

Time

Place

July 23 - 9:00 a.m. - 5:00 p.m.
July 24 - 9:00 a.m. - 5:00 p.m.
July 25 - 9:00 a.m. - 3:00 p.m.

Moot Court Room
U.S.C. Law School
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

July 23-25, 1964

Bring the following materials to the meeting (in addition to other items listed on agenda):

- (1) Printed pamphlet containing Uniform Rules of Evidence (you have a copy)
- (2) Printed pamphlets containing tentative recommendations and studies on:
 - a. Hearsay Evidence
 - b. Authentication and Content of Writings
 - c. Privileges
 - d. Witnesses
 - e. Extrinsic Policies Affecting Admissibility
 - f. Judicial Notice
 - g. Expert and Other Opinion Testimony
 - h. Burden of Producing Evidence, Burden of Proof, and Presumptions (to be sent)
 - i. General Provisions (to be sent)
- (3) New Evidence Code (Material contained in a loose-leaf binder (enclosed))
- (4) Comments on Evidence Code (Material contained in loose-leaf binder) (to be sent)
- (5) Professor Degnan's Research Study (Contained in a soft-cover binder) (Parts I-VIII) (last portions sent 7/3/64)

AGENDA ITEMS

1. Approval of Minutes for June 1964 Meeting (sent 6/26/64)
2. Administrative Matters
 - a. Stanford Lease

3. Evidence Code

Consideration of portion of preprinted bill set in type

Memorandum 64-51 (to be sent)

First Supplement to Memorandum 64-51 (to be sent)

Approval of portions of preprinted bill for printing

Note: We want to approve the following portions of the statute for printing at the July meeting. (If we can not approve all of the Privileges Division for printing at the July meeting, we want to approve the major portion of this division for printing at the July meeting.) We do not plan to approve any of the Comments for printing at the July meeting. However, we suggest you read the Comments in connection with the statute sections.

Division 1 (Preliminary Provisions)

Statute (attached to Memorandum 64-41) (sent 6/26/64)
Comments (attached to Memorandum 64-41) (sent 6/26/64)
Memorandum 64-41 (sent 6/26/64)

Division 2 (Words and Phrases Defined)

Statute (attached to Memorandum 64-42) (sent 6/26/64)
Comments (attached to Memorandum 64-42) (sent 6/26/64)
Memorandum 64-42 (sent 6/26/64)

Division 8 (Privileges)

Statute (attached to Revised Memorandum 64-39) (sent 6/26/64)
Comments (attached to Revised Memorandum 64-39) (sent 6/26/64)
Revised Memorandum 64-39 (sent 6/26/64)
Memorandum 64-47 (sent 6/26/64)
First Supplement to Memorandum 64-47 (to be sent)

Division 9 (Extrinsic Policies)

Statute (attached to Memorandum 64-48) (sent 7/3/64)
Comments (attached to Memorandum 64-48) (sent 7/3/64)
First Supplement to Memorandum 64-48 (enclosed)
Second Supplement to Memorandum 64-48 (to be sent)
Part VII of Professor Degnan's Research Study (sent 7/3/64)

Division 4 (Judicial Notice)

Statute (attached to Memorandum 64-44) (sent 6/26/64)
Comments (attached to First Supplement to Memorandum 64-44)
(enclosed)
Second Supplement to Memorandum 64-44 (to be sent)

Amendments and Repeals

Note: We already have sent this material to the printer. Otherwise, it would not be possible to have the preprinted bill by the time of the State Bar Convention. We do not plan to consider the amendments, repeals, and additions to other codes until the August meeting. (We anticipate only a few, if any, changes in the material we have sent to the printer.) We enclose a copy of the amendments, repeals, and additions in substantially the form we sent it to the printer. Several additional sections were added before it was sent to the printer. We are setting in type only the text of the section to be amended, added, or repealed. We will set the amending, adding, or repealing clause at a later time. We will prepare the comments for the amendments, repeals, and additions in time for the August meeting.

Work on Divisions of Evidence Code

Note: All of the material hereunder listed must be approved for printing at the August meeting. Hence, we need to make the policy decisions at the July meeting so that we can meet this schedule.

