34(L) 2/17/64

Memorandum 64-13

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

BACKGROUND

Late in 1962 we distributed the printed tentative recommendation on Article VIII (Hearsay Evidence). Since then we have encouraged interested persons and organizations to submit comments on the printed tentative recommendation. We have received comments from a number of interested persons and groups and we anticipate that we will receive additional comments after March 1.

In this memorandum we present the comments received to date for Commission consideration and action. The comments are attached as exhibits to this memorandum and are discussed in the memorandum itself. We want to consider these comments at the February meeting because the special subcommittee of the Senate Judiciary Committee plans to hold hearings on this subject in March during the Special Session.

Before considering the various comments on the Hearsay Evidence recommendation, we suggest that the Commission consider the problem of drafting the substance of the article in the form of a statute. We plan to submit a tentative outline of the entire new evidence statute for Commission consideration within the next few months. It seems clear now, however, that the material on Hearsay Evidence will be a separate division or chapter of the comprehensive evidence statute. Hence, at this time we can consider the form which this portion of the comprehensive evidence statute should take. If the Commission approves the staff's suggestions

on how the portion of the statute relating to hearsay evidence should be drafted, we will be able to prepare the material in the form of a chapter or division of the comprehensive statute for consideration at a future meeting. In addition, we can consider the language of the various hearsay exceptions in light of the tentative decision made on the form of the statute.

FORM OF STATUTE ON HEARSAY EVIDENCE

An analysis of the Hearsay Evidence Article as revised reveals that it contains a number of general provisions relating to hearsay evidence (Rules 62, 63 (opening paragraph), 65, 66, and 66.1) and a large number of exceptions to the Hearsay Rule (subdivisions 1 through 32 of Rule 63). Further examination reveals that Rule 63 is very complex and extremely long because the various exceptions are tabulated following the word "except" in the opening paragraph of Rule 63. Moreover, a particular exception makes sense only if one reads it in connection with the opening paragraph of Rule 63.

When we previously considered the Hearsay Evidence Article we determined that we would not attempt to express it in statutory form in the tentative recommendation. We recognized, however, that Rule 63 was very complex and extremely long and it was generally agreed that Rule 63 should be split into a number of separate sections when the final statute is drafted.

We believe it highly desirable to break up Rule 63 into a number of separate statute sections. Generally speaking, each exception should be

a separate section and a complete sentence. The easy way to make each exception a complete sentence is to insert the words "is admissible" in the language stating the exception.

If we are to phrase the exceptions to the hearsay rule so that they state that a particular type of statement "is admissible" it is necessary to make it clear that the statement is not made admissible if it is privileged or otherwise is made inadmissible by some other provision of law. The Model Code of Evidence faced this same problem and met it with the following rule:

> RULE 10. CONDITION IMPLIED IN RULES DECLARING EVIDENCE ADMISSIBLE.
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> Subject to Rule 3 [same as URE Rule 3 (Exclusionary Rules Not to Apply to Undisputed Matter) which was deleted by the Law Revision Commission], each Rule stating that evidence is admissible contains by implication the provision, "if relevant and not subject to exclusion by another of these Rules."
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> Comment:
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> The Rule prevents the necessity of inserting the condition in each Rule that provides for the admissibility of evidence. Evidence may be admissible under one Rule and subject to exclusion by reason of a claim of privilege or for some other reason recognized in another Rule. For example, evidence of a statement made by a witness testifying at a trial may be admissible against him in a later proceeding under Rule 506, as an exception to the rule against hearsay; but if in making the statement he was erroneously compelled to incriminate himself, the evidence is inadmissible under Rule 232.

Rule 10 of the Model Code of Evidence applied to the entire code. We do not propose that a similar rule be made applicable to our entire evidence statute because we can deal with the problem when it arises in particular sections (other than in hearsay) and we would be concerned about the effect of the rule on sections that will be added to the new statute from our existing statute on evidence.

In view of the above discussion, the staff suggests that the Hearsay Evidence Chapter tentatively be organized as follows:

CHAPTER HEARSAY EVIDENCE

ARTICLE 1. GENERAL PROVISIONS

Section 1. Definitions. [Rule 62]

Note: It appears that most of the definitions in the hearsay article will need to be made applicable to the entire statute. For example, "unavailable as a witness" is used in sections outside the hearsay article. That definition uses the word "declarant" which also is defined; and the definition of "declarant" uses the word "statement" which is defined. In addition, the definition of "State" appears to be unnecessary. We merely mention this problem, but suggest that action be deferred until a later time when we can consider the general problem of definitions.

Section 2. General rule excluding hearsay evidence.

Note: This section is based on the opening paragraph of Rule 63 which should be revised to read:

> Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except as provided in Article 2 of this chapter.

Section 3. Credibility of declarant. [Rule 65]

Section 4. Multiple hearsay. [Rule 66]

Section 5. Savings clause. [Rule 66.1]

ARTICLE 2. EXCEPTIONS TO HEARSAY RULE

Section 10. Article does not make evidence admissible that is subject to exclusion on grounds other than hearsay.

Note: This section is new. It would read:

> Although the sections contained in this article declare that certain evidence is admissible, such evidence may be excluded if it is not relevant evidence or if it is subject to exclusion on some ground other than Section 2.

Section 11. Previous statement of trial witness.

Note: This is subdivision (1) of Rule 63 which should be revised to read:

> A statement made by a person who is a witness at the hearing, but not made at the hearing, is admissible if the statement would . . .

Additional sections covering other hearsay exceptions revised to use the words "is admissible."

Section 44. Evidence admissible under other statutes.

Note: This is subdivision (32) of Rule 63 which should be revised to read:

> Hearsay evidence declared to be admissible by any other statute section is admissible.

We strongly urge the Commission to approve this scheme tentatively. We believe that it will simplify and clarify the proposed statute and may simplify some of the problems we will face in revising particular hearsay exceptions to meet objections.

REVIEW OF TENTATIVE HEARSAY EVIDENCE RECOMMENDATION

Attached as exhibits are comments received from the following persons or organizations:

Exhibit I. Committee of Municipal Court Judges' Association of Los Angeles County (pink sheet)

Exhibit II. California Commission on Uniform State Laws (gold sheet)

Exhibit III. County of Los Angeles--Office of the District Attorney (green sheets)

Exhibit IV. Professor Kenneth Culp Davis (yellow sheets)

Exhibit V. Committee of the Conference of California Judges (white sheets)

Exhibit VI. Hollywood Bar Association (blue sheet)

Exhibit VII. Attorney General Mosk (Extract from official transcript of Hearing of Joint Legislative Committee for the Revision of the Penal Code (buff sheets)

Exhibit VIII. Office of County Counsel--San Bernardino County

We anticipate we will be receiving additional comments after March 1.

General analysis of comments.

The Committee of the Municipal Court Judges' Association of Los Angeles County congratulates the Commission "for the excellent study and recommendations that have been made." The Committee suggests only that Rule 62(6)(c) be revised.

The California Commission on Uniform State Laws has no suggestions to make with regard to the tentative recommendation.

The Office of the District Attorney--Los Angeles County has a number of specific comments on the tentative recommendation.

Professor Kenneth Culp Davis suggests a distinction should be made between judge tried cases and jury cases, but he makes no specific suggestions for revision of the tentative recommendation. He states: "The report, in my opinion, misses the boat. It proposes to turn the clock back, and it won't succeed."

The Committee of the Conference of California Judges makes a number of specific suggestions for revision. In most cases the Committee's suggestions go to the form in which the proposed rule should be drafted. We will not consider these suggestions now, but will take them into account when we prepare the draft of the portion of the statute relating to hearsay evidence.

The office of the San Bernardino County Counsel has made a careful study of the tentative recommendation. Generally speaking, the comments do not object to the tentative recommendation.

The Hollywood Bar Association has no recommendations to submit. They comment: "We believe that the Commission has made an exhaustive study and and that their efforts are accurately reflected in the proposed recommendations."

Attorney General Mosk made two specific points in his objection to our tentative recommendation, but he further stated: "Many of these points I have made could be called surface criticisms, and I will concede that they are. But a deeper analysis, I am sure, will reveal deeper problems."

General problems in tentative recommendation.

Form of proposed statute. This matter is discussed in a previous portion of this memorandum. We plan to draft the tentative recommendation in the form of a portion of the proposed statute for consideration by the Commission at a subsequent meeting.

Definitional problems. In Memorandum 64-15 (relating to the General Provisions Article) we suggest certain definitions. The need for these definitions is apparent when various hearsay evidence provisions are considered. We will use the definitions when we draft the tentative recommendation in the form of a portion of the proposed statute.

General philosophy of tentative recommendation. We suggest that you read Exhibit IV (the comments of Professor Davis). Those members of the Commission who are engaged in trial practice will be in a position to better evaluate the comments of Professor Davis. It might be noted, however, that a statute based on the philosophy contained in the Davis letter would have little chance of enactment.

Preliminary determination on admissibility. Many of the hearsay exceptions are conditioned on a finding by the judge. Others should be but are not. E.g., subdivision (29.1). Whether the phrase "if the judge finds" should be used; whether the determination should be made on evidence

sufficient to sustain a finding or by a preponderance of evidence, and the like, are not considered in this memorandum. The memorandum on Rule 8 will consider what technique should be used to clarify this matter. Whatever determination is made in connection with Rule 8 will be reflected in the revised draft of the tentative recommendation in the form of a portion of the comprehensive statute.

Form of exceptions. The Committee of the Conference of California Judges comments that the form of the subdivisions under Rule 63 should be uniform, and that the subject matter of the hearsay evidence should be stated first and that any modifying or conditional phrases, or exceptions should be stated in the latter provisions of the subdivisions or as a separate paragraph as is done in Rule 63(1). Earlier in this memorandum we suggested the need to revise the form of the subdivisions so that each is a separate section. If this suggestion is adopted, we will consider this comment in redrafting the subdivisions as separate sections. If the suggestion is not adopted, we should consider the comment in connection with each of the subdivisions of Rule 63.

Consideration of specific comments.

Rule 62(6)(c). See Tentative Recommendation, pages 309-310. The Committee of the Municipal Court Judges' Association of Los Angeles County made only one comment and that comment concerned Rule 62(6)(c):

> The only suggestion for a change is as to Rule 62(6)(c). The language offered by the Uniform Rules of Evidence appears to be preferable to the language recommended by the Commission. While it is true that the language recommended by the Commission is taken from Section 2016(d)(3)(iii) of the Code of Civil Procedure, there is no reason why "age" in and of itself should make a witness unavailable. It is the "physical or mental illness" that makes a witness unavailable, not "age." Also, "imprisonment" should not make a witness "unavailable," as witnesses who are imprisoned can be and frequently are brought to court to testify.

The office of the Los Angeles County District Attorney comments:

> Rule 62(6)(c) includes in its definitions of the term "unavailable" one who is imprisoned or sick or infirm. It appears obvious that the testimony of such a person would usually be inherently unreliable, and the presence of a convict can be obtained by an order of the court and his testimony tested by cross examination. Further, the testimony of sick or infirm persons can usually be obtained by the court holding a bedside hearing.

In view of the above objections, it is suggested by the staff that subdivision (6)(c) be revised to read:

> (c) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness.

This would restore the original URE test. If this change is made, consideration should be given to whether the definition of "unavailable as a witness" should apply in C.C.P. Sec. 2016 (d)(3)(iii) (pages 350-351 of tentative recommendation) and in Penal Code Sections 1345 and 1362 (page 353 of tentative recommendation). It would appear that the revised definition should apply to these existing code sections.

