but are not required to be noticed) and inconsistent (e.g., a/ pleaded ordinance must be judicially noticed in a criminal case under Penal Code Section 963, but ordinarily the same ordinance may not be judicially noticed in a civil case by a superior or appellate court). Moreover, unlike the URE, the existing law does not provide the parties with adequate procedural protections. Except as to the law of foreign countries, there does not appear to

be any requirement that the adverse party be notified of a request to take judicial notice. Nor is there any statutory requirement that the parties be given a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice of a matter or as to the tenor of the matter to be noticed.

The Commission tentatively recommends that URE Article II, revised as hereinafter indicated, be enacted as law in California.[3] The revised article slightly broadens the list of matters of which judicial notice may be taken under existing law and requires that judicial notice be taken of some matters. This should result in greater use of judicial notice with a corresponding reduction in trial time. Any fear of expanded judicial notice should be offset by the procedural protections that are provided the parties under the revised article.

REVISION OF URE ARTICLE II

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. New rules tentatively recommended by the Commission but not included in the URE are shown in italics. Each rule is followed by a Comment setting forth the major considerations that influenced the Commission in recommending important substantive changes in the URE rule or in the corresponding California law. For a detailed analysis of the various rules and the California law relating to judicial notice, see the research study beginning on page 000.

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3. The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

RULE 9. [FACTS] MATTERS WHICH MUST OR MAY BE JUDICIALLY NOTICED

(1) Judicial notice shall be taken [without-request-by-a-party,] of :

(a) The [common-law,-constitutions-and-public-statutes] decisional, constitutional, and public statutory law [in-force-in] of the United States and of every state, territory, and [jurisdiction] possession of the United States . [,-and-of-such-specific]

(b) Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of court of this State and of the United States.

(d) Facts and propositions of generalized knowledge [as] that are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken [without-request-by-a-party,] of the following matters to the extent that they are not embraced within subdivision (1).

(a) Resolutions and private acts [and-resolutions] of the Congress of the United States and of the legislature of [this] any state, territory, or possession of the United States. [and-duly-enacted]

(b) [Ordinances-and-duly-published-regulations] Legislative enactments and regulations of governmental subdivisions or agencies of [this] (i) the United States and (ii) any state, territory, or possession of the United States. [and]

(c) Official acts of the legislative, executive, and judicial departments of this State and of the United States.

(d) Records of any court of this State or of the United States.

(e) [~~(b)~~] The [~~laws~~] law of foreign countries [~~,~~] and governmental subdivisions of foreign countries.

[~~(c)~~] (f) [~~such facts as are so generally known or of such common notoriety~~] Specific facts and propositions that are of such common knowledge within the territorial jurisidiction of the court that they cannot reasonably be the subject of dispute [~~, and (d)~~].

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

[~~(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.~~]

(3) Judicial notice may not be taken of any matter unless authorized or required by statute.

COMMENT

Revised Rule 9 Generally

The judge is required to take judicial notice of the matters listed in subdivision (1). He may take judicial notice of the matters listed in subdivision (2) even when not requested to do so; he is required to notice them if a party requests it and satisfies the requirements of Proposed Rule 9.5.

There is some overlap between the matters listed in the mandatory notice provisions of subdivision (1) and the matters listed in the permissive-unless-a-request-is-made-provisions of subdivision (2). Thus, when a matter falls within subdivision (1), notice is mandatory even though the matter would also fall within subdivision (2). For example, public statutory law is required to be noticed under subdivision (1)(a) even though it would also be included under official acts of the legislative department und. subdivision (2)(c). And certain regulations are required to be noticed under subdivision (1)(b) even though they might also be included under subdivision (2)(b) and (c). Indisputable matters of universal knowledge are required to be noticed under subdivision (1)(d) even though such matters might be included under subdivision (2)(f) and (g).

There is also some overlap between the various categories listed in subdivision (2). However, this overlap will cause no difficulty because all of the matters listed in subdivision (2) are treated alike.