Division 10 (Hearsay Evidence)

Statute (attached to Memorandum 64-49) (to be sent)
Comments (attached to Memorandum 64-49) (to be sent)
Memorandum 64-49 (to be sent)

Division 11 (Writings)

Statute (attached to Memorandum 64-50) (to be sent)
Comments (attached to Memorandum 64-50) (to be sent)
Memorandum 64-50 (to be sent)

Division 6 (Witnesses)

Statute (attached to Memorandum 64-45) (to be sent)
Comments (attached to Memorandum 64-45) (to be sent)
Memorandum 64-45 (to be sent)
Part VII of Professor Degnan's Research Study (sent 7/3/64)

Division 7 (Opinion Testimony and Scientific Evidence)

Statute (attached to Memorandum 64-46) (to be sent)
Comments (attached to Memorandum 64-46) (to be sent)
Memorandum 64-46 (to be sent)

Division 3 (General Provisions)

Statute (attached to Memorandum 64-43) (enclosed)
Comments (attached to Memorandum 64-43) (enclosed)
Memorandum 64-43 (enclosed)

Additional Material to be Read Before July Meeting

Note: We do not plan to discuss any portion of the material listed below at the July meeting. We do not believe that these materials require any Commission policy decisions. If a Commissioner believes a matter discussed in the material listed below should be discussed at the July meeting, we suggest that he bring up the matter in connection with our consideration of the pertinent portion of the Evidence Code.

Memorandum 64-44 (sent 6/26/64)
First Supplement to Memorandum 64-44 (enclosed)
Memorandum 64-48 (sent 7/3/64)
Memorandum 64-52 (sent 7/3/64)
Memorandum 64-53 (sent 7/3/64)

MINUTES OF MEETING

of

JULY 23, 24, AND 25, 1964

Los Angeles

A regular meeting of the California Law Revision Commission was held in Los Angeles on July 23, 24, and 25, 1964.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman
Hon. James A. Cobey (July 24 and 25)
Hon. Alfred H. Song
Joseph A. Ball
James R. Edwards
Sho Sato
Thomas E. Stanton, Jr.

Absent: 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, representing the Judicial Council, and Mr. Joseph Powers, representing the Association of District Attorneys, also were present.

ADMINISTRATIVE MATTERS

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

Stanford Lease. The Commission approved a lease prepared by the Department of General Services covering the period July 1, 1964 to December 31, 1964 for the space presently occupied by the Commission in Crothers Hall and the Law School. The rent for the six-month period covered by the lease is to be \$1,500, payable quarterly as provided in the lease.

The Commission directed the Vice Chairman to sign the lease on behalf of the Commission.

Execution of Leases and Contracts by Executive Secretary. A motion was made by Commissioner Stanton, seconded by Commissioner Edwards, and unanimously adopted that the Executive Secretary be authorized to sign on behalf of the Commission all leases and contracts previously approved by the Commission.

Authorization to Publish Certain Research Studies in Law Reviews. By motion unanimously adopted, the Commission authorized Professor Friedenthal to publish his research study relating to Vehicle Code Section 17150 in the Stanford Law Review. This approval is conditioned upon the Stanford Law Review permitting the Commission to republish the article (without charge to the Commission) using offset printing from the law review pages in the publication containing its recommendation on this subject. In addition, the law review article must contain a note (similar to notes previously required) indicating that the study was prepared for the Commission but does not represent the views of the Commission.

Minutes - Regular Meeting
July 23, 24, and 25, 1964

By motion unanimously adopted, the Commission expressed its willingness to have the research study prepared by Mr. George Brunn relating to Civil Code Section 163.5 also published under the same conditions. The Executive Secretary was authorized to discuss the matter with Mr. Brunn.

Notification of Conference of California Judges of Commission Action on Comments on Tentative Recommendations. It was suggested that, to the extent staff time is available, the Special Committee of the Conference of California Judges should be advised of the action taken by the Commission on the comments submitted by the committee. The committee should be advised of the reasons why the Commission did not accept suggestions of the committee in all cases where a suggestion was not accepted by the Commission.