Rule 62--additional definitions. The Committee of the Conference of California Judges suggests that two new definitions be added to Rule 62.

The first definition would define "physical or mental condition of a person." See definition on page 3 of Exhibit V (white pages). We do not believe that this should be defined in Rule 62. The only place we find the term used is in subdivision (12) of Rule 63.

The second definition would define "family history." We believe that this is a good suggestion. The phrase "family history" is used in subdivisions (23), (24), (26), and (26.1). The use of a general definition would shorten these subdivisions and would seem to create no problems.

Rule 63(1). There were no comments on this subdivision.

Witkin, California Evidence §§ 695, 696 (1958) points out that there is a distinction between the so-called "recent fabrication" exception and the "statement before alleged improper motive arose" exception:

> § 695. . . . Where the impeachment has been made on the grounds of bias or other improper motive, a consistent statement made prior to the time the bias or motive was alleged to have arisen tends to show that the witness was not influenced by it in testifying on the stand. Accordingly the prior consistent statement is admissible in rehabilitation. . . .
>
> § 696. . . . The charge, express or implied, that the testimony was recently fabricated by the witness, is similar to the charge that it was influenced by improper motives (supra, § 695), and rehabilitation by proof of prior consistent statements is equally proper. . . .

Our analysis of the cases indicates (1) that the "recent fabrication" exception is broader than the "statement before alleged motive arose" exception and (2) that, in view of recent cases, the "recent fabrication" exception has been interpreted to cover cases of bias or other improper motive as well. The flexibility of the "recent fabrication" exception, and its tendency to merge with the "statement before alleged motive arose" exception, are well illustrated in People v. Walsh, 47 C.2d 36, 41, 301 P.2d 247 (1956). Defendants W and S, building inspectors, were charged with bribery--taking money from contractors to fix violations. Cross-examination of the contractor witnesses showed their past and present hostility to defendants and friendliness with the police. The prosecutor was then allowed to introduce the contractors' checks (to defendants) and prior oral statements to the effect that the money was used for bribes. The District Court of Appeal held the rehabilitation improper because the witnesses were as much biased against the defendants at the time of the prior consistent statements as at the time of the trial; i.e., the statements were not made before the alleged motive arose. But the Supreme

Court, without extended discussion, treated the cross-examination as an implied charge of recent fabrication, observing that "inferences of fabrication since the alleged bribes could be fairly drawn by the jurors."

The flexible "recent fabrication" rule was again stretched in People v. Bias, 170 Cal. App.2d 502, 512, 339 P.2d 204 (1959), where the court suggested that, under the theory of recent cases, the "charge" of fabrication may be "implied": "The very fact that defendant sought to impeach her [a prosecution witness] on an important circumstance of the crime, proving a statement at the preliminary examination contrary to that made at the trial, is in effect a charge of recent fabrication."

We have concluded that Rule 63(1) is satisfactory without making an express reference to bias or improper motive, but we believe that a statement should be contained in the comment to indicate that the "recent fabrication" exception of Rule 63(1)(b) embraces the "statement before alleged improper motive arose" exception.

If, however, the Commission desires to make the law entirely clear, the following new paragraph could be added to Rule 63(1):

> Is offered after an express or implied charge has been made that his testimony at the hearing is influenced by bias or improper motive and the statement is one made before the bias or motive is alleged to have arisen and is consistent with his testimony at the hearing; or

This new paragraph would follow paragraph (b) of the revised rule. The new paragraph would codify existing law.

In addition, the Commission should consider revising Rule 63(1)(b) to read:

> (b) Is offered after evidence of a prior inconsistent statement ~~or of a recent fabrication~~ by the witness has been received, or after

an express or implied charge has been made that his testimony at the hearing was recently fabricated, and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

Rule 63(3). The Committee of the Conference of California Judges suggests one change in substance in subdivision (3)(b): To substitute "to cross-examine" in place of "for cross-examination with an interest and motive similar to that which he has at the hearing."

The staff suggests that the language of the revised rule be retained. This requirement is necessary to insure a sufficient guarantee of trustworthiness to permit the former testimony to be used. Merely because the person against whom the former testimony is now being offered was a party to the former proceeding does not mean that the former testimony should be admitted. The party may have considered the former testimony insignificant in the former proceeding and thus did not object to it or cross-examine concerning it. Moreover, under the revised provision, unlike existing law it is not required that the former testimony have been given in a former action between the same parties relating to the same subject matter.

A possible response to the suggestion of the Committee would be to add two additional paragraphs to subdivision (3) to read:

(c) The former testimony was given in a former action or proceeding, relating to the same matter, between the same parties or their predecessors in interest.

(d) The former testimony was given in a former trial of a criminal action in the presence of the defendant against whom it is now offered and the defendant was given and had the opportunity to cross-examine the witness.

These additional paragraphs are not recommended by the staff, but they are based on Code of Civil Procedure Section 1870(8) ("The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter") and Penal Code Section 686(3) ("the testimony on behalf of the people or the defendant of a witness deceased, insane, out of

jurisdiction, or who cannot with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.")

Rule 63(3.1). The Committee of the Conference of California Judges recommends that this subdivision be eliminated. The Committee "feels that said rule is contrary to the California law as it now exists and that the said admission of testimony against a person who was not a party to the previous action or proceeding is dangerous and unfair."

The office of the District Attorney of the County of Los Angeles comments:

> Rule 63(3.1)(b) limits former testimony to that offered in a civil action or against the People in a criminal action. There appears to be no valid reason for changing the present rule which permits former testimony, whether given for or against a criminal. The recent case of People v. Volk, 221 A.C.A. 367, is an example of the fallacy of this provision.

(The office of the District Attorney of the County of Los Angeles apparently overlooked subdivision (3) which would make the testimony in People v. Volk admissible. People v. Volk involved testimony at the preliminary hearing that was offered at the trial in the same criminal action where the witness could not be located at the trial. Under subdivision (3)(b) such testimony would continue to be admissible.)

The office of the County Counsel of San Bernadino County comments on subdivision (3.1): "One's natural reaction is to oppose any such radical reduction of the right to cross-examine. However such testimony should be more reliable than many other types of hearsay which are admitted."

Rule 63(5). The office of the District Attorney of the County of Los Angeles states:

> Rule 63(5) contains an extremely broad dying declaration exception which in conjunction with Rule 63(10) would make admissible false confessions of guilt by dying criminals to benefit their confederates.

It should be noted that Rule 63(10) makes the evidence objected to admissible; Rule 63(5) is not needed for that purpose unless Rule 63(10) is redrafted to make such confessions inadmissible.

Rule 63(6). A majority of the Committee of the Conference of California Judges were in favor of this subdivision as recommended by the Commission. One member dissented as to paragraph (c); two members dissented as to paragraph (b) because this paragraph "does not make it sufficiently clear that there must be a causal connection between the alleged violation of the State of Federal Consitutions and the obtaining of the confession."

The Attorney General (Exhibit VII, pages 2-3--buff colored paper) and the office of the District Attorney of Los Angeles County (Exhibit III, page 2--green paper) object to subdivision (c) which provides that a confession is inadmissible if made while the defendant was illegally detained.

Consideration should be given to deleting the phrase "relative to the offense charged" from the introductory clause of Rule 63(6).

Rule 63(7), (8). There were no objections to these subdivisions. The Committee of the Conference of California Judges suggests changes in form which we will consider when we redraft the tentative recommendation in the form of a statute. Exhibit VIII specifically approves subdivision (8).

Rule 63(9). The Committee of the Conference of California Judges suggests the following changes in this subdivision:

(1) In paragraph (a), delete "before the determination of" and insert "during."

(2) In paragraph (a), after "discretion" insert "as to order of proof."

(3) In paragraph (b), delete "prior to the termination" and insert "during the existence" and delete "independent."

The Attorney General suggests that subdivision (b) should permit evidence of a statement of a co-conspirator to come in if the judge in his discretion, permits it to come in subject to proof of the existence of the conspiracy. In other words, subdivision (b) would be the same as to order of proof as is subdivision (a).

Subdivision (b) changes existing California law. Witkin, California Evidence 264 (1958) states:

> (1) Ordinarily proof of the existence of the conspiracy should precede proof of the declarations. But this rule yields to convenience, and the trial judge has power to allow the statements to be introduced, subject to a continuing objection and a later motion to strike if the prosecution does not connect them up. (See People v. Griffin, supra, 98 C.A.2d 47, 52; People v. Ferlin (1928) 203 C. 587, 599, 265 P.230.)

In addition, the Committee of the Conference of California Judges states: "We have eliminated the word 'independent' from Rule 63(9b ii) to comply with the rules set forth in People v. Collier, 111 Cal. App. 215; and People v. Curtis, 106 Cal. App.2d 321, to the effect that the acts and declarations of conspirators are properly received in evidence in proof of the 'fact' of the existence of a conspiracy." The following is a quotation from People v. Curtis:

> [7] Generally, the hearsay rule prohibits the reception in evidence of the acts done and the declarations made by one defendant, out of the presence of his codefendant, against such codefendant. One of the exceptions to the hearsay rule is provided by section 1870(6) of the Code of Civil Procedure, which reads: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . . 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy." [8] The section refers to declarations made by an alleged conspirator out of the presence of his confederate. Section 1870 also provides that evidence may be given of "[t]he act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty." (Subd. 7.) Section 1850 reads: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." [9] An act, declaration, or omission of

one alleged conspirator in the presence of his alleged confederate is not hearsay and is admissible in evidence. [10] An act, declaration, or omission of an alleged conspirator which forms a part of the transaction which is in dispute--the agreement coupled with an overt act--is not hearsay and is admissible in evidence. [11] An act or declaration of an alleged conspirator, not a part of the transaction which is in dispute, made out of the presence of his alleged confederate, is hearsay, and is not admissible in evidence until prima facie proof has been made of the existence of the conspiracy, subject to the power of the trial judge to regulate the order of proof. The very existence of a conspiracy is generally a matter of inference deduced from acts of the persons accused, and frequently from their declarations, written and verbal.

The distinction between admissible and inadmissible acts and declarations of alleged conspirators is lucidly explained in People v. Collier, 111 Cal. App. 215, 240 [295 P. 898]: "Now it must be apparent that when an agreement is not in writing parol evidence is admissible to prove its contents. And when the agreement is in parol, evidence of the conversations of the parties tending to disclose the agreement made is evidence of the very fact to be proved and hence is evidence of the res gestae. Hence, when the conspiracy charged in the indictment is an 'agreement' to do or not to do a certain act evidence of the conversations and acts of the conspirators which constitute the agreement is admissible to prove the agreement. Thus, when, as a part of the agreement, one or more of the conspirators undertakes to ask for a bribe, one or more agrees to accept a bribe, one or more agrees to do or not to do some act for the purpose of effectuating the compact, and one or more of the conspirators gives his assent to the compact either by express words or by actions from which such assent might be implied, evidence of such facts, when the agreement is in parol, is competent evidence of the acts or declarations which form 'a part of the transaction' which is in dispute, and, as such is admissible under the express provisions of section 1850 of the Code of Civil Procedure. On the other hand, if a witness were asked to relate a conversation which he had had with one of the alleged conspirators such testimony would be hearsay and would not be admissible under section 1870, subdivision 6 of the Code of Civil Procedure, until after the conspiracy had been proved, and, by thus permitting evidence of the acts and declarations of a conspirator against his coconspirator, this subdivision becomes an enlargement of rather than a limitation upon the ordinary hearsay rule." (Cf. People v. Raze, 91 Cal. App.2d 918, 921, 922 [205 P.2d 1062].) In People v. Daener, 96 Cal. App.2d 827, we said, page 831 [216 P.2d 511]: "The agreement may be inferred from the declarations, acts and conduct of the alleged conspirators. (People v. Benenato, 77 Cal. App.2d 350, 358 [175 P.2d 296].) 'If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy (People v. Yeager, supra [194 Cal. 452 (299 P. 40)]; People v. Sisson, 31 Cal. App.2d 92 [87 P.2d 420].) It may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end (People v. Montgomery, 47 Cal. App.2d 1 [117 P.2d 437]).' (People v. Torres, 84 Cal. App.2d 787, 794 [192 P.2d 45].)"

