#34(L) 4/9/64

First Supplement to Memorandum 64-21

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article I. General Provisions)

Attached to this supplement as Exhibit I (yellow pages) are suggested revisions of Revised Rule 1(2) and Revised Rule 7. These revisions are discussed in this supplement.

BACKGROUND

At the March meeting, the Commission did not agree on the final disposition to be made of the first sentence of Code of Civil Procedure Section 1868. That sentence reads:

> Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute.

At the meeting, we argued over the meaning of "material" and whether it was properly replaced by the word "disputed" in the definition of "relevant evidence" in Rule 1(2). It was pointed out at the meeting that there is nothing in the Rule 1(2) definition of "relevant evidence" which requires the "disputed fact" to be of any consequence in the case. There followed some discussion of the word "material" and whether it is broad enough to include evidence going to the issue of credibility. Finally, the Commission directed the staff to reconsider the definition in Rule 1(2), the provisions of Rules 7, 8, 20 (relating to the credibility of witnesses), and 45 (relating to remote or inconsequential evidence), and the definition of "material allegation" in Code of Civil Procedure Section 463. The rules are to make clear that only relevant evidence is admissible. They are also to make clear that evidence relating to credibility is admissible.

Rule 7, at present, merely states that all relevant evidence is admissible (except as limited by specific rules) but nothing other than Section 1868 provides that only relevant evidence is admissible. According to Wigmore, the two great axioms of admissibility are: (1) None but facts having rational probative value are admissible. (2) All facts having rational probative value are admissible, unless some specific rule forbids. Wigmore, Evidence §§ 9, 10. Rule 7 expresses the second axiom, but nothing in the URE as revised to date expresses the first.

We suggest, therefore, that a new definition of "relevant evidence" is needed to assure that the disputed fact to which the evidence is relevant is one that is of consequence to the determination of the action. We suggest, too, that a provision be added to the rules expressing the first axiom of admissibility, i.e., that none but relevant evidence is admissible.

REVISED RULE 1(2)

The URE used the word "material" in defining "relevant evidence". In Exhibit II (pink pages) to this memorandum there is some information relating to the meaning of the word "material". Exhibit II indicates that there is some difference of opinion as to its meaning. This was apparent, too, in the discussion at the last meeting. Because of this difference of opinion, the Commission substituted the word "disputed" for the word "material" in the original URE definition. The problem with "disputed" is that it is not a synonym for "material" as it appears to have been used in the URE definition. The URE definition would make sense if the word material were construed to mean "of consequence" (Merriam-Webster, New Collegiate Dictionary) to the action or proceeding or as referring to anything that "could have influenced

the tribunal upon the question at issue before it" (People v. Dunstan, 59 Cal. App. 574, 584 (1922)). However, if the word is taken to mean only the ultimate facts, the definition would give some problems. Accordingly, we have substituted in the following proposal words which mean substantially the same thing as the word "material" as we believe it was intended to be used in the URE definition:

> "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

The foregoing definition appears to us to be consistent with People v. Dunstan and similar cases which hold that a matter may be material even though it relates only to the credibility of a witness or some other fact which might be considered collateral.

Section 1870 of the Code of Civil Procedure contains three subdivisions which in substance define what is relevant evidence. The pertinent subdivisions provide:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
> 1. The precise fact in dispute;
>
> * * * * *
>
> 15. Any other facts from which the facts in issue are presumed or are logically inferable;
> 16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven.

The Commission should consider a definition of relevant evidence which combines the definition suggested above with the substance of the provisions of Section 1870 set out above:

> "Relevant evidence" means:
> (1) Evidence of a disputed fact that is of consequence to the determination of the action.

(2) Evidence of any other fact from which such disputed fact is presumed or is logically inferable.

(3) Evidence having any tendency in reason to prove the credibility or lack of credibility of a witness.

(4) Evidence admissible under Revised Rule 65.

The staff prefers this definition of relevant evidence. It does not leave to judicial construction a determination that evidence relating to credibility is relevant.