Subdivision (1)

Judicial notice of the matters specified in subdivision (1) is mandatory, whether or not the judge is requested to notice them. Although the judge errs if he fails to take judicial notice of the matters specified in subdivision (1), such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles are not abrogated by subdivision (1).

Subdivision (1) includes both matters of law and fact. The matters specified in paragraph (a), (b), and (c) of subdivision (1) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The judge can reasonably be expected to discover and apply this law, even if the parties fail to provide him with references to the pertinent cases, statutes, and regulations. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign countries, certain regulations, and ordinances) are included under subdivision (2), rather than under subdivision (1), primarily because of the difficulty of ascertaining such matters. Paragraph (d) of subdivision (1) covers "universally known" facts.

Listed below are the matters that are included under subdivision (1).

California and Federal Law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (1)(a). This requirement states existing law as found in subdivision (3) of Section 1875 of the Code of Civil Procedure.

Law of Sister States. The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (1)(a). Courts now take judicial notice of the law of sister states under subdivision (3) of Section 1875 of the Code of Civil Procedure. However, the revised rule requires notice of relevant decisions of all sister-state courts, whereas Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate and trial courts of sister states. The existing law is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On necessity for request for judicial notice, see Comment, 24 Cal. L. Rev. 311, 316 (1936). On whether judicial notice is mandatory, see In re Bartages, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in Estate of Moore, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935).

Law of Territories and Possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (1)(a). It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See Witkin, California Evidence 60 (1958).

Regulations of California and Federal Agencies. Judicial notice must be taken under subdivision (1)(b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and

filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing California law as found in Government Code Sections 11383 and 11384. Under subdivision (1)(b), judicial notice must also be taken of the rules and amendments of the State Personnel Board. This, too, is existing California law under Government Code Section 18576.

Subdivision (1)(b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although 44 U.S.C. Section 307 provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this requires notice by state courts. See Broadway Fed. Etc. Loan Assoc. v. Howard, 133 Cal. App.2d 382, 386, 285 P.2d 61, 64 (1955)(referring to 44 U.S.C. §§ 301-314). Compare Note, 59 Harv. L. Rev. 1137, 1141 (1946)(doubt expressed that notice is required) with Knowlton, Judicial Notice, 10 Rutgers L. Rev. 501, 504 (1956)("it would seem that this provision is binding upon the state courts"). Livermore v. Beal, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. E.g., Pacific Solvents Co. v. Superior Court, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948)(orders and regulations); People v. Mason, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946)(presidential and executive proclamations)(disapproved on other grounds in People v. Friend, 50 Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); Downer v.

Grizzly Livestock & Land Co., 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (regulation). The revised rule will make the California law clear.

Rules of Court. Judicial notice of the rules of the courts of this State and of the federal courts is required under subdivision (1)(c). This may change existing California law, for a number of older cases indicate that our appellate courts do not take judicial notice of the rules of the lower courts. E.g., Cutter v. Caruthers, 48 Cal. 178 (1874); Warden v. Mendocino County, 32 Cal. 655 (1867); Gammon v. Baley & Thompson, 97 Cal. App. 452, 275 Pac. 1005 (1929). However, these cases are inconsistent with the modern philosophy of judicial notice as indicated by the holding in Flores v. Arroyo, 56 Cal.2d 492, 496-497, 15 Cal. Rptr. 87, 89-90, 364 P.2d 263, 265-266 (1961)(stating that judicial notice would be taken of records and proceedings of courts of this State and overruling cases to the contrary). Moreover, the rules of the California and United States courts are, or should be, familiar to the court or easily discoverable from materials readily available to the court. Since this cannot be said of the rules of court of sister states and of other jurisdictions, there is no provision in the revised rules requiring or permitting judicial notice of them.

"Universally known" facts. Subdivision (1)(d) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. Cf. People v. Tossetti, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (1)(d) should be contrasted with paragraphs (f) and (g)

of subdivision (2), which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Paragraphs (f) and (g) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. They must fulfill the requirements of subdivision (1)(d) or subdivision (2)(f) or (g). If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under Rule 9, he may not "notice" it.