In reviewing the cases involving declarations of co-conspirators, we find that the existing law--i.e., permitting the declarations of co-conspirators to come in subject to later proof of the conspiracy--has worked well in practice. The existing law permits the prosecution to present its case in a logical manner. The proposed revised rule would result in confusion in some cases. We strongly urge that the rule advocated by the Attorney General be approved by the Commission and that subdivision (9)(b) be conformed to subdivision 9(a) on the order of proof of the declaration.

We suggest that the phrase "independent evidence" be deleted from subdivisions (a) and (b) and the phrase "otherwise admissible evidence" be substituted therefore. We believe that this will meet the objections of the Committee of the Conference of California Judges.

Rule 63(10). The Committee of the Conference of California Judges suggested that this subdivision be rewritten, but the committee did not suggest any change in substance. We will consider their suggestion when we redraft the subdivision in statutory form.

Two members of the Committee disapproved subdivision (10) for the following reasons:

> By reason of the decision by a District Court of Appeal in the case of People v. Spriggs, 220 A.C.A. 348, to the effect that the declaration of another person that he committeed the crime is inadmissible hearsay, and since the Supreme Court granted a hearing in the Spriggs case, and in the absence of additional safeguards to assure the trustworthiness of the declarant, it is suggested that the Committee not recommend favorable action on this subdivision until our Supreme Court renders its decision.

The office of the County Counsel of San Bernardino County makes the following comment regarding subdivision (10):

> This is another very substantial enlargement of the present hearsay exception. It seems as though the new rule will be more

logical. Formerly a declaration against interest had to be against pecuniary interest and even that exception was rather narrowly defined. A person would be even less likely to make a statement which would subject him to the risk of criminal liability than to make a statement which could cost him, perhaps, a nominal sum of money. How broadly the courts will interpret the exception to cover hatred, ridicule, or social disgrace remains to be seen. In the privileges article an example was given where X confessed to P, a psychotherapist, that X had murdered Y. D, charged with murder of Y could compel P to testify regarding X's confession. [Privileges recommendation changes to eliminate the exception that permitted D to compel P to testify to X's confession.]

The office of the District Attorney of Los Angeles County makes the following comment concerning subdivision (10):

> Rule 63(10) contains a very broad permissible use of declarations against interest but excludes statements made while the declarant was in custody insofar as such statements may be used against a defendant in a criminal action. Under this rule, evidence of other individuals that they committed the crime for which the defendant is being tried could be used on behalf of the defendant. Such a rule would lead to an increased number of perjurious defenses and would create chaos in criminal trials. Further, there appears no sound reason for the exception that declarations of a person in custody cannot be used against a defendant.

Rule 63(12). The Committee of the Conference of California Judges disapproved paragraph (c) of subdivision (12). Two members of the Committee believe that the subject matter of paragraph (c) should be included in the subdivision in language substantially as follows:

> (c) His previous symptoms, pain or physical sensation made to a physician relative to an issue of declarant's bodily condition.

The Office of the County Counsel of San Bernardino County states: "Only paragraph (c) is intended to be a change from present law. It does not appear to be an important one.

Rule 63(13). There were no objections to this subdivision.

Rule 63(14). There were no objections to this subdivision. Consideration might be given to making subdivision (14) consistent with subdivision (13). This could be accomplished by revising subdivision (14) to read:

> Evidence of the absence from the records of a business (as defined in subdivision (13) of this rule) of a record of an asserted act, condition or event, to prove the non-occurence of the act or event, or the non-existence of the condition, if the judge finds that:
>
> (a) It was the regular course of that business to make records of all such acts, conditions or events, at or near the time of the act, condition or event, and to preserve them; and
>
> (b) The sources of information and method and time of preparation of the records of that business [~~are such as to indicate that the absence of a record of an act, condition or event warrants an inference that the act or event did not occur or the condition did not exist~~] were such as to indicate their trustworthiness.

The revision would make it clear that the proponent of the evidence under subdivisinn (14) must make the same showing as under subdivision (13)--i.e., that the records of the business are trustworthy. Just what kind of a showing is required under subdivision (14)(b) of the revised rule and just how it differs from the showing under subdivision (13) if not clear. In this connection, the case that held that evidence of the absence from the record of a business was evidence that an act or event did not occur or a condition did not exist stated:

> The primary purpose of admitting evidence of any character in any case, is to arrive at the truth in controversy. Hence, if a business record is otherwise admissible under Section 1953f [now Revised Rule 63(13)], we see no reason why it should not be equally admissible to disprove an affirmative as to prove an affirmative, just as competent to prove the falsity of a fact affirmed as to prove the truth of the fact affirmed. We are unable to conceive of any kind of evidence which does not, in a measure, partake of both an affirmative and negative character. If it proves an affirmative, it thereby logically disproves the reverse.

Note that the court requires the same foundational showing to prove the absence of a record as to prove the existence of a record. The proposed revision of Rule 63(14) would retain the existing law in this respect.

Rule 63(15). The Committee of the Conference of California Judges approves Rule 63(15)(a), (b), and (c), provided that whenever the author of such writing is called as a witness by the party against whom

the writing is offered and concerning the subject matter of the writing, such witness may be examined as an adverse witness as on cross-examination.

The Committee also suggests that consideration be given to the admissibility of reports prepared by agencies of government prior to the litigation dealing with natural or physical conditions, for example, reports that might be used in water, mining, oil subsidence cases, but which would not qualify for admission under subparagraph (b). The Commission considered this matter when the tentative recommendation was prepared. See discussion of Rule 63(15)(c) on pages 522-524 of the study.

Rule 63(16). The Committee of the Conference of California Judges approves this subdivision if the words "or report" is deleted from the first line of the subdivision.

This subdivision is discussed in a supplement to this memorandum.

Rule 63(17). The Committee of the Conference of California Judges would revise paragraph (a) of subdivision (17) to read:

> (a) A writing purporting to be a copy of a writing recorded or filed pursuant to law in the office of a public officer, or a writing in the custody of such an officer, and offered to prove the contents of such writing if the original would be admissible and a copy meets the requirements of authentication under Rule 68.

This revision presents several policy questions:

(1) We have used the words "a writing in the custody of a public officer or employee" to include a copy of a writing recorded or filed pursuant to law in the office of a public officer or employee. The Committee suggests that subdivision (17)(a) be revised to read:

> (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record of a writing recorded or filed pursuant to law in the office of a public officer or employee or to prove the content of a writing in the custody of a public officer or employee, a writing purporting to be a copy thereof.

This seems to be an unnecessary change. However, to make subdivision (a) consistent with Revised Rule 68, the words "or of an entry therein" should be added after "a writing in the custody of a public officer or employee." See Tentative Recommendation on Authentication and Content of Writings, page 12. Thus, subdivision (a) should read:

> (a) If meeting the requirements of authentication under Rule 68, to prove the content of a writing in the custody of a public officer or employee or of an entry therein, a writing purporting to be a copy [~~thereof~~] of such writing or entry.

(2) The Committee suggests that the requirement that "if the original would be admissible" be added to subdivision (17)(a). The theory of subdivision (17)(a) is that it permits proof of the official record by a copy. Whether the official record is admissible depends on whether a hearsay exception exists that makes it admissible.

See the comment to subdivision (17). See also, Revised Rule 68 (Authentication). If this suggestion is adopted by the Commission, paragraph (a) of subdivision (17) might be revised to read:

> (a) A purported copy of a writing in the custody of a public employee, or of an entry therein, is admissible if:
> (1) The copy of the writing or entry meets the requirements of authentication under Rule 68; and
> (2) The writing in the custody of the public employee, or the entry therein, would itself be admissible.

Rule 63(18). There were no objections to this subdivision.

Rule 63(19). There were no objections to this subdivision.

Rule 63(20). This subdivision is discussed in a supplement to this memorandum.

Rule 63(21). There were no objections to the substance of this provision.

Rule 63(21.1). There were no objections to this subdivision.

Rule 63(22). No change in substance was recommended by persons commenting on this subdivision. This subdivision is discussed in a supplement to this memorandum.

Rule 63(23). The Committee of the Conference of California Judges would revise this subdivision to require the proponent of the evidence to show that the declarant "in making such statement had no apparent motive or reason to deviate from the truth." No reason is given for changing the burden of producing evidence of motive or reason to deviate from the truth to impose it on the proponent rather than on the person objecting to the evidence.

Rule 63(24). The Committee of the Conference of California Judges recommends the same change in this subdivision as in subdivision (23).

Rule 63(26). No change in the substance of this subdivision was recommended by persons sumitting comments.

Rule 63(26.1). No change in the substance of this subdivision was recommended by persons submitting comments.

Rule 63(27). No change in the substance of this subdivision was recommended by persons submitting comments. This subdivision is discussed in a supplement to this memorandum.

Rule 63(27.1). The Committee of the Conference of California Judges recommends that the proponent of the evidence have the burden of showing that the "statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth."

Rule 63(28). No change in the substance of this subdivision was recommended by persons submitting comments.

Rule 63(29). The Committee of the Conference of California Judges recommends that the words "real or personal" be inserted before "property" in the introductory clause of this subdivision. In this connection, it is noted that Section 17 of the Code of Civil Procedure provides in part:

> The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:
> 1. The word "property" includes both real and personal property;

Hence, the suggested revision seems unnecessary, since the general definitions applicable to the Code of Civil Procedure will apply unless we provide for conflicting definitions. Note also that "real property" and "personal property" are defined in Section 17 of the Code of Civil Procedure.

Rule 63(29.1). There were no comments on this subdivision. The subdivision does present the problem whether the words "if the judge finds" should be inserted in cases where the hearsay evidence is admissible subject to the finding of a condition. Here, the judge must find that statement has been since generally acted upon as true by persons having an interest in the matter. Hence, the least that should be done to this section is to change the word "when" to "if."

Rule 63(30). There were no comments on this subdivision.

Rule 63(31). There was only one comment on this subdivision. The office of the County Counsel of San Bernardino County states:

> This is C.C.P. 1936 modified only to conform to the general format of the hearsay statute. The courts have held that "books of science or art" do not include medical books since medicine is not an exact science. Consequently a doctor can be cross-examined as to his knowledge regarding various medical books, but the books themselves cannot be used as substantive evidence. The commission considered the possibility of broadening this exception by stating specifically that medical books are included. There is no indication why the commission decided against this desirable change.