REVISED RULE 7

As indicated above, the URE as revised to date contains only the second of Wigmore's two basic axioms of evidence. It is difficult to fit the first into the context of Rule 7 as now drafted. Rule 7 opens with the phrase "except as otherwise provided by statute". The rule that only relevant evidence is admissible has no exceptions. Accordingly, it would be inaccurate or, at least, misleading to place the rule in Rule 7 where the exception language would apply to it.

When the URE as revised is placed in statutory form we think it would be desirable to split Rule 7 up. Subdivisions (a) and (c) relate only to witnesses. Subdivisions (b), (d), and (e) relate only to privileges. We think these subdivisions should be combined according to their subject matter and placed in the titles or chapters to which they specifically relate. The portion of Revised Rule 7 relating to relevance is general and should be left in the general provisions.

Accordingly, we recommend that Rule 7 be revised as set out in Exhibit I. Eventually, the draft of 7(1) would appear in the portion of the code relating to witnesses, 7(2) in the portion relating to privileges, and 7(3) in general provisions.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

SUGGESTED REVISIONS OF REVISED RULE 1(2) AND REVISED RULE 7

SUGGESTED REVISION OF REVISED RULE 1(2)

(2) "Relevant evidence" means:

(a) Evidence of a disputed fact that is of consequence to the determination of the action.

(b) Evidence of any other fact from which such disputed fact is presumed or is logically inferable.

(c) Evidence having any tendency in reason to prove the credibility or lack of credibility of a witness.

(d) Evidence admissible under Revised Rule 65.

COMMENT

The definition of relevant evidence has been broadened to include the matters specified in subdivisions 1, 15, and 16 of Section 1870 of the Code of Civil Procedure. Revised Rule 65, which is referred to in paragraph (d) deals with the admissibility of evidence relating to the credibility of a hearsay declarant.

The word "material" has not been used in the revised rule because the term is ambiguous. It is sometimes used to refer to one of the ultimate facts in dispute between the litigating parties. See, e.g., Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574-575 (1956). And it is sometimes used to refer to any matter that is of some importance or consequence. See, e.g., People v. Boggess, 194 Cal. 212, 235 (1924); People v. Arrangoiz, 24 Cal. App.2d 116, 118 (1937); People v. Dunstan, 59 Cal. App. 574, 584 (1922); Black, Law Dictionary (4th ed. 1951); Merriam-Webster, New International Dictionary (2d ed. 1951).

"Relevant evidence" is used in Revised Rule 7(3).

SUGGESTED REVISION OF RULE 7

(1) Except as otherwise provided [~~in these rules~~] by statute, [~~(a)~~] every person is qualified to be a witness, and [~~(b) no person has a privilege to refuse to be a witness; and (c)~~] no person is disqualified to testify to any matter. [~~; and (d)~~]

(2) Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to produce any object or writing. [~~; and (e)~~]

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing. [~~; and (f)~~]

(3) No evidence is admissible except relevant evidence. All relevant evidence is admissible except as otherwise provided by statute.

COMMENT

Rule 7 is the keystone of the Uniform Rules of Evidence. It abolishes all pre-existing rules relating to the competency of evidence or witnesses. Under the URE scheme, all rules disqualifying persons to be witnesses or limiting the admissibility of evidence must be found, if at all, among the Uniform Rules of Evidence.

The approval of Rule 7, modified as indicated, is recommended in order that the purpose of the URE--to codify the law relating to the admissibility of evidence--might be fully realized. Revised Rule 7 precludes the possibility that additional restrictions on the admissibility of evidence will remain valid in addition to those restrictions declared by statute. The revised rule does

not, however, make evidence admissible if it is declared inadmissible by statute. Nor does the revised rule affect the power of the judge to exclude otherwise admissible evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury. See Revised Rule 45 in Tentative Recommendation and a Study relating to the Uniform Rules of Evidence: Article VI (Extrinsic Policies Affecting Admissibility), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, ___, ___ (1964).

The phrase "in these rules" which appears in the URE rule has been changed to "by statute" in order to avoid any implication that the validity of statutory restrictions on the admissibility of evidence--such as the restrictions on speed trap evidence provided in Vehicle Code Sections 40803-40804--will be impaired. The URE rule has also been revised to include the substance of Code of Civil Procedure Section 1868, thereby making explicit what is assumed by the URE--that evidence is not admissible unless it is relevant evidence.

