

Place of Meeting

State Bar Building
601 McAllister Street
San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

April 23-25

Thursday Evening, April 23 (Meeting starts at 7:00 p.m.)

Friday and Saturday, April 24-25 (Meeting starts at 9:00 a.m. each day)

1. Approval of Minutes of March 1964 Meeting (sent 4/9/64)
2. Administrative matters (if any)
3. Study No. 34(L) - Uniform Rules of Evidence

Bring to Meeting:

- (1) Printed pamphlet containing Uniform Rules of Evidence (you have a copy)
- (2) Report of New Jersey Supreme Court Committee on Evidence (you have a copy)
- (3) Loose-leaf binder containing Uniform Rules of Evidence as Revised to Date (you have this)
- (4) Printed pamphlets on Article V (Privileges), Article VIII (Hearsay Evidence), and Article IX (Authentication and Content of Writings) (you have these)
- (5) Loose-leaf binder containing New Evidence Statute as Revised to Date (you have this)

Approval for Printing

Tentative Recommendation on Article I (General Provisions)

Memorandum 64-21 (enclosed)

First Supplement to Memorandum 64-21 (sent 4/9/64)

Second Supplement to Memorandum 64-21 (sent 4/16/64)

Part I of Research Study on Review of Existing Statutes
Not Affected by URE (you have this)

Approval for Distribution to State Bar Committee

Tentative Recommendation on Burden of Proof, Burden of Producing Evidence, and Presumptions (Replacing URE Article III)

Memorandum 64-22 (sent 4/16/64)(part of tentative recommendation attached)

First Supplement to Memorandum 64-22 (to be sent)(part of tentative recommendation attached)

Part III of Research Study on Review of Existing Statutes Not Affected by URE (sent 4/16/64)

Organization of New Statute

Memorandum 64-23 (sent 4/9/64)

Disposition of Particular Sections of C.C.P. Part IV

Memorandum 64-24 (sent 4/9/64)

Memorandum 64-25 (sent 4/9/64)

Memorandum 64-26 (enclosed)

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

Memorandum 64-17 (sent 3/17/64)

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MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

April 23 and 24, 1964

San Francisco

A regular meeting of the Law Revision Commission was held at San Francisco on April 23 and 24, 1964.

Present: John R. McDonough, Jr., Chairman
Hon. James A. Cobey
James R. Edwards
Sho Sato
Thomas E. Stanton, Jr.

Absent: Richard H. Keatinge, Vice Chairman
Hon. Alfred H. Song
Joseph A. Ball
Herman F. Selvin
Angus C. Morrison, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey, and Jon D. Smock of the Commission's staff were also present. Mr. Warren P. Marsden and Mr. Steve Birdlebough, representing the Judicial Council, and Mr. Joseph Powers, representing the Association of District Attorneys, also were present.

ADMINISTRATIVE MATTERS

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

Study No. 62 - Imputed Contributory Negligence Under Vehicle Code Section 17150. The Executive Secretary reported the receipt of the research consultant's study on this topic. The study appears to be satisfactory.

The research consultant, Professor Jack H. Friedenthal of the Stanford Law School, is entitled to \$1,000 for this study. The staff recommended that he be paid the entire amount due him for the study.

A motion was made by Commissioner Sato, seconded by Commissioner Edwards, and unanimously adopted that Professor Friedenthal be paid the entire \$1,000 due him. This payment is to be made with the understanding that Professor Friedenthal will attend meetings upon request as required by the agreement and will revise and supplement his study and report as may be requested by the Commission.

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

May 21-23	Los Angeles
June 18-20	San Francisco
July 23-25	Los Angeles (U.S.C.)
August 20-22	San Francisco

ORGANIZATION OF NEW EVIDENCE STATUTE

The Commission considered Memorandum 64-23 relating to the organization of the new statute. The Commission made the following decisions:

New Evidence Code. The new statute should be in the form of a new code--an Evidence Code. The material in the evidence part of the Code of Civil Procedure (Part IV) takes three volumes of West's Annotated California Codes. The most important single consideration calling for a new code is that the rules of evidence in the new evidence statute will apply both to civil and criminal proceedings, and the privilege provisions will apply in all proceedings where testimony can be compelled.

When the outline of the new code is prepared, the staff is to check with the Legislative Counsel to determine whether the organization is proper and whether the material should be made a new code.