Additional Hearsay Exception. In its tenative recommendation relating to the Privileges Article, the Commission approved the following additional exception to the hearsay rule (in connection with the repeal of the Dead Man Statute):

> (5.1) When offered in an action or proceeding brought against an executor or administrator upon a claim or demand against the estate of a deceased person, a statement of the deceased person if the judge finds it was made upon the personal knowledge of the declarant.

See Tentative Recommendation on Privileges Article, pages 117-119. We have not made a general distribution of this tentative recommendation for comments.

Rule 63(32). There were no comments on this subdivision.

Rule 64. The office of the District Attorney of Los Angeles County points out that discovery by the prosecution is very limited in criminal cases and, hence, it might be desirable to retain Rule 64.

Rule 65. There were no comments on this subdivision.

Rule 66. There were no comments on this subdivision.

Rule 66.1. There were no comments on this subdivision.

Amendments and Repeals of Existing Statutes. There were no objections to the amendments and repeals except, as noted below. One member of the Committee of the Conference of California Judges objects to repealing Section 1850. See comment on page 16 of Exhibit V (white pages).

The office of the County Counsel of San Bernardino County (Exhibit VIII) commented:

> C.C.P. 2047 will be changed rather substantially by permitting a witness to refer to a document not prepared by him, and by permitting the opposing attorney to inspect a document used to refresh the witness's memory, even when the witness does not take it with him to the witness stand. Probably the court would hold that this does not require disclosure of a document containing privileged information. The witness might be deemed to have waived his privilege (like the lawyer-client privilege) by referring to

the document to refresh his memory, but this should not compel him to hand over a document (like part of an adoption file) when the privilege belongs to another party or when disclosure is forbidden by statute. It would be a good idea to say so, if this is the law.

Witnesses will have to be careful what they use to refresh their memory prior to trial if they don't want the opposing attorney to see their files.

It is noted, also, that Code of Civil Procedure Section 117g refers to the Uniform Business Records as Evidence Act and will require a conforming amendment.

Additonal objections. We will redraft the rules in statutory form to reflect Commission action at the February meeting and will consider this portion of the proposed new statute and additional objections to the tentative recommendation (if any are received) at the March meeting. We also plan to make a careful study of the Hearsay Evidence Provisions when we prepare the tentative recommendation in statutory form.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-13

EXHIBIT I

MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
Elisabeth Eberhard Zeigler, Judge

December 30, 1963

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

The members of the committee of the Municipal Court Judges' Association of Los Angeles County have studied the California Law Revision Commission's tentative recommendations on the hearsay evidence article of the Uniform Rules of Evidence. May we offer our congratulations to the Commission for the excellent study and recommendations that have been made.

The only suggestion for a change is as to Rule 62(6)(c). The language offered by the Uniform Rules of Evidence appears to be preferable to the language recommended by the Commission. While it is true that the language recommended by the Commission is taken from Section 2016(d)(3)(iii) of the Code of Civil Procedure, there is no reason why "age" in and of itself should make a witness unavailable. It is the "physical or mental illness" that makes a witness unavailable, not "age". Also, "imprisonment" should not make a witness "unavailable", as witnesses who are imprisoned can be and frequently are brought to court to testify.

We appreciate the opportunity you have afforded us to study and to comment on your recommendations.

Very truly yours,

Elisabeth E. Zeigler
Chairman of Municipal Court
Judges' Association Committee

EEZ:mks

EXHIBIT II

BROBECK, PHLEGER & HARRISON
Attorneys at Law
One Eleven Sutter Street
San Francisco 4

January 3, 1964.

Mr. John H. DeMoully,
Executive Secretary,
California Law Revision Commission,
School of Law,
Stanford University,
Stanford, California.

Dear Mr. DeMoully:

As you will recall, Mr. George Richter, the chairman of the California Commission on Uniform State Laws, has designated me to act by way of liaison with the California Law Revision Commission in connection with the Hearsay Evidence Article of the Uniform Rules of Evidence. On September 6, 1963, you wrote me in regard to this matter, enclosing a copy of a tentative recommendation and research study prepared by the California Law Revision Commission.

This is to inform you that the California Commission on Uniform State Laws has no suggestions to make with regard to the tentative recommendation and research study.

Sincerely,

S/ALVIN J. ROCKWELL
Alvin J. Rockwell

AJR:mb

EXHIBIT III

COUNTY OF LOS ANGELES
OFFICE OF THE DISTRICT ATTORNEY
600 Hall of Justice
Los Angeles 12, California

January 7, 1964

Mr. Spencer M. Williams
County Counsel
County of Santa Clara
70 West Rosa Street
San Jose 10, California

Dear Spence:

At your request, we have reviewed the tentative proposals on Hearsay Evidence and Privileges Articles of the Uniform Rules of Evidence prepared by the California Law Revision Committee. There are a number of provisions which we feel are unwise changes in the law of evidence.

As to Article VIII, Hearsay Evidence, we object to the following proposals:

1. Rule 62 (5)(c) includes in its definitions of the term "unavailable" one who is imprisoned or sick or infirm. It appears obvious that the testimony of such a person would usually be inherently unreliable, and the presence of a convict can be obtained by an order of court and his testimony tested by cross examination. Further, the testimony of sick or infirm persons can usually be obtained by the court holding a bedside hearing.

2. Rule 63 (3.1)(b) limits former testimony to that offered in a civil action or against the People in a criminal action. There appears to be no valid reason for changing the present rule which permits former testimony, whether given for or against a criminal. The recent case of People v. Volk, 221 A.C.A. 367, is an example of the fallacy of this provision.

3. Rule 63(5) contains an extremely broad dying declaration exception which in conjunction with Rule 63(10) would make admissible false confessions of guilt by dying criminals to benefit their confederates.

4. Subdivision Rule 63 (6) (c) provides that a confession is inadmissible if made while the defendant was illegally detained. While the commission does not clearly state it in their comment the effect of this recommendation would be to hamper law enforcement agencies by the adoption of the federal McNabb-Mallory Rule which has been rejected by the Supreme Court of the State of California. (See People v. Rogers, 46 Cal. 2d 3.)

5. Rule 63 (10) contains a very broad permissive use of declarations against interest but excludes statements made while the declarant was in custody, insofar as such statements may be used against a defendant in a criminal action. Under this rule, evidence of other individuals that they committed the crime for which the defendant is being tried could be used on behalf of the defendant. Such a rule would lead to an increased number of perjurious defenses and would create chaos in criminal trials. Further, there appears no sound reason for the exception that declarations of a person in custody cannot be used against a defendant.

6. The commission declines to adopt Rule 64 on the grounds that discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise. While this comment may be true in civil matters, it is absurd as applied to the People in a criminal case. (See Jones v. Superior Court, 58 Cal. at 56.)

We also find the following provisions of the Privileges Articles to be objectionable:

[omitted]

We have attempted to point out only the provisions which we feel are particularly objectionable in the commission recommendations. Our failure to mention other provisions should not be taken as an indication of approval for the rest of the material.

Sincerely yours,

s/

Manley J. Bowler
Chief Deputy District Attorney

MJB:kmh

Memo 64-13

EXHIBIT IV

THE UNIVERSITY OF CHICAGO

Chicago 37 · Illinois

The Law School

January 20, 1964

Mr. John H. DeMoully
California Law Revision Commission
Stanford University School of Law
Stanford, California

Dear John:

Many thanks for sending me the report of the California Law Revision Commission on hearsay.

The report, in my opinion, misses the boat. It proposes to turn the clock back, and it won't succeed.

More specifically, the report goes wrong at page 308, where the unsupported assertion appears that "the tentative recommendation would make a broader range of hearsay evidence admissible in the courts of this State than is now the case." The report makes this assertion without even any awareness of what proceedings will be subject to the new rules; the report merely refers vaguely to "the California law of evidence."

One has to turn to the Chadbourn report, beginning at page 407, to discover what the proposed rules will apply to. The rules will apply "in every criminal or civil proceeding conducted by or under the supervision of a court in which evidence is produced." In the footnote to that statement appears the exceedingly important qualification: "Except to the extent to which the Uniform Rules of Evidence 'may be relaxed by other procedural rule or statute applicable to the specific situation.'" Then appears the example of the Small Claims Court, before which the proposed rules will be "relaxed."

With all respect, I want to raise the exceedingly elementary question whether the Commission is aware of the fact that the jury-trial rules of evidence, including especially the hearsay rule, are "relaxed" in most cases that are tried without juries. I want to raise the elementary question whether the Commission is aware of the fact that probably about two-thirds of all trials in superior courts of California are without juries, and that in the lesser courts of California a still higher proportion are without juries.

On the basis of statistics in recent reports of the Judicial Council of California, I think it may be a good guess that more than nine-tenths

of the trials to which the proposed rules will be applicable are without juries. In the nonjury trials, the hearsay rule is "relaxed" to some uneven extent from case to case and from judge to judge.

From this approach, I think it highly improbable that "the tentative recommendation would make a broader range of hearsay evidence admissible in the courts of this State than is now the case." This statement at page 308 of the report has no support whatsoever, and the only way it could be supported would be through a study of the present practices in nonjury trials, which probably account for more than nine-tenths of all trials in courts of California. Even if the statement is true with respect to jury cases, which are probably less than one-tenth of the trials, I think the statement is unjustifiable unless some sort of study of nonjury trials supports it.

The reality seems to me to be that today's evidence practices in California make a lot of sense because the jury-trial rules are relaxed in more than nine-tenths of all trials. And application of the California Law Revision Commission's proposed rules to the nonjury trials of California will, as I see it, be a move in the wrong direction.

Even in jury cases, I am not convinced that the recommendations will be a step forward. What is important here is the difference between the formal system and what actually happens in trials, plus the further fact that the codification proposed will probably tend to have more effect than today's relative looseness. Nothing in the report or in the Chadbourn study discerns the crucial realities emphasized by some of the best students of evidence. An example is Professor Jack Weinstein of Columbia University: "So quickly has the exclusionary hearsay rule waned that there are few cases today where the outcome of a well-tried case would have been different had it not been for the hearsay rule, where a good court was prevented from admitting persuasive hearsay. Not all lawyers and courts, of course, have fully exploited present tendencies." See the whole Weinstein article, Probative Force of Hearsay, 43 Ia. L. Rev. 331 (1961), which has in it ninety-nine times as much wisdom as the Chadbourn report.

The proposed rules of the California Law Revision Commission fail to recognize the fundamental truth captured by McCormick in one sentence: "The trustworthiness of hearsay ranges from the highest reliability to utter worthlessness." The proposed rules assume, wrongly, that the hearsay rule and its exceptions can be made to fit McCormick's fundamental truth. They don't fit it.

If more than nine-tenths of trials in California are without juries, then in preparing rules of evidence for all trials, we need to release our minds from jury thinking and to prepare rules for nonjury trials. We can then provide for the needed adaptation for the small minority of trials that use juries. The rules proposed by the California Law Revision Commission are dominated by jury thinking. The proposed rules should be prepared by minds that are released from jury thinking.

When our minds are released from jury thinking, we shall see the merit of building on our valuable experience under the satisfactory provisions of the Administrative Procedure Act that "Any oral or documentary evidence may be received" and that a finding may be supported by "reliable, probative, and substantial evidence" without regard to the question whether the evidence is "competent."

When our minds are released from jury thinking, we shall see that when the only available alternative to giving the hearsay as much weight as it seems to deserve is to decide without evidence, our belief that direct evidence is usually better than hearsay is unhelpful because it is irrelevant.