It is clear under existing law that the judge may judicially notice the matters specified in subdivision (1)(d); it is doubtful, however, that he must notice them. See Varcoe v. Lee, 180 Cal. 338, 347, 181 Pac. 223, 227 (1919)(dictum). Since subdivision (1)(d) covers universally known facts, the parties ordinarily will expect the judge to take judicial notice of them; the judge should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

Subdivision (2)

Subdivision (2) includes both matters of law and fact. The judge may take judicial notice of these matters, even when not requested to do so; he is required to notice them if a party requests it and satisfies the requirements of Proposed Rule 9.5.

The matters of law included under subdivision (2) may be neither known to the judge nor easily discoverable by him because the sources of information are not readily available. However, if a party requests it and furnishes the judge with "sufficient information" for him to take judicial notice, the judge must do so if proper notice has been given to each adverse party. See Proposed Rule 9.5, infra. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the judge as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign countries.

Although subdivision (2) extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the judge. Under Proposed Rule 9.5, this burden falls upon the party requesting that notice be taken. In addition, the parties are entitled under Rule 10 to a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that are included under subdivision (2).

Resolutions and Private Acts. Subdivision (2)(a) provides for judicial notice of the resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States.

The California law on this matter is unclear. Our courts would take notice of private statutes of this State and the United States under subdivision (3) of Section 1875 and probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas notice of the same private act pleaded in a civil action pursuant to Code of Civil Procedure Section 459 is discretionary.

Although no case has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Section 1875 is not the exclusive list of the matters that will be judicially noticed, but the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. Ellis v. Eastman, 32 Cal. 447 (1867).

Regulations, Ordinances, and Similar Legislative Enactments. Subdivision (2)(b) provides for judicial notice of the legislative enactments and regulations of governmental subdivisions and agencies of the United States and of any state, territory, or possession of the United States. The words "legislative enactments and regulations" have been substituted for "ordinances" in the revised rule to include other similar legislative enactments as well as ordinances. Not all governmental subdivisions legislate by ordinance.

This subdivision would change existing California law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. People v. Crittenden, 93 Cal. App.2d Supp. 871, 877, 207 P.2d 161, 165 (1949); People v. Cowles, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. Thompson v. Guyer-Hays, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); County of Los Angeles v. Bartlett, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); Becerra v. Hochberg, 193 Cal. App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Notice of certain regulations of California and federal agencies is mandatory under subdivision (1)(b). As revised, paragraph (b) of subdivision (2) provides for notice of California and federal regulations that are not included under subdivision (1)(b) and for notice of regulations of other states and of territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision (3) of Code of Civil Procedure Section 1875. 18 Cal. Jur.2d, Evidence 447-448. Although no case has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official Acts of the Legislative, Executive, and Judicial Departments. Paragraph (c) of subdivision (2) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of this State and of the United States. This paragraph is not found in the URE, but it states existing law as found in subdivision (3) of Code of Civil Procedure Section 1875. Under this provision, our courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities and records of the State Board of Education and a county planning commission. See Witkin, California Evidence § 49 (1958), and 1963 supplement thereto.

Court Records. Paragraph (d) of subdivision (2) provides for judicial notice of the records of any court of this State or of the United States. This paragraph is not found in the URE, but it states existing law. Flores v. Arroyo, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of paragraph (c) are comprehensive enough to include court records, specific mention of these records is desirable in order to eliminate any uncertainty in the law on this point. See the Flores case, supra.

Law of Foreign Countries. Paragraph (e) of subdivision (2) provides for judicial notice of the law of foreign countries and governmental subdivisions of foreign countries. Paragraph (e) should be read in connection with Proposed Rule 10.5 and paragraph (c) of subdivision (2) of Revised Rule 10. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study at I-1 (1957).