General Organization of Evidence Code. Various provisions of the proposed new evidence statute as outlined in Memorandum 64-23 were deleted. These include the material on interpretation of statutes and other writings, material on records destroyed in disaster or calamity, other material on restoration of writings, material on discovery and depositions, affidavits, and effect of judicial records and judgments, etc. These provisions are to be retained in the Code of Civil Procedure without change (except for necessary conforming changes).

Title 10 is to follow Title 6.

Part IV of the Code of Civil Procedure. Provisions now contained in Part IV of the Code of Civil Procedure that do not relate to evidence are to be retained in Part IV without change in substance or section numbers. The necessary conforming changes in these sections will, of course, be made.

The Commission plans to request authority in 1965 to study and reorganize these provisions to improve their organization and to eliminate obsolete, superseded, and duplicating provisions.

The changes to be made in Part IV in connection with the new evidence code should be limited to essential changes.

Preprinted Bill. A memorandum is to be prepared for Senator Cobey to support a request that the new evidence code be printed as a preprinted bill. The Commission hopes to have the preprinted bill available for the State Bar Convention in early October.

UNIFORM RULES OF EVIDENCE
(ARTICLE I. GENERAL PROVISIONS)

The Commission considered Memorandum 64-21 and the First and Second Supplements thereto, relating to the tentative recommendation on general provisions, The following actions were taken:

RULE 1(2)

The Commission considered the Southern Section's suggestion that Rule 1(2) be deleted and its substance restated in Rule 7(f). After discussion, it was agreed that Rule 1(2) should be revised to read substantially as follows:

(2) "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action, including the credibility of a witness or hearsay declarant.

The Comment to this rule is to develop more fully the discussion of materiality in connection with explaining the phrase "is of consequence."

RULE 1(3)

The Commission agreed to revise this definition to read:

(3) "Proof" is the establishment of a fact by evidence.

RULE 1(10)

The Commission disapproved a suggestion that the definition of "judge" should include an "officer authorized to conduct and conducting a fact-finding tribunal" to make this conform with the definition of evidence. Since all of the rules except privileges apply only to judicial proceedings, it was agreed that the expansion suggested would be improper.

RULE 1(18)

It was noted that the inconsistency between the definition of "State"

as defined in this rule and as defined in the hearsay recommendation has been eliminated by deleting the definition in the hearsay article.

RULE 7

In connection with its consideration of Rule 1(2), the Commission approved the proposed revision to Rule 7 as set out in Exhibit 1 to the First Supplement to Memorandum 64-21, dividing this rule into three separate rules dealing with witnesses, privileges, and a general provision stating the admissibility of relevant evidence. The Commission approved in principle the addition of a reference to the Constitution in proposed subdivision (2), and directed the staff to consider the necessity of also referring to the Constitution in the other proposed subdivisions in this rule.

RULE 8

The Commission reconsidered Rule 8 in the light of the criticisms of the Northern and Southern Sections of the State Bar Committee. The Northern Section's criticism was that the distinction between subdivisions (3) and (4) is not sufficiently clear. The finality of the judge's decision under (3) and the lack of such finality under (4) is not clearly stated. To meet the objection, subdivisions (3) and (4) were revised in substance to read:

(3) Subject to subdivisions (4) and (5):

(a) When the existence of a preliminary fact is disputed, the judge shall indicate to the parties who has the burden of producing evidence and the burden of proof on the issue as implied by the rule under which the question arises. The judge shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule under which the question arises.

(b) If a fact in issue in the action is also a preliminary fact, the judge shall not inform the jury of his determination of the preliminary fact. The jury shall make its determination of the fact without regard to the determination made by the judge. If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the judge's determination of the preliminary fact.

(4)(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the judge finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when:

(i) The relevance of the proffered evidence depends on the existence of the preliminary fact; or

(ii) The preliminary fact is the personal knowledge of the witness concerning the subject matter of his testimony; or

(iii) The preliminary fact is the authenticity of a writing; or

(iv) The proffered evidence is of a statement or other conduct by a particular person and the disputed preliminary fact is whether that person made the statement or did the act.

(b) The judge may admit conditionally the proffered evidence under paragraph (a), subject to the evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the judge admits the proffered evidence under paragraph (a):

(i) He may on his own motion, and on request shall, instruct the jury to determine the existence of the preliminary fact and to disregard the evidence unless the jury finds that the preliminary fact exists.

(ii) He shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.