When our minds are released from jury thinking, we shall see the nonsense of a hearsay rule that operates in the same way irrespective of the reliability or unreliability of the hearsay and irrespective of the availability or unavailability of the declarant; we shall see that even somewhat unreliable hearsay may for some purposes in some circumstances be better than no evidence.

If you want figures showing that five-sixths of all trials in courts of general jurisdiction in the United States today are without juries, I refer you to § 14.03 of the 1963 pocket parts of my Administrative Law Treatise. (If you want support for some of my remarks to you at the lunch table about judicial notice, see § 15.09 of the same pocket parts.)

I was much pleased to become a bit acquainted with you in Los Angeles, John, and I hope the future will often bring us together.

Warm regards.

Sincerely yours,

Kenneth Culp Davis

KCD:fs

EXHIBIT V.

Chambers of

THE SUPERIOR COURT

Los Angeles 12, California

January 28, 1964

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

Attention: Mr. John H. DeMoully, Executive Secretary

Gentlemen:

The Honorable Vernon W. Hunt, President of the Conference of California Judges, several months ago appointed a special committee of the Conference to work with your Commission on the study of the Uniform Rules of Evidence. The members of said committee are as follows:

Justice Mildred Lillie
Justice, District Court of Appeal
Los Angeles, California

Judge Mark Brandler
The Superior Court
Los Angeles, California

Judge Raymond J. Sherwin
The Superior Court
Fairfield, California

Judge James C. Toothaker
The Superior Court
San Diego, California

Judge Howard E. Crandall
The Municipal Court
San Pedro, California

Judge Leonard A. Diether
The Superior Court
Los Angeles, California
Chairman of the Committee

The Committee has studied and reviewed the tentative recommendations of your Commission on the Uniform Rules of Evidence relating to hearse

evidence as expressed in your report of August 1962, and has prepared a report of its recommendations and conclusions, copies of which are enclosed herewith. Please deliver a copy of said report to each member of the Commission

If the Commission desires, the Committee will be happy to furnish the Commission with additional information as to the reasons or basis for its recommendations and conclusions.

The Committee will be happy to study and review any additional tentative recommendations of the Commission on the Uniform Rules of Evidence.

Yours very truly,

s/

Leonard A. Diether
Chairman of the Committee of the
Conference of California Judges to
Work with the California Law
Revision Commission on Uniform
Rules of Evidence

LAD:IM
Encls.

REPORT OF THE SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES TO WORK WITH THE CALIFORNIA LAW REVISION COMMISSION ON THE STUDY OF THE UNIFORM RULES OF EVIDENCE RELATIVE TO HEARSAY EVIDENCE

The Committee approves the tentative recommendations of the Commission on all Rules relating to hearsay evidence not specifically mentioned herein.

RULE 62

DEFINITIONS

The Committee recommends that Rule 62 be amended to include the definitions hereinafter set forth. The Committee believes that such definitions will simplify and shorten Rule 63.

Rule 62(9) Physicial or mental condition of a person as used in these rules shall include the then existing state of mind, emotion or physicial sensation, statements of intent, plan, motive, design, mental feeling, pain and bodily health.

Rule 62(10) Family history shall mean a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact.

RULE 63

HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS

The Committee recommends that the form of the subdivisions under Rule 63 should be uniform, and that the subject matter of the hearsay evidence should be stated first and that any modifying or conditional phrases, or exceptions should be stated in the latter provisions of the subdivisions or in a separate paragraph as is done in Rule 63(1).

RULE 63(3)

FORMER TESTIMONY OFFERED AGAINST A PARTY TO THE FORMER ACTION OR PROCEEDING

The Committee recommends that Rule 63(3) be rewritten as follows:

Former testimony of a declarant if the judge finds that the declarant is unavailable as a witness and any one of the following exists:

(a) It is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine, except that testimony in a deposition taken in another action or proceeding and testimony given in a preliminary examination in another criminal action or proceeding is not admissible under this subparagraph against the defendant in a criminal action or proceeding unless it was received in evidence at the trial of such other action or proceeding.

The admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time.

RULE 63(3.1)

FORMER TESTIMONY OFFERED AGAINST A PERSON NOT A PARTY TO THE FORMER ACTION OR PROCEEDINGS

The Committee recommends that Rule 63(3.1) be eliminated. It feels that said rule is contrary to the California Law as it now exists and that the admission of testimony against a person who was not a party to the previous action or proceedings is dangerous and unfair.

RULE 63(6)

CONFESSIONS

The majority of the Committee are in favor of the subdivision as recommended by the Commission.

Two members dissent as to subparagraph (b) and one member dissents as to subparagraph (c).

The view of one member of the Committee is that subparagraph (a), amply protects the rights of the defendant and that under the California authorities the trial judge may properly consider the subject matter presently encompassed in the Commission's subparagraph (b) and (c).

Two members of the Committee believe that subparagraph (b) does not make it sufficiently clear that there must be a causal connection between the alleged violation of the State or Federal Constitutions and the obtaining of the confession.

Although the Committee believes that subparagraph (c) is contrary to the present California Law as stated in the case of People v. Freeland, 218 A.C.A. 215; Rogers v. Superior Court, 46 Cal.2d 3, the majority of the Committee is in favor of the Commission's recommendations.

RULE 63(7)

ADMISSIONS BY PARTIES

The Committee recommends that Rule 63(7) be rewritten as follows:

A statement by a person who is a party to a civil action or proceeding offered against him in either his individual or representative capacity regardless of whether such statement was made in his individual or representative capacity.

RULE 63(8)

AUTHORIZED AND ADOPTIVE ADMISSIONS

The Committee recommends that Rule 63(8) be rewritten to read as follows:

A statement offered against a party if:

(a) Made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; or

(b) The party against whom it is offered had knowledge of its content and has by words or conduct manifested his adoption or his belief in its truth.

RULE 63(9)

VICARIOUS ADMISSIONS

The Committee recommends that Rule 63(9) be rewritten as follows:

A statement which would be admissible if made by the declarant at the hearing if offered against a party and:

(a) The statement is that of an agent, partner or employee of

the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made during such relationship and (ii) the statement is offered after, or in the judge's discretion as to the order of proof, subject to proof by independent evidence of the existence of the relationship between the declarant and the party; or

(b) The statement is that of a co-conspirator of the party and (i) the statement was made during the existence of the conspiracy and in furtherance of the common object thereof, and (ii) the statement is offered after proof by evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, the liability, obligation or duty of the declarant is an issue between the party and the proponent of the evidence of the statement and the statement tends to establish that liability, obligation or duty.

We have eliminated the word "independent" from Rule 63(9b ii) to comply with the rules set forth in People v. Collier, 111 Cal. App. 215; and People v. Curtis, 106 Cal. App.2d 321, to the effect that the acts and declarations of conspirators are properly received in evidence in proof of the "fact" of the existence of a conspiracy.

RULE 63(10)

DECLARATIONS AGAINST INTEREST

The Committee recommends that Rule 63(10) be rewritten as follows:

A statement which the judge finds was at the time of the statement: (i)

so far contrary to the declarant's pecuniary proprietary interest or (ii) so far subjected him to the risk of civil or criminal liability, or (iii) so far tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, provided the declarant is not a party to the action or proceedings and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, except, however, that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.

Two members of the Committee disapproved said subdivision for the following reasons:

By reason of the decision by a District Court of Appeal in the case of People v. Spriggs, 220 A.C.A. 348, to the effect that the declaration of another person that he committed the crime is inadmissible hearsay, and since the Supreme Court granted a hearing in the Spriggs case, and in the absence of additional safeguards to assure the trustworthiness of the declarant, it is suggested that the Committee not recommend favorable action on this subdivision until our Supreme Court renders its decision.

RULE 63(12)

STATEMENTS OF PHYSICAL OR MENTAL CONDITION OF DECLARANT

The Committee recommends that Rule 63(12) be rewritten as follows:

A statement of a declarant unless the judge finds it was made in bad faith, relative to:

(a) His physical or mental condition when such is an issue or is relevant to prove or explain acts or conduct of the declarant, but, except as provided in paragraphs (b), (c) and (d) of this subdivision, not including memory or belief to prove the fact remembered or believed; or

(b) His state of mind, emotion or physical sensation at a time prior to the statement to prove such prior facts when such is an issue in the action or proceedings, but not to prove any other fact provided declarant is unavailable as a witness; or

(c) Whether he has or has not made a will or has or has not revoked his will or that identifies his will provided he is unavailable as a witness.

The majority of the Committee believe that the Commission's subparagraph (c) should be eliminated entirely and that the present law of California on that subject as it now exists should apply.

Two members of the Committeee believe that the subject matter of subparagraph (c) should be included in the subdivision in language substantially as follows:

(c) His previous symptoms, pain or physical sensation made to a physician relative to an issue of declarant's bodily condition.

RULE 63(15)

REPORTS OF PUBLIC OFFICERS AND EMPLOYEES

The Committee approves Rule 63(15) (a), (b) and (c) provided that whenever the author of such writing is called as a witness by the party against whom the writing is offered and concerning the subject matter of the writing, such witness may be examined as an adverse witness as on cross-examination.

The Committee suggests that the Commission give consideration to the admissibility of reports prepared by agencies of the government prior to the litigation dealing with natural or physical conditions, for example, reports that might be used in water, mining, oil subsidence cases, but which would not qualify for admission under subparagraph (b).

RULE 63(16)

REPORTS OF VITAL STATISTICS

The Committee recommends that the title of this subdivision be changed to "Records of Vital Statistics."

The Committee also recommends that the words "or reports" in the first line of the subdivision should be eliminated, and if so eliminated the Committee approves the subdivision as recommended by the Commission.

RULE 63(17)

CONTENT OF OFFICIAL RECORDS

The Committee recommends that Rule 63(17) be rewritten as follows:

(a) A writing purporting to be a copy of a writing recorded or filed pursuant to law in the office of a public officer, or

a writing in the custody of such an officer, and offered to prove the contents of such writing if the original would be admissible and a copy meets the requirements of authentication under Rule 68.

(b) A writing made by the public officer who is the official custodian of the records in his office and offered to prove the absence of a record in such office if such writing meets the requirements of authentication under Rule 69 and recites diligent search and failure to find such record.

One member of the Committee disapproves of the recommendation of the Commission and of this Committee with regard to subparagraph (a), and feels that the provisions of the Uniform Rules of Evidence should be followed.

RULE 63(20)

JUDGMENT OF PREVIOUS CONVICTION

The majority of the Committee approves the recommendation of the Commission in eliminating subdivision 20 of the Uniform Rules of Evidence. However, the Committee suggests that the Commission give consideration to the case of Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd., 58 Cal.2d 601. If said subdivision 20 is eliminated and the Teitelbaum case remains as the law of this state would not the final judgment of conviction be admissible in any other action in which it would be material?

One member of the Committee believes that subdivision 20 should be included as proposed in the Uniform Rules of Evidence so long as it is made clear that it is not intended to repeal by implication the new subdivision 3 of Section 1016 Penal Code dealing with a plea of nolo contendere.

RULE 63(21)

JUDGMENT AGAINST PERSONS ENTITLED TO INDEMNITY

The Committee recommends that Rule 63(21) be rewritten as follows:

Evidence of a final judgment if offered by the judgment debtor in any action of proceedings to prove any fact which was essential to the judgment and such action or proceedings is to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment; or

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

RULE 63(22)

JUDGMENT DETERMINING PUBLIC INTEREST IN LAND

The Committee recommends Rule 63(22) be rewritten as follows:

Evidence of a final judgment determining the interest or lack of interest of a public entity in land, and offer to prove any fact which was essential to the judgment if such judgment was entered in an action or proceedings to which the public entity whose interests or lack of interest was determined, was a party. As used in this subdivision "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or a state or territory of the United States.