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

August 13 (evening), 14 and 15
September 10-12

Los Angeles
San Francisco

PRINTED PUBLICATIONS ON EVIDENCE CODE

The Commission discussed the comments that are to be contained in the printed pamphlet on the Evidence Code. It was agreed that the following policy decisions should govern the form of the comments.

The URE rules should be referred to where the Evidence Code provision is substantially the same as the URE rule. This was considered a useful method of calling the reader's attention to the pertinent URE rule as a source of interpretative materials. Where the Commission has not used the URE provision, no reference would be made to it in the Commission's publication.

The following tables should be prepared:

Table 1 - Source Table -- showing source of each section of the Evidence Code (whether new, based on URE provision or on existing code section). The table should have headings for each division of the Evidence Code and should have a general note under each division referring to the pertinent tentative recommendations published by the Commission that relate to that division. This would provide a quick reference to the pertinent materials relating to the particular division.

Table 2 - Table of Cases -- showing cases cited in tentative recommendations.

Table 3 - Table of URE Rules Cited -- showing where URE rules are cited.

Table 4 - Table of Statutes Cited -- showing where California statutes are cited.

Table 5 - Table showing Disposition of Repealed California Statutes.

Table 6 - Table showing Disposition of URE rules.

PROPOSED EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS

The Commission considered Memorandum 64-41 and Division 1 of the Proposed Evidence Code and the Commission Comments thereto.

The following actions were taken:

Section 2.

The words "and all proceedings under it" were deleted.

Section 5.

The addition of the reference to "section headings" was approved.

Section 12.

The section heading to this section was revised to read:

12. Code effective January 1, 1967.

The section was revised to substitute "This code shall become effective on January 1, 1967," for the words "This code shall not become operative until January 1, 1967."

Section to be added at end of bill.

The following section is to be added at the end of the bill:

SEC. ____ . Sections 2 to ____, inclusive, of this act shall become effective on January 1, 1967.

Approval for printing.

Division 1 was approved for printing as revised.

DIVISION 2. WORDS AND PHRASES DEFINED

The Commission considered Memorandum 64-42 and the first supplement thereto and Division 2 of the Proposed Evidence Code and the Commission's Comments thereto.

The following actions were taken.

Section 115.

This section was revised to read:

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Unless a rule of law requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

Burden of proof is synonymous with burden of persuasion.

Section 120.

This section was revised to read:

120. "Civil action" includes civil proceedings.

Section 130.

This section was revised to read:

130. "Criminal action" includes criminal proceedings.

Section 140.

The words "in a judicial proceeding" were substituted for "to prove the existence or nonexistence of a fact in judicial or factfinding tribunals."

Section 150.

This section was revised to read:

150. "The hearing" means the hearing at which the particular question arises, and not some earlier or later hearing.

Section 155.

This section was revised to read:

155. "Hearsay evidence" is defined in Section 1200.

Section 190.

This section was revised to read:

190. "Proof" is the effect of evidence.

Section 195.

No change was made in this section, but the staff is to make a check to determine that this definition is satisfactory as used in the various sections of the Proposed Evidence Code.

Section 200.

The comment to this section is to be revised to indicate that this definition is limited to public entities in the United States.

Section 220.

No change was made in this section, but the staff is to make a check of the Evidence Code provisions to determine whether this section should be broadened to include those entities or jurisdictions included in the authentication provisions.

Section 225.

This section was revised to read:

225. "Statement" means (a) a verbal expression, or (b) nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

Approval for printing.

Division 2, revised as above indicated, was approved for printing.

DIVISION 4. JUDICIAL NOTICE

The Commission considered the Second Supplement to Memorandum 64-44 and the preliminary draft of Division 4 of the Evidence Code. The following actions were taken:

Section 450.

The Commission considered, but did not accept, the suggestion that there be no limitation of the matters subject to judicial notice to those specified by statute. The comment on the section is to be broadened, however, in its discussion of the right of a court to consider "legislative facts" when determining what the law (which the court is required to notice) is.

Section 451.

Subdivision (b) was added, reading as follows:

(b) The true signification of all English words and phrases and of all legal expressions.

Section 456 is to be amended to refer to the matters specified in subdivisions (a) and (b) as matters the judge need not note for the record.