Paragraph (e) refers to "the law" of foreign countries and governmental subdivisions of foreign countries. This makes all law, in whatever form, subject to judicial notice. Since the law of a foreign country may take a number of unanticipated forms, it is best not to limit this paragraph by a definition of "law."

Matters of "Common Knowledge" and Verifiable Facts. Paragraph (f) of subdivision (2) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This paragraph states existing California case law. 18 Cal. Jur.2d, Evidence 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. Witkin, California Evidence 65-68 (1958).

Paragraph (g) of subdivision (2) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject

matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and to determine the tenor of the matter to be noticed.

Paragraphs (f) and (g) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. The paragraphs include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world" and "the true signification of all English words and phrases." To the extent that paragraphs (f) and (g) overlap with subdivision (1)(d), notice is, of course, mandatory under subdivision (1)(d).

The matters covered by paragraphs (f) and (g) are included in subdivision (2)--rather than subdivision (1)(d)--because it seems reasonable to put the burden on the parties to bring adequate information before the judge if judicial notice is to be mandatory. See Proposed Rule 9.5 and the Comment thereto.

Under existing California law, courts take judicial notice of the matters that are included under paragraphs (f) and (g), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge and are certain and indisputable. Witkin, California Evidence 65-68 (1958). Notice of these matters is probably not compulsory under existing law.

Subdivision (3)

This subdivision states clearly that judicial notice may not be taken of any matter unless authorized or required by statute, i.e., unless it is listed in Rule 9 or in some other statute. By way of contrast, the principal judicial notice provision found in existing law--Code of Civil Procedure Section 1875--does not limit judicial notice to matters specified by statute. Judicial notice has been taken of various matters not so specified, principally matters of common knowledge which are certain and indisputable.

Subdivision (3) should not be thought to prevent courts from considering whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may take note of legislative history, discussions by learned writers in treatises and law reviews, and similar materials is inherent in the requirement that it take notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. Cf. People v. Sterling Refining Co., 86 Cal. App. 558, 564, 261 Pac. 1080, 1083 (1927)(statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts). Revised Rule 9 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law it is required to notice.

RULE 9.5. MATTERS CONDITIONALLY REQUIRED TO BE JUDICIALLY NOTICED

(1) Except as provided in subdivision (2), judicial notice shall be taken of each matter specified in subdivision (2) of Rule 9 if a party requests it and:

(a) Furnishes the judge sufficient information to enable him to take judicial notice of the matter; and

(b) Has given each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.

(2) Judicial notice need not be taken under subdivision (1) if:

(a) An adverse party disputes the propriety of taking such notice or the tenor thereof; and

(b) The party requesting that judicial notice be taken fails to persuade the judge as to the propriety of taking such notice and as to the tenor thereof.

COMMENT

This rule provides that the judge must take judicial notice of any matter specified in Revised Rule 9(2) if a party (a) requests that such notice be taken, (b) provides the judge with sufficient information to enable him to take judicial notice of the matter, and (c) gives each adverse party sufficient notice of the request to prepare to meet it. However, the judge may decline to take judicial notice of such matters if an adverse party disputes the propriety of taking such notice or the tenor thereof and the party requesting that notice be taken fails to persuade the judge both as to the propriety of taking judicial notice of the matter and as to the tenor of the matter to be noticed.

Proposed Rule 9.5 is intended as a safeguard and not as a rigid limitation on the power of the judge to take judicial notice. The proposed rule does not affect the discretionary power of the judge to take judicial notice under subdivision (2) of Revised Rule 9 where the party requesting notice fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Revised Rule 9(2) and may consult and use any source of pertinent information, whether or not provided by the parties. However, even though the judge may take judicial notice under Revised Rule 9(2) when the requirements of Proposed Rule 9.5 have not been satisfied, the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See Revised Rule 10 and the Comment thereto, infra.