The Commission did not approve the recommendation of the Southern Section that the existence of the preliminary fact should be submitted to the jury under appropriate instructions whenever the preliminary fact coincides with an ultimate fact. Such a submission should be made only on the preliminary fact issues arising under subdivision (4). The Commission's recommended rule will retain the existing law for the most part, but it will change existing law on confessions, dying declarations, and spontaneous statements, for the existing law requires the admissibility of those matters to be resubmitted to the jury.

The "second crack" doctrine in regard to confessions was rejected because the Commission believes that a jury will consider a confession it believes to be true on the issue of guilt despite an instruction that it may not consider the confession.

The Commission decided to retain subdivision (5). Without subdivision (5), the judge would be required to determine the incriminatory nature of the evidence sought under the standards of subdivision (3). Thus, he would be required to be persuaded of the incriminatory nature of the testimony in order to uphold the privilege. Subdivision (5), which states existing law, is needed to indicate that the determination of the incriminatory nature of the information sought proceeds under a different standard.

AMENDMENTS AND REPEALS

After discussion, the Commission approved the portion of the tentative recommendation attached to the Second Supplement to Memorandum 64-21. The Comments under the repealed sections are to be made more concise and some of the material in the Comments is to be added to the research study.

The Comment to the repeal of Section 1831 (defining "direct evidence") is to state that Section 1844 uses the phrase "direct evidence" and that if Section 1844 is to be retained consideration will be given to expanding the section to include a definition of "direct evidence."

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

(ARTICLE III. PRESUMPTIONS)

The Commission considered Memorandum 64-22 and the tentative recommendation relating to presumptions (April 10, 1964, draft). The following actions were taken:

Amendments and Repeals of Existing Statutes (Generally)

The Commission decided not to revise the large number of statutes in the various codes creating presumptions. The staff is to make the necessary adjustments in the sections relating to presumptions in Part IV of the Code of Civil Procedure. If the revision of the presumption sections in Part IV necessitates revision of any sections in any of the four basic codes, those sections, too, are to be revised. But no revision is to be made in any of the other sections in the codes relating to presumptions. Revision of these remaining sections will follow at a later time.

Section 3600

Section 3600 was revised to read:

The burden of producing evidence is on the party to whom it is assigned by statutory or decisional law. In the absence of such assignment, the party who has the burden of producing evidence shall be determined by the court as the ends of justice may require.

The factors to be taken into consideration are to be mentioned in the comment.

Section 3610

Section 3610 is to be revised in the same way that Section 3600 was revised.

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The first full paragraph of the comment on page 9 should be revised to indicate more clearly that the burden of proof does shift.

Section 3615

The staff was directed to do further research on the operation of presumptions and the allocation of the burden of proof to the defendant in criminal cases. Some question was raised concerning the nature of the instruction to be given the jury on issues where the defendant has the burden of proof. The staff was asked to determine whether the jury is instructed that it may find the presumed fact or whether it is instructed that the presumption is controlling or the presumed fact is established in the absence of sufficient contrary evidence.

Section 3620

This section was approved.

Section 3625

This section was approved.

Section 3630

This section was approved.

Article 3 (beginning with Section 3700)

The word "rebutted" is to be substituted for "overcome" throughout the article.

Section 3700

This section was revised to read:

A presumption is a rule of law which requires a fact to be assumed from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

Section 3705

Section 3705 was revised to read:

A presumption is either conclusive or rebuttable. Every rebuttable presumption in the law of this State is either:

- (1) A presumption affecting the burden of producing evidence.
- (2) A presumption affecting the burden of proof.

Section 3710

Section 3710 was revised to read:

A statute providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption.

Sections 3715, 3725

The Commission discussed the criteria for the various presumptions. The objection was made that the two sections do not necessarily apply to all presumptions. Only one kind of presumption should be defined and the other kind of presumption should include all presumptions that do not fit within the first definition.

The staff was directed to redefine a presumption affecting the burden of proof. It was suggested that the definition might be that such a presumption is one based on a public policy that warrants placing the burden of proof on the party against whom it operates. A further suggestion was made that the definition should exclude the policy in favor of dispensing with unnecessary proof and thus expediting determination of the case. The staff was also asked to consider adding a provision indicating that such a presumption either shifts the burden of proof from the party who otherwise would have that burden or increases his burden from a preponderance of the evidence to clear and convincing evidence.

The staff was directed to submit several drafts containing and omitting the various provisions suggested above for the Commission to consider. If the staff develops a more accurate way of defining the various presumptions, such a draft should also be submitted for consideration.