The Commission considered the suggestion of the Judicial Council Committee that subdivision (a) be limited to California and federal law and that law of sister states be included in Section 452. The Commission decided to retain the requirement that the law of sister states be noticed under Section 451. The majority of judges are from populous counties where the necessary materials are available. In small counties, the materials may not be available readily, but the problem will probably not arise there frequently, and if it does the court ought to be required to determine

the applicable law correctly anyway. The doctrine of invited error and the consequences of failure to urge a point in the trial court will still be applicable. As most cases involving the law of other states will probably arise in the populous counties, the judges and litigants in such counties should not be cumbered with the procedural requirements incident to judicial notice of the matters specified in Section 452 when it is necessary to determine the law of another state.

The Commission also considered, but did not accept, the suggestion that the reference to "facts . . . universally known" be deleted from Section 451 and inserted in Section 452.

Section 452.

Subdivision (b) was revised to read:

(b) Legislative enactments and regulations issued by governmental subdivisions, agencies, or officers of (1) the United States and (2) any state of the United States.

Subdivision (c) was revised to read:

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

The staff was directed to add an additional subdivision referring specifically to rules of court of other states.

Section 453.

Subdivision (b) was deleted. The remainder of the section was revised to read substantially as follows:

453. Judicial notice shall be taken of each matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the judge with sufficient information to persuade him as to the propriety of taking such notice and as to the tenor thereof.

Section 455.

The staff was directed to revise the section to limit both subdivisions (a) and (b) to facts that are of substantial consequence to the case and reasonably subject to dispute.

Section 456.

Section 456 is to be limited to facts of substantial consequence to the case and reasonably subject to dispute.

The cross-reference was modified to refer to "subdivision (a) or (b) of Section 451".

Section 458.

The staff was directed to make any changes necessary to conform the section to the actions taken on the previous sections.

DIVISION 5. BURDEN OF PRODUCING EVIDENCE,
BURDEN OF PROOF, AND PRESUMPTIONS

The Commission considered Memorandum 64-51 and the Comment to Section 607 contained in the tentative recommendation relating to the Burden of Producing Evidence, Burden of Proof, and Presumptions. The following actions were taken:

Section 607. The staff was directed to revise the comment to state not only the holdings of the appellate cases but also the practice of the trial courts in instructing on presumptions in criminal cases. The comment should reflect the uncertainties and confusion in the law resulting from language in the cases indicating both that the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of the existence of the presumed fact and that the prosecution has the burden of proof beyond a reasonable doubt as to each and every element of the crime charged.

Section 607 was revised to read substantially as follows:

607. When by rule of law a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant; but, if the trier of fact find that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the trier of fact may but is not required to find that the presumed fact has also been proved beyond a reasonable doubt.

DIVISION 6. WITNESSES

The Commission considered Memorandum 64-45 and the First Supplement thereto and Division 6 and the Commission's comments thereto. The following actions were taken:

Section 700.

This section was approved as drafted.

Section 701.

The Commission approved a suggestion by the Judges' Committee to delete the phrase "by the judge and jury" immediately following the word "understood" in subdivision (a). The remainder of Section 701 was approved as drafted.

It was agreed that the Comment to this section should include a discussion of the applicable standard for the judge to determine the disqualification of the witness.

Section 702.

The Commission approved in principle the suggestion of the Judges' Committee that against the objection of a party the personal knowledge of a witness must be shown as a prerequisite before the witness is permitted to testify upon the merits and agreed that subdivision (b) of Section 403 should be inapplicable to this situation. The Commission also agreed that it is unnecessary to state specifically in Section 702 that the quantum of evidence of personal knowledge is evidence sufficient to sustain a finding of personal knowledge since this matter is adequately covered in Section 403.

The Commission agreed that subdivision (b) should be revised to make it clear that a witness' personal knowledge of a matter may be shown by other evidence as well as by his own testimony.

Section 703.

The Commission approved in principle the substance of a suggestion by the Judges' Committee to provide different rules for civil and criminal cases. In a civil case, if a party objects to the judge's testifying or, whether or not a party objects, if the judge determines that his testimony would be of importance, the judge should declare a mistrial and assign the case for trial before another judge. In a criminal case, if a party objects to the judge's testifying or, whether or not a party objects, if the judge determines that his testimony would be of importance, the judge should inform the parties of the information he has concerning the facts of the case and, unless a party moves for a mistrial, he may testify; if a party moves for a mistrial, the judge shall grant the motion and assign the case for trial before another judge.

