

#34

1/17/64

Memorandum 64-6

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rule 8)

Rule 8 has not been approved by the Commission. The revisions, however, were made pursuant to the Commission's instructions to make clear the difference in the functions of judge and jury when ruling on questions of competency and when ruling on questions of relevancy.

The comment appended to the rule explains the manner in which the rule operates and the extent to which it changes existing law. The following matters should also be noted:

There is one change in existing law that was not explained in connection with subdivision (1). Therefore, it is suggested that the following paragraphs be added to the comment relating to subdivision (1):

Subdivision (1) will alter California law in one respect. Subdivision (1) provides that, on request, the judge is required to determine the admissibility of a confession out of the presence of the jury. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. People v. Gonzales, 24 Cal.2d 870, 151 P.2d (1944); People v. Nelson, 90 Cal. App. 27, 31, 265 Pac. 366 (1928).

The existing rule permits evidence that may be extremely prejudicial to be heard by the jury. For example, in People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. To avoid this kind of prejudice, subdivision (1) forbids the conduct of the preliminary hearing in the presence of the jury if the defendant objects.

Subdivision (2). The Commission asked to know where the phrase "sufficient evidence to sustain a finding" is used. It is used in Rules 67 and 68. The staff proposed to use the phrase in Rule 19 relating to the personal knowledge of a witness, but the Commission directed a revision to obscure the fact that personal knowledge is a condition of a witness' testimony.

The comment to Rule 19 indicates that the requirement is still there, although the formula language is not used. The staff suggests that the formula language be used so that judges may easily discover that they are to apply subdivision (2) to the condition of personal knowledge and not subdivision (3).

Subdivision (3). The comment to subdivision (3) explains the operation of the subdivision and the changes it will make in existing California law. The policy argument for subdivision (3) insofar as vicarious admissions is concerned is that the rule eliminates the "second crack" doctrine. The policy argument the other way is that the trial judge has but one rule to apply in all agency cases. If the evidence offered is either a verbal act--such as an offer or acceptance--or hearsay, it is admissible upon a prima facie showing only. And if the statement is both, no limiting instruction is necessary.

The proposed rule is more difficult for the judge, easier for the jury. The existing law is easier for the judge, and more difficult--if not impossible--for the jury. The Commission has never considered specifically the impact of Rule 8 on the admissibility of vicarious admissions in California. Should Rule 8 be approved in this regard?

The Commission asked for a report on the appellate review of the voluntariness of confessions. The comment contains the report on page 26.

Respectfully submitted,

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