The "notice" requirement. The person requesting the judge to judicially notice a matter under Proposed Rule 9.5 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the judge may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision (4) of Section 1875 when a request for judicial notice of the law of a foreign country is made. Proposed Rule 9.5 broadens this existing requirement to cover all matters specified in subdivision (2) of Rule 9.

The notice requirement is an important one since judicial notice is binding on the jury under Rule 11. Accordingly, the adverse parties should

be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since subdivision (2) of Revised Rule 9 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the judge should take judicial notice may come up at the trial. Proposed Rule 9.5 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

The notice requirement of Proposed Rule 9.5 replaces the somewhat similar requirement of URE Rule 9(3). URE Rule 9(3) is unsatisfactory because it requires the judge to make an initial determination in each case as to the time and form of the notice to be given.

The "sufficient information" requirement. Under the proposed rule, the judge is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice be taken of a matter specified in Revised Rule 9(2) fails to provide the judge with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the judge to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the

necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

The proposed rule does not define what is "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. In particularly complicated cases, the judge justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

Burden on party requesting that judicial notice be taken. Where a request is made to take judicial notice under the proposed rule and an adverse party disputes the propriety of taking judicial notice or disputes the tenor of the matter to be noticed, the judge may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Revised Rule 9(2) and also persuades the judge as to the tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the paragraph of Revised Rule 9(2) which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (f) of Revised Rule 9(2), the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, i.e., that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Revised Rule 9(2), the party must persuade the judge

that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Revised Rule 9(2) will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See Revised Rule 12, infra. On the other hand, even though a party requested that judicial notice be taken under Proposed Rule 9.5 and gave notice to the adverse parties in compliance with subdivision (1)(b) of the proposed rule, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.

RULE 10. DETERMINATION AS TO PROPRIETY OF TAKING JUDICIAL NOTICE AND TENOR OF MATTER NOTICED

(1) Before judicial notice of any matter specified in subdivision (2) of Rule 9 may be taken, the judge shall afford each party reasonable opportunity to present to him information relevant to (a) the propriety of taking judicial notice of [a] the matter [~~or to~~] and (b) the tenor of the matter to be noticed.

(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, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party .[~~, and~~]

(b) No exclusionary rule except a valid claim of privilege shall apply.

(c) With respect to any matter specified in subdivision (2) of Rule 9, if the judge resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action or proceeding, and the judge shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

[~~(3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls clearly within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.~~]

[~~(4) In any event the determination either by judical notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.~~]

COMMENT

Subdivision (1). This subdivision guarantees the parties a reasonable opportunity to present information to the judge as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. The URE provision has been revised to limit its application to matters specified in subdivision (2) of Revised Rule 9, for it would not be practicable to make Rule 10(1) applicable to subdivision (1) of Revised Rule 9.

What constitutes a "reasonable opportunity to present information" will depend upon the complexity of the matter and its importance to the case. For example, in a case where there is no dispute as to the existence and validity of a city ordinance, no formal hearing would be necessary to determine the propriety of taking judicial notice of the ordinance and of its tenor. But where there is a complex question as to the tenor of the law of a foreign country applicable to the case, the granting of a hearing under subdivision (1) would be mandatory. The New York courts have so construed their judicial notice statute, saying that an opportunity for a litigant to know what the deciding tribunal is considering and to be heard with respect to both law and fact is guaranteed by due process of law. Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

Subdivision (2). Since one of the purposes of judicial notice is to simplify the process of proof-making, the judge should be given considerable latitude in deciding what sources are trustworthy. This subdivision permits the judge to use any source of pertinent information, including the advice of persons learned in the subject matter. As revised, it probably

restates existing California law as found in Section 1875 of the Code of Civil Procedure. See the Study, infra at 000.

In taking judicial notice of a matter specified in subdivision (2) of Revised Rule 9, if the judge resorts to sources of information not previously known to the parties, Revised Rule 10(2)(c) requires that such information and its source be made a part of the record. This requirement is based on a somewhat similar requirement found in Section 1875 regarding the law of a foreign country. Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court. In addition, Rule 10(2)(c) requires the judge to give the parties reasonable opportunity to meet such additional information before judicial notice of the matter may be taken.