Section 704.

The Commission agreed to treat testimony of a juror in the same manner as testimony by a judge.

Sections 710 and 711.

These sections were approved as drafted.

Section 720.

The Commission agreed to treat the foundation requirement for expert testimony in the same manner as personal knowledge is treated

in Section 702. A motion to defer specific action on this section until comments were received from the Judges' Committee failed to pass.

Section 721.

This section was approved as drafted.

Section 722.

The Commission agreed to revise the introductory clause in subdivision (b) to read substantially as follows:

A witness giving expert testimony in the form of an opinion

The remainder of this section was approved as drafted.

Sections 723 and 724.

These sections were approved as drafted.

Sections 730-733.

The Commission deferred specific action on these sections pending the staff's review to determine whether any change in language inadvertently changes existing law as set out in Code of Civil Procedure Section 1871. Several Commissioners expressed concern over the language and meaning of Section 733 and directed the staff to revise this section to eliminate any ambiguity.

Section 750.

The Commission approved a revised version of this section to

read substantially as follows:

A witness who serves as an interpreter or translator is subject to all the rules of law relating to witnesses.

Section 751.

The Commission approved a substitute version of this section reading substantially as follows:

(a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself so as to be understood directly, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

(b) The interpreter may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

Section 752.

The Commission agreed to delete the "including" clause from subdivision (a) as well as the limiting clause "by the judge and jury." The word "may" was substituted for the word "shall" in subdivision (b).

As so revised, the Commission approved Section 752 in substantially the following language:

(a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The translator may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

The staff was directed to revise the Comment to this section to include a discussion of the different types of writings that would fall within this section, such as writings in the form of punch cards or in foreign languages.

Section 753.

The Commission revised subdivision (a) of this section to read as follows:

(a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding language spoken in a normal tone.

The Commission agreed to revise the introductory language in subdivision (c) of this section to read as follows: "In all cases where the mental condition of a ~~person-who-is~~ a deaf person"

The Commission agreed to delete subdivision (d) from this section and to restate its substance as a separate section in this article to apply to all interpreters and translators.

The remainder of this section was approved as drafted.

Section 760.

The Commission approved a revision of this section in the following form:

"Direct examination" means the examination of a witness by the party producing him.

Section 761.

The Commission agreed to restrict cross-examination to examination of a witness by an adverse party upon the same matter testified to by the witness on direct examination. In thus agreeing to re-enact the present law in regard to the scope of cross-examination, the Commission directed the staff to make conforming changes in other sections.

Section 762.

The Commission approved a revision of this section to read substantially as follows:

A "leading question" is a question that suggests to the witness the answer that the examining party desires.

Section 763.

In light of the Commission's action with respect to the scope of cross-examination, the Commission agreed to delete this section and to restate its substance in Section 775 (the equivalent of existing Code of Civil Procedure Section 2055).

Section 765.

The Commission approved this section, substituting "ascertainment" for "extraction" in subdivision (a).

Section 766.

This section was revised to read as follows:

A witness is required to give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

Section 767.

This section was approved as drafted.

Section 768.

This section was approved as drafted. The staff was directed to re-examine the existing law on this subject to verify the substantive changes intended.

Sections 769 and 770.

These sections were approved as drafted.

Section 771.

In connection with its discussion of Section 761, the Commission approved revising this section to limit cross-examination to examination by adverse parties

on the same matters testified to by the witness on direct examination.

In connection with its discussion of Evidence Code Section 947 (replaced by this section), the Commission approved revising subdivision (b) of Section 771 to read as follows:

Notwithstanding subdivision (a), a defendant in a criminal action who testifies as a witness in that action may be cross-examined only as to those matters about which he was examined in chief.

Sections 772-774.

These sections were approved as drafted.

Section 775.