Section 3720

The staff was requested to consider redrafting this section to incorporate its provisions in the section setting forth the criteria for a presumption affecting the burden of proof. The provision relating to the operation of such presumptions in criminal cases is also to be reconsidered in light of further research on the question.

Section 3730

This section was approved.

Section 3750

Section 3750 is to be revised to indicate that other conclusive presumptions may be found elsewhere in the codes.

Section 3751

This section was approved.

C.C.P. § 1962

Subdivisions 2, 3, and 4, relating to estoppel, are to be recodified without significant change in the Civil Code. The staff was asked to determine whether the last two clauses of subdivision 6 should be amended into some other section or whether they may be repealed. Those clauses require a judgment to be pleaded, if there is an opportunity to do so,

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and provide that if there is no such opportunity the judgment may be used as evidence.

Subdivisions 1, 5, and 7 are not to be continued.

Section 3760

This section is to be revised to indicate more clearly that other statutory and common law presumptions--other than those in Article 3--affect the burden of proof.

Section 3761

This section was approved after the words "that the child is not legitimate" appearing at the end of the section were deleted.

Sections 3762, 3763, 3764, and 3766

These sections were previously approved. A further report is to be submitted on Section 3764.

Section 3765

This section was passed over pending a research report from the staff.

Section 3767

This section was deleted. Section 2235 of the Civil Code, which expresses the identical rule, is to be retained.

Section 3768

This section was not approved. The presumption of negligence by a bailee is to be left to common law development.

Section 3769

This section was not approved. The presumption of the unlawfulness of an arrest without a warrant is to be left to common law development.

Section 3770

Section 3770 was approved. The Commission concluded that the Uniform Absence as Evidence of Death Act would not cover all the situations covered by the presumption. The Uniform Act provides principally for appointing a receiver to take charge of an absentee's property and the distribution of such property after a certain number of years. Similar procedures are provided in Probate Code Sections 260-294. The Uniform Act has some desirable provisions relating to the validity of provisions in life insurance policies relating to the time after death within which a claim may be made and providing a specific time after disappearance within which such claims may be made. But the Uniform Act would not deal with any situation except insurance or the administration and distribution of an absentee's estate. The presumption may be relevant and material in a variety of other situations. Retention of the presumption, therefore, is desirable insofar as the evidence code is concerned. Adoption of some provisions of the Uniform Act might be desirable, but it is beyond the scope of an evidence statute.

Section 3800

Section 3800 is to be revised to make clear that other presumptions affecting the burden of producing evidence may exist in other codes or as a matter of common law.

Sections 3801-3812

These sections were previously approved.

Section 3813

The words "or kept" were inserted after the word "found" on both

lines of subdivision (3). As amended, the section was approved.

Sections 3814 and 3815

These sections were approved.

Section 3816

The doctrine of res ipsa loquitur was passed over pending a report from the staff.

Article 5 (beginning with Section 3850)

This article is not to list as separate sections the matters not continued as presumptions. Instead, Section 3650 is to provide that the matters formerly specified in named subdivisions of Sections 1963 are not presumptions, but nothing in the section is to be construed to prevent the drawing of any inference that might be appropriate under the circumstances. Some of the subdivisions should be located among the maxims in the Civil Code. The staff is to review the other subdivisions of Section 1963 to determine whether they might be preserved.

Civil Code Section 164.5

No action was taken on proposed Civil Code Section 164.5. The staff was requested to submit the problem of the disposition of Section 1963(40) of the Code of Civil Procedure to the next meeting. Proposed Civil Code Section 164.5 will be considered again in connection with that problem.

UNIFORM RULES OF EVIDENCE

(ARTICLE VII. EXPERT AND OTHER OPINION TESTIMONY)

The Commission considered Memorandum 64-27, relating to the tentative recommendation on this subject, and approved in substance the following revision to subdivision (2) of Revised Rule 56:

- (2) If the witness is testifying as an expert, his opinions are limited to such opinions as are:
- (a) Related to a subject that is beyond the competence of persons of common experience, training, and education; and
 - (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates, unless under the decisional or statutory law of this State such matter may not be used by an expert as a basis for his opinion.

The Comment to this rule is to indicate the Commission's intent to state a uniform standard applicable to all expert testimony, retaining the existing law as to particular matter that may or may not be used by an expert as a basis for his opinion. The Comment also is to include some discussion of the various criteria used by the courts to exclude certain matter as a basis for expert opinion.

REVISED SCHEDULE OF DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE

Revised April 1, 1964

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