Subdivision (3). This subdivision of the URE rule has been deleted. To the extent that it merely repeats the principle of sufficiency set forth in Proposed Rule 9.5, subdivision (3) is unnecessary duplication. See the Comment to Proposed Rule 9.5, supra. To the extent that it makes Rule 9 an exclusive list of matters that may be judicially noticed, it is unnecessary since that principle is more clearly stated in subdivision (3) of Revised Rule 9.

Subdivision (4). This subdivision of the URE rule has been deleted as superfluous. The principle is well established that matters of law are for the judge, not for the jury; and under Rule 11, any matter judicially noticed that would otherwise have been for determination by the jury must be accepted as a fact by the jury.

RULE 10.5. PROCEDURE WHEN JUDGE UNABLE TO DETERMINE WHAT FOREIGN LAW IS

If the judge is unable to determine what the law of a foreign county or a governmental subdivision of a foreign county is, he may, as the ends of justice require, either (a) apply the law of this State if he can do so consistently with the Constitution of this State and of the United States or (b) dismiss the action or proceeding without prejudice.

COMMENT

This rule restates existing California law as found in the last sentence of Code of Civil Procedure Section 1875. The rule continues in effect statutory language enacted in 1957 upon recommendation of the California Law Revision Commission. See 1 CAL. LAW REVISION COMM'N. REP., REC. & STUDIES, Recommendation and Study at I-6 (1957).

RULE 11. [~~INSTRUCTING THE TRIER OF FACT AS TO MATTER JUDICIALLY NOTICED~~]
NOTING FOR RECORD MATTER JUDICIALLY NOTICED; INSTRUCTING JURY

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

(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~~] the jury, the judge may and upon request shall instruct the [~~trier of the fact~~] jury to accept as a fact the matter so noticed.

COMMENT

Subdivision (1). This subdivision requires that the judge at the earliest practicable time indicate for the record a matter which is judicially noticed. However, matters of law judicially noticed under paragraph (a) of subdivision (1) of Revised Rule 9 are not included within this requirement. The requirement is imposed in order to provide the parties with an adequate opportunity to try their case in view of the judicially noticed law and facts applicable to the case. In addition, needless dispute sometimes results from the failure of the judge to put in the record matters which he has judicially noticed. No comparable requirement is found in existing California law.

Subdivision (2). This subdivision makes matters judicially noticed binding on the jury and thereby eliminates any possibility of presenting evidence to the jury disputing the fact as noticed by the judge. The subdivision is limited to instruction on a matter that would otherwise have been for determination by the jury; instruction of juries

on matters of law is not a matter of evidence and is covered by the general provisions of law governing instruction of juries. Subdivision (2) states the substance of the existing law as found in Code of Civil Procedure Section 2102. See People v. Mayes, 113 Cal. 618, 625-626, 45 Pac. 860, 862 (1896).

Under subdivision (2), the judge need not instruct the jury unless requested. This revision of the URE rule is intended to avoid time consuming and unnecessary instructions.

RULE 12. JUDICIAL NOTICE IN PROCEEDINGS SUBSEQUENT TO TRIAL

(1) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the [~~trier of fact~~] jury with respect to the matter, [~~shall~~] does not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

[~~(2) The rulings of the judge under Rules 9, 10 and 11 are subject to review.~~]

[~~(3) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9 whether or not judicially noticed by the judge.~~]

(2) The reviewing court shall judicially notice each matter specified in Rule 9 that the judge was required to notice under Rules 9 and 9.5. The reviewing court may judicially notice any matter specified in subdivision (2) of Rule 9 and has the same power as the judge under Rule 10.5. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

[~~(4)~~] (3) [A] The judge or [a] reviewing court taking judicial notice under [~~Paragraph (1) or (3) of~~] this rule of a matter [~~not theretofore so noticed in the action~~] specified in subdivision (2) of Rule 9 shall [~~afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.~~] comply with the provisions of Rule 10 if the matter was not theretofore judicially noticed in the action or proceeding.