RULE 63(23)

STATEMENT CONDERNING ONE'S OWN FAMILY HISTORY

The Committee recommends that Rule 63(23) be rewritten as follows:

A statement of a matter concerning a declarant's own family history, even though the declarant had no means of acquiring personal knowledge of the matter declared provided the judge finds the declarant is unavailable as a witness and that the statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth.

RULE 63(24)

STATEMENT CONCERNING FAMILY HISTORY OF ANOTHER

The Committee recommends that Rule 63(24) be rewritten as follows:

A statement concerning the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) The statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth; and

(b) The declarant was related to the other by blood or marriage; or

(c) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

RULE 63(26)

REPUTATION IN FAMILY CONCERNING FAMILY HISTORY

The Committee recommends that Rule 63(26) be rewritten as follows:

Evidence of reputation among members of a family if the reputation concerns the family history of a member of the family by blood or marriage and if offered to prove the truth of the matter reputed.

RULE 63(26.1)

ENTRIES CONCERNING FAMILY HISTORY

The Committee recommends that Rule 63(26.1) be rewritten as follows:

Entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones and the like if offered to prove the family history of a member of the family by blood or marriage.

RULE 63(27)

COMMUNITY REPUTATION CONCERNING BOUNDARIES, GENERAL HISTORY AND FAMILY HISTORY

The Committee recommends that Rule 63(27) be rewritten as follows:

Evidence of reputation in a community if offered to prove the truth of the matter reputed and the reputation concerns:

(a) Boundaries of or customs affecting land in the community and the judge finds that the reputation, if any, arose before the controversy.

(b) An event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community.

(c) The date of fact of birth, marriage, divorce or death of a person resident in the community at the time of the reputation.

RULE 63(27.1)

STATEMENT CONCERNING BOUNDARY

The Committee recommends that Rule 63(27.1) be rewritten as follows:

A statement concerning the boundary of land if the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject and that the statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth.

RULE 63(28)

REPUTATION AS TO CHARACTER

The Committee recommends that Rule 63(28) be rewritten as follows:

Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated and if offered to prove the truth of the matter reputed.

RULE 63(29)

RECITALS IN DOCUMENTS AFFECTING PROPERTY

The Committee recommends that Rule 63(29) be rewritten as follows:

A statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property if the judge finds that:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

RULE 64

DISCRETION OF JUDGE

UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

One member of the Committee disagrees with the recommendation of the Commission as set forth on page 343 of its Report that section 1850 (res gestae) of the Code of Civil Procedure be repealed notwithstanding the suggestion of the Commission that Rule 62 and 63 make declarations that are themselves material and relevant, not subject to the hearsay rule.

Said member also believes that a portion of said section 1850 is not encompassed within the Rules as recommended by the Commission:

Dated: January 28, 1964.

Respectfully submitted,

Justice Mildred Lillie

Judge Mark Brandler

Judge Raymond J. Sherwin

Judge James C. Toothaker

Judge Howard E. Crandall

Judge Leonard A. Diether, Chairman

Memo 64-13

EXHIBIT VI

Hollywood Bar Association

Law Offices

Meserve, Mumper & Hughes

Mr. John H. DeMoully
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This will acknowledge your letter of January 31, 1964, regarding the hearsay evidence article. We believe that the Commission has made an exhaustive study and their efforts are accurately reflected in the proposed recommendations. The Hollywood Bar Association is a relatively small organization, and the committee was not in a position to conduct extensive research. We have no recommendations to submit.

Yours very truly,

DOWNEY A. GROSENBAUGH

DAGpon

Memo 64-13

EXHIBIT VII

Extract from Hearing of Joint Legislative Committee for the Revision of of the Penal Code, September 24 and 25, 1963 (Official Transcript, pages 12-15).

Attorney General Mosk:

No consideration of the advisability of setting up separate codes to deal with the main branches of criminal law would be complete without a careful study of the law of evidence as it pertains to criminal cases. The Penal Code specifically deals with many rules of evidence. Section 1102 provides that the rules of evidence in civil actions are applicable to criminal proceedings, except as provided in the Penal Code, but then the Code goes on to set forth numerous rules of evidence in criminal cases. There are many other specific evidentiary rules scattered throughout the Penal Code, such as Section 315, which relates to the admissibility of the reputation of a house of prositution; Section 1322, the scope of the marital privilege and objections thereto; 1323, the privilege of self-incrimination, and so forth.

This committee, in revising the Penal Code, must exercise its judgment and bring to bear its experience on the rules of evidence expressed specifically within the Penal Code and those applicable to criminal proceedings by virtue of other statutes or judicial decisions.

In this connection, this committee can draw on the studies and recommendations produced by the California Law Revision Commission in its study to determine whether the California Law of Evidence should be revised to conform to Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

Thus far the California Law Revision Commission has prepared a tentative recommendation on hearsay evidence and on privileges. My staff

has reviewed this work and we feel that the Commission has contributed a great deal by way of the research and study that has gone into this project.

However, candor compels me to note that this committee was specifically designed to represent a more balanced viewpoint than the California Law Revision Commission, and thus I hope you will only view the recommendations of the Law Revision Commission as only one source.

I take it as settled that this committee will not deem itself foreclosed from examining questions of criminal evidence solely because the California Law Revision Commission has already offered its recommendation.

To illustrate my concern in this regard, I have noted that the California Law Revision Commission recommendation in connection with the admissibility of confessions in criminal cases provides that an extra-judicial statement by a defendant is not admissible, regardless of its free and voluntary character, if it was made during a period while the defendant was illegally detained by a police officer or employee of the United States or a state or territory of the United States. It should be noted initially that neither the Uniform Rules of Evidence nor the consultant to the California Law Revision Commission recommended this rule.

This suggested rule is, of course, the so-called McNab-Mallory rule, which is effective in the federal courts. Our California Supreme Court, which yields, quite properly, to no court in its concern for rights of criminal defendants, has refused repeatedly to adopt the McNab rule. To my knowledge, no state has adopted it. The policy reasons advanced

by the California Law Revision Commission for adopting this rule consist of a few lines, the gist of which is that the suggested rule will implement the right of an accused person to be brought promptly before a magistrate.

Now, we all agree with the goal of prompt arraignment. Our state law at the present time requires in various code sections that an accused person be brought promptly before a magistrate. These are desirable provisions and they should be, and I believe they are, enforced by our public officials.

It does not follow, however, that a confession, or even an exculpatory statement, which might be taken after what a judge deems to be an unreasonable period of time in custody, should be inadmissible when there are no circumstances that point to an involuntary or untruthful statement.

Now, there are, undoubtedly, intelligent and sincere people who believe that the Mallory rule should be adopted in this state. There are many more who have disputed this. This issue can be, and should be, fully debated before this committee, thus resulting in a studied judgment.

There are other recommendations of the California Law Revision Commission which highlight the need for a complete examination by this committee of the rules of criminal evidence. Such an instance is the recommendation which would withdraw from the trial judge his traditional and proper discretion to determine the order of proof in conspiracy cases. The suggested rule would provide for a rigid requirement that a conspiracy must be first proved independently prior to the reception in evidence of the declarations of co-conspirators.

Many of these points I have made could be called surface criticisms, and I will concede that they are. But a deeper analysis, I am sure, will reveal deeper problems.

EXHIBIT VIII

OFFICE OF COUNTY COUNSEL - SAN BERNARDINO COUNTY

COMMENTS ON THE HEARSAY EVIDENCE ARTICLE OF THE UNIFORM RULES OF EVIDENCE

In commencing on Article V privileges, we suggested that it would be desirable for each article to contain a provision listing the types of proceedings to which the rules in that article would apply. Otherwise uncertainty would exist as to whether the rules applied just to courts, or also to some or all administrative proceedings. The privileges article was quite explicit in this respect. A proceeding was defined as "any action, hearing, investigation, inquest, or inquiry, whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body or any other person authorized by law to do so, in which testimony can be compelled to be given." RULE 22.5 SCOPE OF THE PRIVILEGES ARTICLE stated: "Except as otherwise provided by statute, the provisions of this article apply to all proceedings."

There is no such provision in the Article on Hearsay Evidence. This type of provision would be very desirable because at present the rules are scattered throughout the codes, and in many cases they are quite uncertain. For example, §11513 of the Government Code provides that a hearing conducted under the Administrative Procedure Act "need not be conducted according to technical rules relating to evidence and witnesses, any relevant evidence shall be admitted if it is the sort of evidence which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions..."

In court proceedings inadmissible hearsay is sufficient to support a judgment if it is in the record through failure of the opponent to object. Since there is no basis for objecting to hearsay evidence in a hearing conducted under the Administrative Procedure Act, the weight and effect of hearsay evidence is reduced until it is not sufficient, by itself, to support a finding.*

The courts apparently have adopted the same rule for local administrative proceedings not governed by the Administrative Procedure Act. In Walker vs. City of San Gabriel 20 C 2d 879 in a hearing before the city council, the court held that hearsay evidence alone was insufficient to support the revocation of a business license.

* QUERY: As to both court and administrative proceedings, should not a default by failure to answer or appear at the hearing be deemed an admission of every allegation in the complaint, petition, accusation or other pleading? Should not the defaulting party waive both his right to object to "inadmissible" hearsay and his right to require other proof?

Government Code section 11514 permits affidavits, under certain circumstances, to have the same effect as if the affiant had testified orally.

Section 5709 of the Laber Code states, regarding hearings before the Industrial Accident Commission, "...No order, decision, award or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure." The Labor Code apparently has very liberal rules of evidence, and there is no requirement that a finding be supported by non-hearsay evidence. In the case of State Compensation Insurance Fund v Industrial Accident Commission 195 C 174 the court held that even jurisdictional facts are provable by hearsay evidence, and such evidence alone may be sufficient to sustain an award. On the other hand, the case of Casualty Company vs. Accident Commission 195 C 533, the court stated: "While the terms of this section are broad and comprehensive, covering as they do the admission into the record and use as proof of any fact in dispute of any evidence objectionable under the common law and statutory rules, yet it was not intended thereby that it would be any the less the duty of the Commission to follow the prescribed procedure and rules of evidence. In other words, it still remains the duty of the Commission to conduct the proceedings so that there will be as little occasion as possible for the courts to resort to the said rule of decision." This is an odd statement. It implies that while reversible error will not occur from failure to apply formal rules of evidence, the Commission has a duty to exclude evidence which would not be admissible in a court of law. In the more recent case of Pacific Empire Insurance Company v Industrial Accident Commission 47 CA 2d 494, "unsubstantial" hearsay evidence was not sufficient to sustain an award.

From these conflicting rules and decisions, it appears desirable to state which rules shall apply in which hearings, and that could easily be done by having a provision, similar to the one in the privileges article, setting forth the scope of the hearsay rules.