The Commission deferred taking specific action in regard to this section subject to the staff's revising this section in light of the action taken in regard to restricting the scope of cross-examination to examination upon the same matter by an adverse party. The Commission directed the staff to consider the recent discovery legislation in regard to providing specific language to make this section apply to former officials as well as present officials, thereby preserving explicitly the existing case law.

Section 776.

The Commission approved this section after revising it to permit the judge to exclude witnesses without a request from a party.

Section 777.

This section was approved as drafted.

Section 780.

The Commission approved a revision to the introductory clause in this section reading substantially as follows:

Except as otherwise provided by rule of law, the judge or jury may consider in determining the credibility of a witness any statement or other conduct that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

Section 781.

The Commission approved this section as drafted and specifically rejected a suggestion by the Judges' Committee that would substantially re-enact the existing law.

Sections 782 and 783.

These sections were approved as drafted.

Section 784.

The Commission approved the deletion of subdivision (a) of this section, thereby eliminating the special procedural limitation on attacking the credibility of a criminal defendant-witness.

The Commission revised subdivision (b) to read substantially as follows:

(b) Subject to subdivision (c), evidence of the conviction of a witness for a crime is admissible for the purpose of attacking his credibility as a witness if the judge, in proceedings held out of the presence and hearing of the jury, finds that:

- (1) An essential element of the crime is deceit or fraud; and
- (2) The witness has admitted his conviction for the crime or the party attacking the credibility of the witness has produced competent evidence of the record of conviction.

The Commission approved subdivision (c) of this section as drafted.

Sections 785 and 786.

These sections were approved as drafted.

Section 787.

The Commission agreed to restate this section as a general rule in Chapter 5 and revised the introductory portion of this section to read substantially as follows:

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

The Commission agreed to delete subdivision (c) from this section.

Section 788.

This section was approved as drafted.

DIVISION 8. PRIVILEGES

The Commission considered Revised Memorandum 64-39, Memorandum 64-47, the First Supplement to Memorandum 64-47, and Division 8 and the Commission's comments to that division.

The following actions were taken.

Section 912.

The last sentence of subdivision (a) was revised to read:

Consent to disclosure is manifested by any statement or other conduct of a holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

A motion to delete subdivision (b) failed. It was suggested, however, that the staff attempt to improve the drafting of subdivision (b).

A suggestion for revision of subdivision (a) made by the Committee of the Conference of California Judges was not adopted because it would have required each holder to waive the privilege. Thus, if a guardian waives the privilege for a minor, the minor could nevertheless later claim the privilege. The language of Section 912 prevents this.

Section 913.

Subdivisions (b) and (c) and the introductory clause of subdivision (a) were deleted. The comment to Section 913 is to mention the California constitutional provision relating to comment

and is to further state that the section does not prevent comment on the weight of evidence, i.e., on the fact that the evidence on a particular issue in the case against a party is not contracted.

The suggestion was made that the comment to Section 913 indicate that Foss v. Wotton is being overruled by this section insofar as that case permitted the drawing of an inference from the claim of a privilege.

Section 914.

The first sentence of subdivision (b) was revised to read:

"No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a judge that he disclose such information."

The heading of Section 914 was revised to read:

914. Determination of existence of privilege; limitation on punishment for contempt.

Section 915.

The addition of the reference to the newsmen's privilege was approved.

Section 919.

Subdivision (b) was revised to read:

(b) The presiding officer did not exclude the privileged information as required by Section 916.

The word "erroneously" was substituted for "wrongfully" in subdivision (a).

Section 930.

This section was revised to read:

930. To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

Sections 940-948.

Sections 940-948 were deleted and the following section was inserted in place of the deleted sections:

940. To the extent that such privilege exists under the Constitution of the United States or the State of California, every natural person has a privilege to refuse to disclose any matter that will incriminate him.

The section on cross-examination of a criminal defendant is to be included in a revised form in the division of the Evidence Code relating to witnesses.

No action was taken with respect to Section 404 which deals with the preliminary determination on a claim of the privilege against self-incrimination.

It was suggested that the comment to Section 940 refer to the printed tentative recommendation for a statement of the exceptions to the privilege against self-incrimination.

Section 951.

This section was approved.

Section 953.

Subdivision (a) was revised to read:

- (a) The client when he has no guardian or conservator.
Subdivision (d) was approved.