(4) In determining the propriety of taking judicial notice of a matter specified in subdivision (2) of Rule 9, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action or proceeding, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action or proceeding, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

COMMENT

Rule 12 sets forth a separate set of rules for the taking of judicial notice in proceedings subsequent to trial and in appellate proceedings.

Subdivision (1). This subdivision provides that the failure or even the refusal of a judge to take judicial notice of a matter at the trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a motion for a new trial or the like. Although no California case has been found, it seems safe to assume that the trial judge has the power to take judicial notice of a matter in subsequent proceedings, since the appellate court can properly take judicial notice of any matter that the trial court could properly notice. See People v. Tossetti, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (2). Subdivision (2) of the revised rule requires that a reviewing court take judicial notice of any matter which the trial judge was obliged to notice. This means that the matters specified in

subdivision (1) of Revised Rule 9 must be judicially noticed by the reviewing court even though the trial court did not take judicial notice of such matters. The matters specified in subdivision (2) of Revised Rule 9 also must be judicially noticed by the reviewing court if an appropriate request was made at the trial level. See Proposed Rule 9.5. However, if the trial court erred, the reviewing court is not bound by the tenor of the notice taken by the trial court.

Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character and are not mentioned in these rules. For example, the appellate court is required to notice the matters of law mentioned in Rule 9(1), but it may hold that an error which the appellant has "invited" is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law; they merely mean that for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it.

In addition to requiring the reviewing court to judicially notice those matters which the trial court was required to notice, the subdivision also provides authority for the reviewing court to exercise the same discretionary power to take judicial notice as is possessed by the trial court.

Subdivision (3). Subdivision (3) of the revised rule provides the parties with the same procedural protection when judicial notice is taken in proceedings subsequent to trial as is provided by Rule 10.

Subdivision (4). This subdivision assures the parties the same procedural safeguard at the appellate level that they have in the trial court. If the appellate court resorts to sources of information not included in the record in the action or proceeding, or not received in open court at the appellate level, either to sustain the tenor of the notice taken by the trial court or to notice a matter in a tenor different from that noticed by the trial court, the parties must be given a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken. See Rule 10(2)(c) and the Comment thereto, supra.

Deleted Provisions of URE Rule. Subdivision (2) of the URE rule has been deleted as unnecessary. The principle of this subdivision is well established by existing case law. See extensive annotations to Code of Civil Procedure Section 1875 in West's Annot. Cal. Codes and Deering's Annot. Cal. Codes. No comparable provision is included in existing law or in other URE rules.

Subdivision (3) of the URE rule also has been deleted. This subdivision is superseded by subdivision (2) of the revised rule.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to judicial notice that should be revised or repealed in light of the Commission's tentative recommendation concerning Article II (Judicial Notice) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Civil Code

Section 53 should be revised to read:

53. (a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, religion, ancestry, or national origin is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's race, color, religion, ancestry, or national origin is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court [~~may take~~] takes judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence.

This revision makes the procedure provided in Rules 9-12 applicable when judicial notice is taken of a matter specified in subdivision (c) of Section 53.

Code of Civil Procedure

Section 433 should be revised to read:

433. When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer; except that when the ground of demurrer is that there is another action or proceeding pending between the same parties for the same cause [,] and the court may take judicial notice of [~~other actions~~

~~and-proceedings-pending-in-the-same-court,-or-in-other-courts-of-the State,-and-for-this-purpose-only~~] the other action or proceeding under Article II of the Revised Uniform Rules of Evidence, an affidavit may be filed with the demurrer [~~re-establish~~] for the sole purpose of establishing such fact or [~~invoke~~] invoking such notice.

This revision is necessary to conform Section 433 to Rule 9(2)(d) and Rule 9.5.