Probably if the Uniform Rules of Evidence are adopted by this state, they will, for the most part, be adopted with the modifications recommended by the California Law Revision Commission. Comments will be directed primarily to the Uniform Rules as so modified or revised. To distinguish between them, the Uniform Rules of Evidence will be referred to as URE, and the rules as revised by the Commission will be referred to as RURE. Along with its tentative recommendations, the Commission has made comments of its own, which are brief and to the point. Consequently these comments will be confined primarily to major changes in the law or changes most likely to affect law enforcement or other county functions.

RULE 62: DEFINITIONS

As used in Rules 62 through 66;

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's senses.

(4) "Public officer or employee of a state or territory of the United States" includes an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

(6) Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" means that the declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant.

(b) Disqualified from testifying to the matter.

(c) Dead or unable to attend or to testify at the hearing because of age, sickness, infirmity or imprisonment.

(d) Absent beyond the jurisdiction of the court to compel appearance by its process.

(e) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by subpoena.

(7) For the purposes of subdivision (6) of this rule, declarant is not available as a witness:

(a) If the judge finds that the exemption, disqualification, death, inability or absence of the declarant is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying; or

(b) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

(8) "Former testimony" means:

(a) Testimony given under oath or affirmation as a witness in a former hearing or trial of the same action or proceeding;

(b) Testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies; and

(c) Testimony in a deposition taken in compliance with law in another action or proceeding.

Normally a definitions rule or section does not, in itself, change the substantive law. However this rule makes two major changes. "Statement" is defined so as to exclude conduct not intended as a substitute for words. According to present law, flight from the scene of a crime is considered hearsay conduct. The inference to be drawn is that flight was motivated by an awareness of guilt and a fear of apprehension. Running away is equivalent to saying, "I am guilty." If the statement, "I am guilty," could be received in evidence through some exception to the hearsay rule, evidence of flight could also be received; otherwise not. (It might be mentioned here that a statement, "I am guilty" or "I committed the crime," would be admissible under the new rules, even when made by someone other than a party to the action. Such a statement would fall under the hearsay exception for declarations against interest). Courts have seldom carried the "hearsay conduct" exception to extremes, but in theory one should not be able to testify that everyone was wearing a raincoat to prove that it was raining. The fact that others were wearing a raincoat merely indicates that <u>they</u> thought it was raining, or is equivalent to their saying, "It is raining."

The justification for not treating non-assertive conduct as hearsay is that the person did not intend his conduct as a statement; therefore his veracity is not in issue.

The second major change is the definition of unavailability of a witness. Present law is inconsistent. In some cases a witness must be dead in order to be considered unavailable (so as to admit his out-of-court statements in evidence). Insanity or residence more than 150 miles from the court are frequent grounds of unavailability. Paragraph 6 of Rule 62 eliminates arbitrary distinctions by stating a general, broad rule of unavailability which will be used for all purposes.

These two changes in Rule 62 will allow more hearsay testimony to be admitted than formerly; in fact most of the changes throughout the RURE will have that effect. Whether this change will be beneficial or detrimental, as a whole, to counties and law enforcement is difficult to determine.

RULE 63: HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS

OPENING PARAGRAPH: GENERAL RULE EXCLUDING HEARSAY EVIDENCE

Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

Note that only a "statement" is inadmissible, and statement has been defined so as to exclude conduct other than nodding, sign language, etc., intended as a substitute for words. Following are 32 exceptions to the general hearsay rule.

SUBDIVISION (1): (Previous Statement of Trial Witness)

(1) A statement made by a person who is a witness at the hearing, but not made at the hearing, if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with rule 22*; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is contained in a writing which (i) was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory, (ii) was made by the witness himself or under his direction or by some other person for the purpose of recording the witness's statement at the time it was made, (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and (iv) is offered after the writing is authenticated as an accurate record of the statement.

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* Rule 22 will be the subject of a later study and recommendation by the Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:

"As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

The URE would have permitted any out-of-court statement by a witness to be admitted on the theory that the witness could be fully cross-examined regarding the statement. The RURE rule rejected this approach on the theory that it would be undesirable to permit a party to present his case through written statements carefully prepared in his attorney's office. The prohibition against leading questions on direct examination would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost.

Paragraph (a) restates the present law respecting prior inconsistent statements. Rule 22, referred to in this paragraph, will be the subject of later study, but it will deal primarily with the problem of what foundation must be laid before impeaching a witness - like under what circumstances his written statement must be shown to him or his oral statement pinned down as to time, place and persons present before asking whether he made such a statement.

Paragraph (b) restates the present law except that prior inconsistent statements are admitted as substantive evidence, not just to impeach or cancel out the witness's statement on the stand. This seems a desirable change since it is not realistic to expect a jury to understand and apply the distinction made by present law.

Paragraph (c) makes a minor change in "past recollection recorded" by not requiring the statement to which the witness refers to have been prepared by him or under his direction.

SUBDIVISION 3: FORMER TESTIMONY OFFERED AGAINST A PARTY TO THE FORMER ACTION OR PROCEEDING

(3) Except as otherwise provided in this subdivision, former testimony if the judge finds that the declarant is unavailable as a witness and that:

(a) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action or proceeding and testimony given in a preliminary examination in another criminal action or proceeding is not admissible under this paragraph against the defendant in a criminal action or proceeding unless it was received in evidence at the trial of such other action or proceeding.

Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former

testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

SUBDIVISION 3.1: FORMER TESTIMONY OFFERED AGAINST A PERSON NOT A PARTY TO THE FORMER ACTION OR PROCEEDING

3.1 Except as otherwise provided in this subdivision, former testimony if the judge finds that:

(a) The declarant is unavailable as a witness;

(b) The former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding; and

(c) The issue is such that a party to the action or proceeding in which the former testimony was given had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

The URE provision was much broader than the combined RURE subdivisions 3 and 3.1. The URE would allow depositions to be used in the trial of the action in which they were taken without proof that the witness was unavailable. The justification was that the proponent would usually call the witness, when available, in order to make a more favorable impression upon the judge or jury. If the opponent had observed at the deposition hearing that the witness would not make a favorable impression, or if he wished to cross-examine him further, then he, the opponent, could subpoena the witness, if he were available. When the witness was actually unavailable and it was necessary to use his deposition, the URE rule would eliminate the necessity and difficulty of proving that he was unavailable. Nevertheless the Law Revision Commission chose to restate the present law in this regard, apparently because it was not convinced that self-interest would usually force the proponent to call the witness at the trial. Since it was desirable to have the witness at the trial, when possible, it was logical to place the burden of locating and subpoenaing him upon the proponent.

There is, according to present law, a rule of mutuality or reciprocity which prevents the use of very reliable former testimony. In the action A vs. B, W is called as a witness. In the later action A vs. C, C would like to use a transcript of W's testimony. A had a previous opportunity to examine or cross-examine W, so why shouldn't C be able to use this testimony? The supposed justification for excluding it is that A could not use this testimony against C; therefore it would be unfair to allow C to use it against A. The present rule excluding W's testimony is not stated in terms of mutuality, but that is the real policy reason for its exclusion. (The requirement of admissibility is substantial identity of parties and issues). The proposed change will eliminate the principle of mutuality. RURE subdivision 3 makes testimony admissible against a person who called the witness himself or who was a party and had an opportunity to cross-examine. This principle has two exceptions: It will not apply in criminal actions against the defendant or in other cases where the interest and motive of

the person against whom the evidence was admitted was different from his interest and motive in the new proceeding. The reason for these exceptions is that the party may have failed to cross-examine fully-especially at a deposition for the primary purpose of discovery or at a preliminary hearing - because of not wanting to tip off the weakness of the witness's testimony, or because the witness's testimony, while it could have been refuted, was not harmful in the previous case.

Subdivision 3.1 contains a more controversial change. When the declarant is unavailable, his testimony can be used (except against a criminal defendant) even when the party opposing its admission has not had the previous opportunity to cross-examine! The fact that another party, with a similar motive, had the opportunity to cross-examine is supposed to provide an adequate safeguard. One's natural reaction is to oppose any such radical reduction of the right to cross-examine. However such testimony should be more reliable than many other types of hearsay which are admitted.

SUBDIVISION 4: Contemporaneous and Spontaneous Statements

(4) A statement:

(a) Which the judge finds was made while the declarant was perceiving the act, condition or event which the statement narrates, describes or explains; or

(b) Which the judge finds (i) purports to state what the declarant perceived relating to an act, condition or event which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Apparently this is just a restatement of present law.

SUBDIVISION 5: Dying Declarations

(5) A statement by a person since deceased if the judge finds that it would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith and in the belief that there was no hope of his recovery.

This is a very substantial enlargement of the present dying declaration exception. The latter is limited to a statement by a dying man regarding the cause of death in a criminal homicide action. The clause "if the judge finds that it would be admissible if made by the declarant at the hearing..." is for the purpose of preventing opinion evidence or other unreliable evidence from being admissible merely because the declarant is dying.

SUBDIVISION 6: Confessions

(6) As against the defendant in a criminal action or proceeding, a previous statement by him relative to the offense charged, but only if the judge finds that the statement was made freely and voluntarily and was not made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State; or

(c) During a period while the defendant was illegally detained by a public officer or employee of the United States or a state or territory of the United States.

The major change made by this rule is to eliminate the arbitrary distinction between confessions and admissions. Undoubtedly it will make the securing of convictions in criminal cases more difficult.

SUBDIVISION 7: Admissions by Parties

(7) As against himself in either his individual or representative capacity, a statement by a person who is a party to a civil action or proceeding whether such statement was made in his individual or representative capacity.

This is a restatement of present law.

SUBDIVISION 8: Authorized and Adoptive Admissions

(8) As against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; or

(b) Of which the party, with knowledge of the content thereof, has, by words or other conduct manifested his adoption or his belief in its truth.

This is supposed to be a restatement of present law. Perhaps it is a restatement of case law, but the wording of C.C.P. 1870 seems to allow evidence which would be excluded by the new rule. Section 1870 provides: "Evidence may be given upon a trial of the following facts....3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." This writer has unsuccessfully objected to hearsay statements made in the presence of his party when the statements were not adopted, but were vigorously denied. An example is when A accuses B of doing various things which B denies -- and in the case of B vs C, B would like to prevent the accusations from going into the record. The only rationale for admitting such statements is that the party, by his conduct or silence, has admitted their truth, and if he does not do so, the statements should not be admissible. However a literal reading of C.C.P. 1870 seems to allow such statements to be admitted. In this respect, the new rule, while more restrictive, seems preferable to the old.

SUBDIVISION 9: Vicarious Admissions

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement is that of an agent, partner or employee of the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made beford the termination of such relationship, and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party; or

(b) The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, the liability, obligation or duty of the declarant is in issue between the party and the proponent of the evidence of the statement, and the statement tends to establish that liability, obligation or duty.

This provision makes a substantial change in law. Formerly statements that an agent was not authorized to make were not admissible against the principal. Thus an employee usually was not authorized to admit liability, and statements such as, "It was my fault," or "We knew of the defect for several days but never got around to fixing it," were excluded on the theory that the employee had exceeded the scope of his employment in making such statements. According to this subdivision, statements will be admissible if they concern matters within the scope of the agency or employment, even though the statements themselves were outside of the scope of the agency or employment.

SUBDIVISION 10: Declarations Against Interest

(10) If the declarant is not a party to the action or proceeding and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to the risk of civil or criminal liability or so far tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.