Section 958.

The following was added at the end of this section: ", including but not limited to a communication relevant to any issue of the adequacy of the representation of the client by the lawyer in any proceeding".

Sections 962 and 963.

These sections were deleted.

Section 971.

The Commission considered the suggestion of the Conference of California Judges, but no change was made in this section.

Section 972.

Subdivision (a) was revised to read:

- (a) A proceeding to commit or otherwise place his spouse or his spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.

Section 973.

The word "wrongfully" was changed to "erroneously." The suggestion of the Conference of California Judges was considered but was not adopted.

Section 993.

This section was revised to conform to the change made in Section 953.

Section 996.

This section was approved.

Section 1002.

The words "patient now deceased" were substituted for "deceased patient." A similar change is to be made in comparable sections.

Section 1003.

The words "patient now deceased" were substituted for "now deceased patient." A similar change is to be made in comparable sections.

Psychotherapist-patient privilege.

The Commission discussed the definition of "psychotherapist" but no change was made in the definition.

The following two new sections were added to the article on the psychotherapist-patient privilege:

There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the confidential communication is necessary to prevent the threatened danger.

Section 1016.

This section was approved as drafted.

Section 1017.

This section was revised to read:

1017. There is no privilege under this article if the psychotherapist is appointed by order of the court to examine the patient, but this exception does not apply where the psychotherapist is appointed by the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter a plea based on insanity or present a defense based on the mental or emotional condition of the defendant.

Article 8.

The title to this article was revised to read:

Article 8. Clergyman-Penitent Privileges

Section 1030.

This section was revised to read:

1030. As used in this article, "clergyman" means a priest, minister, or other similar functionary of a church or of a religious denomination or religious organization.

Section 1031.

The word "clergyman" was substituted for "priest" in this section. The suggestion of the Conference of California Judges was rejected because it imposed a subjective test. Moreover, the Commission's draft is based on the policy that the law will not punish a penitent who follows his religious belief which compels him to make the disclosure and will not punish the clergyman who by his religious discipline is required to keep the communication secret.

Section 1032.

The word "clergyman" was substituted for "priest" in this section.

Section 1034.

The word "clergyman" was substituted for "priest" in this section.

Section 1040.

It was suggested that the federal legislation (recently reported by the Senate Judiciary Committee) defining "public interest" be checked to determine whether the wording of Section 1040 can be improved.

This section was revised in substance to provide that official information obtained by a third person as a result of wrongful eavesdropping or interception is protected by the privilege. Appropriate language is to be drafted to effectuate this decision.

Section 1041.

This section was revised in substance to provide that the identity of the informer obtained by a third person as a result of eavesdropping or interception is protected by the privilege. Appropriate language is to be drafted to effectuate this decision.

Article 12.

The title to this article was revised to read:

Article 12. Immunity of Newsman From Citation for Contempt

Section 1072.

This section was revised to read:

1072. A newsman may not be adjudged in contempt for refusing to disclose in any proceeding the source of news procured for publication and published in news media, unless the source has been previously disclosed or the disclosure of the source is required in the public interest.

The Comment to this section is to contain a citation to the opinion of Judge McCoy.

Approval for printing.

Division 8, revised as indicated above, was approved for printing.

DIVISION 9. EXTRINSIC POLICIES

The Commission considered the First, Second, and Third Supplements to Memorandum 64-48 and Division 9 and the Commission's comments to Division 9. The following actions were taken.

Section 1100.

The last line of this section was revised by inserting the words "trait of character" for "a trait of his character."

The Comment to this section or Section 1102 should mention that it does not prevent asking a witness a "Have you heard . . . ?" question.

Section 1101.

This section was approved as drafted.

Section 1102.

Subdivision (b) was revised to read:

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

The section heading was revised to insert "Opinion and reputation" before the word "evidence."

Section 1103.

Subdivision (b) was revised to read:

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

Showing convictions of similar crimes to prove conduct of
criminal defendant.

The Commission declined to add a provision to the statute to permit the prosecution to offer evidence of prior convictions of a defendant of a crime substantially similar to the crime for which the defendant is being prosecuted, whether or not the defendant is a witness in the action.

Section 1104.