Section 1827 should be revised to read:

1827. FOUR KINDS OF EVIDENCE SPECIFIED. There are four kinds of evidence:

1. [~~The knowledge of~~] Matters judicially noticed by the Court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

This revision is necessary to conform Section 1827 to the language used in the revised URE article on judicial notice.

Section 1875 provides:

1875. Courts take judicial notice of the following:

1. The true signification of all English words and phrases, and of all legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States, and the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states;
4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise;
5. The seals of all the courts of this State and of the United States;
6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;
7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;
8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

9. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also 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.

If a court is unable to determine what the law of a foreign county or a political subdivision of a foreign county is, the court may, as the ends of justice require, either apply the law of this State if it can do so consistently with the Constitutions of this State and of the United States or dismiss the action without prejudice.

This section should be repealed. Each portion of this section is superseded by the portion of the URE indicated below.

Section 1875	URE
Portion of subdivision (1) relating to "true signification of all English words and phrases"	Superseded by paragraphs (f) and (g) of subdivision (2) of Rule 9
Portion of subdivision (1) relating to "legal expressions" and all of subdivision (2)	Superseded by subdivision (1) of Rule 9 and paragraphs (a), (b), (c), (d), and (e), of subdivision (2) of Rule 9
Subdivision (3)	Superseded by subdivision (1) and subdivision (2) (a), (c), and (d) of Rule 9
Subdivision (4)	Superseded by subdivision (2)(f) of Rule 9 and Proposed Rule 9.5
Subdivision (5)	Superseded by the Tentative Recommendation on Authentication and Content of Writings
Subdivisions (6) and (7)	The portions relating to official signatures and seals are superseded by the Tentative Recommendation on Authentication and Content of Writings. Balance is superseded by paragraphs (f) and (g) of subdivision (2) of Rule 9
Subdivision (8)	Superseded by the Tentative Recommendation relating to Authentication and Content of Writings

Section 1875	URE
Subdivision (9)	Superseded by paragraph (d) of subdivision (1) and paragraphs (f) and (g) of subdivision (2) of Rule 9
Penultimate paragraph	Superseded by subdivision (2) of Rule 10
Last paragraph	Superseded by Rule 10.5

Section 2102 should be revised to read:

2102. ~~[QUESTIONS OF LAW ADDRESSED TO THE COURT]~~ All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. ~~[Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.]~~

The deleted portion of Section 2102 is superseded by subdivision (2) of Rule 11.

Corporations Code

Section 6602 should be revised to read:

6602. In any action or proceeding, the court ~~[shall take]~~ takes judicial notice ~~[without proof in court of the Constitution and statutes applying to foreign corporations, and any interpretation thereof, the seals of State and state officials and notaries public, and]~~, in the same manner that it takes judicial notice of the matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence, of the official acts affecting corporations of the legislative, executive, and judicial departments of the State or place under the laws of which the corporation purports to be incorporated.

This revision makes the procedure provided in Rules 9-12 applicable to the matters listed in Section 6602. The portion of Section 6602 which has been deleted is unnecessary because it duplicates the provisions of Rule 9.

Government Code

Section 34330 provides:

34330. Courts shall take judicial notice of the organization and existence of cities incorporated pursuant to this chapter.

This section should be repealed. It is superseded by Rule 9(2) and Proposed Rule 9.5.

Penal Code

Section 961 should be revised to read:

> 961. Neither presumptions of law, nor matters of which judicial notice is authorized or required to be taken, need be stated in an accusatory pleading.

This revision makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading.

Section 963 should be revised to read:

> 963. In pleading a private statute, or an ordinance of a county or a municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage, and the court must thereupon take judicial notice thereof in the same manner that it takes judicial notice of matters listed in subdivision (2) of Rule 9 of the Revised Uniform Rules of Evidence.

This revision makes the procedure provided in Rules 9-12 applicable when judicial notice is taken of a matter listed in Section 963. Note that, notwithstanding Proposed Rule 9.5, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.