This is another very substantial enlargement of the present hearsay exception. It seems as though the new rule will be more logical. Formerly a declaration against interest had to be against pecuniary interest and even that exception was rather narrowly defined. A person would be even less likely to make a statement which would subject him to the risk of criminal liability than to make a statement which could cost him, perhaps, a nominal sum of money. How broadly the courts will interpret the

exception to cover hatred, ridicule, or social disgrace remains to be seen. In the privileges article an example was given where X confessed to P, a psychotherapist, that X had murdered Y. D, charged with the murder of Y could compel P to testify regarding X's confession. The problem dealt with in that section was that the communication to P was not privileged in these circumstances. It was assumed that X's confession, if not privileged, would be admissible as a declaration against penal interest. It seems illogical that X's confession would be considered a declaration against interest since it was a privileged communication, and could never be used against him. It is suggested that subdivision 10 be amended by adding the following sentence: "A confidential communication (as defined in rules ____, ____, ____) shall not be deemed a declaration against interest."

SUBDIVISION 12: Statement of Physical or Mental Condition of Declarant

(12) Unless the judge finds it was made in bad faith, a statement of:

(a) The declarant's then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but except as provided in paragraphs (b), (c) and (d) of this subdivision not including memory or belief to prove the fact remembered or believed when such mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant.

(b) A declarant who is unavailable as a witness as to his state of mind, emotion or physical sensation at a time prior to the statement to prove such prior state of mind, emotion or physical sensation when it is itself an issue in the action or proceeding but not to prove any fact other than such state of mind, emotion or physical sensation.

(c) The declarant's previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition.

(d) A declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will.

Only paragraph C is intended to be a change from present law. It does not appear to be an important one.

SUBDIVISION 13: Business Records
SUBDIVISION 14: Absence of Entry in Business Records
SUBDIVISION 15: Reports of Public Officers and Employees
SUBDIVISION 16: Reports of Vital Statistics
SUBDIVISION 17: Content of Official Record
SUBDIVISION 18: Certificate of Marriage
SUBDIVISION 19: Records of Documents Affecting an interest in Property

SUBDIVISIONS 13 to 19 are primarily restatements of present law.

SUBDIVISION 21: Judgment Against Persons Entitled to Indemnity

(21) To prove any fact which was essential to the judgment, evidence of a final judgment if offered by the judgment debtor in an action or proceeding to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

SUBDIVISION 21.1: Judgment Determining Liability, Obligation or Duty

(21.1) When the liability, obligation or duty of a third person is in issue in a civil action or proceeding, evidence of a final judgment against that person to prove such liability, obligation or duty.

These provisions restate the present law.

SUBDIVISION 22: Judgment Determining Public Interest in Land

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of a public entity in land, if the judgment was entered in an action or proceeding to which the public entity whose interest or lack of interest was determined was a party. As used in this subdivision, "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or a state or territory of the United States.

This is a new exception for California. It is unlikely to affect public bodies.

SUBDIVISION 23: Statement Concerning One's Own Family History

(23) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness.

SUBDIVISION 24: Statement Concerning Family History of Another

(24) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth, a statement concerning the birth,

marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) The declarant was related to the other by blood or marriage; or

(b) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

SUBDIVISIONS 23 and 24 are a restatement of present law except that present law requires the declarant to be dead, while the new rules merely require him to be unavailable.

SUBDIVISION 26: Reputation in Family Concerning Family History

(26) To prove the truth of the matter reputed, evidence of reputation among members of a family if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

This makes a minor change in present law. C.C.P. 1870 (11) requires the family reputation in question to have existed "previous to the controversy." This qualification was deemed unnecessary because reputation of a matter of pedigree would be unlikely to be influenced by the controversy.

SUBDIVISION 26.1: Entries Concerning Family History

(26.1) To prove the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage, entires in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones, and the like.

This restates present law.

SUBDIVISION 27: Community Reputation Concerning Boundaries, General History and Family History

(27) To prove the truth of the matter reputed, evidence of reputation in a community if the reputation concerns.

(a) Boundaries of, or customs affecting, land in the community and the judge finds that the reputation, if any, arose before controversy.

(b) An event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community.

(c) The date or fact of birth, marriage, divorce or death of a person

resident in the community at the time of the reputation.

Paragraph (a) restates present law. Paragraph (b) is less restrictive than C.C.P. 1870 (11) since it does not require that the reputation exist for more than 30 years. Paragraph (c) broadens present law to include reputation in the community, not just family reputation.

SUBDIVISION 27.1: Statement Concerning Boundary

(27.1) If the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement concerning the boundary of land unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

This subdivision restates the substance of existing, but uncodified, California law found in cases such as Morton v Folger 15 C 275 and Morcom v Baiersky 16 CA 480.

SUBDIVISION 28: Reputation as to Character

(28) To prove the truth of the matter reputed, evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated.

SUBDIVISION 29: Recitals in Documents Affecting Property

(29) A statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in property, if the judge finds that:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

SUBDIVISIONS 28 and 29 restate the present law.

SUBDIVISION 29.1: Recitals in Ancient Documents

(29.1) A statement contained in a writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter.

This subdivision clarifies existing law relating to recitals in ancient documents. The Supreme Court in dictum indicated that documents over 30 years old, acted upon as genuine, would be presumed genuine and admissible, but the genuineness of the documents imports no verity to the recitals contained therein. Recent cases decided by the district courts of appeal, however, have held that recitals in such documents are admissible to prove the truth of the facts recited.

SUBDIVISION 30: Commercial Lists and the Like

(30) A statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation if the judge finds that the compilation is generally used and relied upon by persons engaged in an occupation as accurate.

This subdivision has no counterpart in the California statutes although there is some indication that it has been recognized as case law. In any event, the provision seems desirable.

SUBDIVISION 31: Learned Treatises

(31) Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties to prove facts of general notoriety and interest.

This is C.C.P. 1936 modified only to conform to the general format of the hearsay statute. The courts have held that "books of science or art" do not include medical books since medicine is not an exact science. Consequently a doctor can be cross-examined as to his knowledge regarding various medical books, but the books themselves cannot be used as substantive evidence. The commission considered the possibility of broadening this exception by stating specifically that medical books are included. There is no indication why the commission decided against this desirable change.

SUBDIVISION 32: Evidence Admissible Under Other Laws

(32) Hearsay evidence declared to be admissible by any other law of this State.

This will cover all sorts of miscellaneous provisions such as the use of affidavits in uncontested probate proceedings, certain medical reports in hearings before the Industrial Accident Commission, etc. The purpose in this subdivision is to prevent such miscellaneous provisions from being deemed repealed by implication.

RULE 65: CREDIBILITY OF DECLARANT

Rule 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

This rule deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it

makes clear that the rule applying to impeachment of a witness---that a witness may be impeached by a prior inconsistent statement only if a proper foundation is laid by calling his attention to the statement and permitting him first to explain it---does not apply to a hearsay declarant.

Thus, Rule 65 would permit the introduction of evidence to impeach a hearsay declarant in one situation where such impeaching evidence would now be excluded. Our decisions indicate that when testimony given by a witness at a former trial is read into evidence at a subsequent trial because the witness is not then available, his testimony cannot be impeached by evidence of an inconsistent statement unless the would-be impeacher laid the necessary foundation for impeachment at the first trial or can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that the trier-of-fact at the second trial should be allowed to consider the impeaching evidence in all cases.

No California case has been found which deals with the problem of whether a foundation is required when the hearsay declarant is available as a witness at the trial. The Commission believes that no foundation for impeachment should be required in this case. The party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies that tend to impeach him.

Rule 63 (1) (a) provides that evidence of prior inconsistent statements made by a witness at the trial may be admitted to prove the truth of the matters stated. In contrast to Rule 63 (1) (a), the evidence admissible under Rule 65 may not be admitted to prove the truth of the matter stated. Inconsistent statements that are admissible under Rule 65 may be admitted only to impeach the hearsay declarant. Unless the declarant is a witness and subject to cross-examination upon the subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognised exception to the hearsay rule.

RULE 66: MULTIPLE HEARSAY

Rule 66. A statement within the scope of an exception to Rule 63 is not inadmissible on the ground that the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Rule 63.

Apparently there are no California cases discussing the admissibility of multiple hearsay has been analyzed and discussed although there are cases where it has been admitted. The rule seems logical.

RULE 66.1: SAVINGS CLAUSE

Nothing in Rules 62 to 66, inclusive shall be construed to repeal by implication any other provision of law relating to hearsay evidence.

It seems that there is a duplication in this rule and rule 63-32. However, it is difficult to see how this duplication can do any harm. A few sections of the URE were not adopted as part of the RURE. These sections, and the reasons for not adopting them, are as follows:

SUBDIVISION 2: AFFIDAVITS

The URE provided: "Affidavits to the extent admissible by the statutes of this state." The RURE omitted this subdivision because it is unnecessary, particularly in view of Rule 66.1, added by the commission. Rule 66.1 provides: "Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence."

SUBDIVISION 11: VOTER'S STATEMENTS

A statement by a voter concerning his qualifications to vote or the fact or content of his vote:

This subdivision was not made part of the RURE on the theory that the exception was unnecessary, that there was no sufficient guarantee of trustworthiness and it would change present law.

SUBDIVISION 20: JUDGMENT OF PREVIOUS CONVICTION

Evidence of a final judgment adjudging a person guilty of a felony; to prove any fact essential to sustain the judgment;

Subdivision 20 was not made part of the RURE because there was no pressing necessity for it. If the witnesses in the criminal trial are no longer available, their testimony would normally be admissible under subdivision 3; if they are available they can be called again. A guilty plea is admissible in a subsequent civil action as an admission by a party (Subdivision 7).

SUBDIVISION 25: STATEMENT CONCERNING FAMILY HISTORY BASED ON STATEMENT OF ANOTHER DECLARANT

Subdivision 25 of the URE provided as follows: "A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;"

This subdivision was not made a part of the RURE because such a statement, with two chances for error, would be very unreliable.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

Rule 64 of the URE provided as follows: "Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy."

The Commission did not make this rule a part of the RURE because it believed that modern discovery procedures are adequate to enable the parties to protect themselves from surprise.

Many present code sections, primarily in the Code of Civil Procedure, are to be repealed or amended to avoid conflict with the Uniform Rules of Evidence. In most cases they are being repealed since the same subject matter is covered in the Uniform Rules. In a few cases, they are being modified so as to be consistent with the Uniform Rules. For example, C.C.P. 2016 will state that a deposition can be used if the witness is unavailable within the meaning of Rule 62 of the Uniform Rules of Evidence rather than dead, more than 150 miles from place of trial, unable to attend because of age, sickness, infirmity or imprisonment, etc. C.C.P. 2047 will be changed rather substantially by permitting a witness to refer to a document not prepared by him, and by permitting the opposing attorney to inspect a document used to refresh the witness's memory, even when the witness does not take it with him to the witness stand. Probably the court would hold that this does not require disclosure of a document containing privileged information. The witness might be deemed to have waived his privilege (like the lawyer-client privilege) by referring to the document to refresh his memory, but this should not compel him to hand over a document (like part of an adoption file) when the privilege belongs to another party or when disclosure is forbidden by statute. It would be a good idea to say so, if this is the law.

Witnesses will have to be careful what they use to refresh their memory prior to trial if they don't want the opposing attorney to see their files.

Penal Code Section 686 will be amended to state that a defendant's right to confront witnesses against him is limited to the extent that hearsay evidence may be produced. This will be a restatement of present law since section 686 does not accurately state the law. P. C. 1345 and 1362 will specify when depositions can be used in criminal trials.