The words "Except as provided in Sections 1102 and 1103," were added at the beginning of this section.

Section 1105.

This section was approved as drafted.

Section 1150.

The word "improperly" was deleted before the word "influenced" and was inserted after the word "verdict."

Section 1151.

This section was approved as drafted.

Section 1152.

This section was approved as drafted. The Commission considered but did not adopt a suggestion that the words "as well as any conduct or statements made in negotiation thereof" be deleted.

Section 1153.

This section was revised to read:

1153. Evidence that the defendant in a criminal action has made a plea of guilty later withdrawn or has offered to plead guilty to the alleged crime or to a lesser crime is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

The language added at the end of Section 1153 is taken from Penal Code Section 1192.4.

Section 1154.

This section was approved as drafted. The Commission considered but did not adopt a suggestion that the words "as well as any conduct or statements made in negotiation thereof" be deleted.

Section 1155.

This section was approved as drafted.

Section 1156.

The word "and" at the beginning of the third line was changed to "or" to retain the language of the existing statute.

Approval for printing.

Division 9, revised as indicated above, was approved for printing.

DIVISION 10. HEARSAY EVIDENCE

The Commission considered Memorandum 64-49 and Division 10 of the Evidence Code relating to Hearsay Evidence. The following actions were taken:

Organization of the division.

The organization of the division was approved, subject to such action as may be taken when the division on writings is considered.

Section 1200.

The Commission approved the substitution of the phrase "Except as provided by statute . . ." for the section in Chapter 2 of the division making all hearsay admissible that is declared to be admissible by statute.

The Commission instructed the staff to add the definition of hearsay evidence to Section 1200. Whether the definition is repeated or is deleted from the definitions division was left to the staff's discretion.

Section 1200 is to be revised so that all hearsay exceptions need not be statutory. The courts may add to the list by decision. Thus, in substance, the recommendation of the New Jersey Supreme Court Committee was approved.

The Commission approved the redrafting of the exceptions to refer uniformly to "evidence of a statement".

Section 1203.

Subdivision (d) was revised by substituting "for cross-examination pursuant to this section" for "as a witness" at the end of the subdivision. The section was then approved.

Section 1204 was approved.

Section 1205.

The principle of URE Rule 64 and the New Jersey revision of the rule was discussed. The staff was asked to prepare a recommended section. Policy reasons for including the subdivisions covered in the recommended section and policy reasons for excluding other subdivisions should be presented and discussed.

Section 1222.

"Of it" was inserted after the word "adoption" in the last line.

Section 1223.

The staff was asked to consider whether the phrase "or in the judge's discretion as to the order of proof subject to," might be conveniently located somewhere else in subdivision (b). The section was then approved.

Section 1224.

The staff was directed to modify subdivision (c) so that statements of a co-conspirator made before the defendant became a member of the conspiracy are admissible against him to the same extent as statements made by a co-conspirator while the defendant is a member of the conspiracy. The change was made to reflect existing law as stated in People v. Weiss, 50 Cal.2d 535, 563-566, 327 P.2d 527 (1958).

Section 1226.

Section 1226 was revised by inserting the word "right" before the word "liability" in both subdivisions (a) and (b). The staff was directed to

consider whether the effect of the amendment might be broader than is intended. The intent of the amendment is to place a defendant in the same evidentiary position insofar as the plaintiff is concerned when either he is sued directly by a person who claims to have been injured by him or he is sued by a third person--such as a subrogee--who is asserting the right of the person claimed to have been injured by him.

Section 1227.

Section 1227 was added to provide a rule similar to that of Section 1226 for wrongful death cases. Section 1227 provides:

1227. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the heirs or personal representatives of the declarant in an action for the wrongful death of the declarant.

The staff was directed to consider whether the section or similar provisions should be made applicable to all situations in which the plaintiff is asserting a right derived from another. Such situations might involve suits by parents for injuries to a child or suits where a party is subject to a claim of imputed negligence--either direct or contributory.

Section 1230.

The revised draft of Section 1230 was approved.

The staff was directed to explain more fully in the comment the meaning of "having sufficient knowledge of the subject".

Section 1253.

The section was modified by removing "such statement" in the last line and substituting "it".