Rule 7 has been reorganized to facilitate the integration of its provisions into a comprehensive evidence statute. The Commission plans to include subdivision (1) of the revised rule in the portion of the statute relating to witnesses, subdivision (2) in the portion of the statute relating to privileges, and subdivision (3) in the general provisions portion of the statute.

First Supplement to
Memorandum 64-21

EXHIBIT II

Meaning of "material"

The word "material" is an adjective that means "of solid or weighty character; of consequence; important." Merriam-Webster, New Collegiate Dictionary (1953). It is similar in meaning to "relevant" which means "bearing upon, or applying to, the case in hand; pertinent." Merriam-Webster, New Collegiate Dictionary (1953). The foregoing source says:

> Relevant, . . . [and] material . . . mean related to or bearing upon the matter in hand. Relevant implies a traceable and significant connection; . . . material, so close an association with the matter in hand that it cannot be dispensed with . . . .

Black's Law Dictionary gives "important" as its first definition of "material." Merriam-Webster's defines the opposite, "immaterial", as "of no substantial consequence; unimportant."

The foregoing is the ordinary English definition of the word. A question is often raised, however, as to the legal meaning of the word. And in some writings the thesis may be found that the word "material" has a specific legal meaning which is somewhat different from the ordinary English definition of the word. This legalistic approach is epitomized in the following passage from an article by Professor Falknor:

> It seems necessary here to attempt a differentiation between "materiality" and "relevancy." While, as McCormick observes, the terms are often "in the courtroom . . . used interchangeably," they nevertheless express quite different concepts, if we are disposed to use them with precision. A fact is material only if in its own right it is significant under the substantive law and if its existence is properly in issue under the pleadings. But a fact (although not itself a material or operative fact) is nevertheless relevant, if it tends, probatively, to establish a material fact. Thus, plainly enough, the problem of relevancy always concerns a collateral rather than a material fact, and thus can concern only indirect or circumstantial evidence. Put otherwise, relevancy is conditioned upon the

> validity of the proposed inference from the fact immediately presented to one or the other of the material facts or to an intermediate collateral fact in turn tending to establish a material fact. [Falknor, Extrinsic Policies Affecting Credibility, 10 Rutgers L. Rev. 574-575 (1956).]

There are several problems with this analysis, not the least of which is the fact that an artificial definition is put on both the word "material" and the word "relevant". "Relevant" under this definition applies only to indirect evidence and "material" applies only to direct evidence. We are required to say that direct evidence is not "bearing upon, or applying to, the case at hand" (the definition of "relevant"); and we are required to say that indirect evidence is not "important" or "of consequence".

This artificial definition of "material" seems to stem from a failure to recognize that the word "material", like its synonym "important", can be applied to a variety of different things. What is important in one context is not necessarily important in another. Advocates of the artificial definition stated above seem to have seized upon the fact that only the ultimate facts are material for some purposes and have reasoned from that conclusion that a material fact can only be an ultimate fact for evidentiary purposes.

Fortunately, the courts have not followed this artificial definition. They seem to give the word its ordinary meaning of "important" or "of consequence". The decisions also recognize that what is material for one purpose may not be material for another.

In Kritt v. Athens Hills Development Co., 109 Cal. App.2d 642, 644 (1952), the appellant's brief recited the evidence that had been introduced. The appellate court criticized this in the following language:

> Before proceeding to a statement of the salient facts we wish to observe that appellant's so-called statement of the facts as set forth in his brief is not such a statement but instead is in large part a resume of all the evidence. This is not what is intended by the Rules on Appeal. The Rules contemplate a statement only of the material facts, i.e., facts which possess weight a character which tends to throw the decision one way or the other.

Compare the foregoing language with Schmidt v. Macco Construction Co., 119 Cal. App.2d 717, 735 (1953) where the court said:

> Obviously, the court should admit no evidence that is not material. By admitting it, over objection, the court necessarily determined that it was material.

The two quotations seem superficially to be inconsistent. The Schmidt case says that all evidence must be material. The Kritt case criticizes the appellant for setting forth all the evidence (which necessarily had to be determined to be material) on the ground that only the material facts should be stated in the brief. Consider the following, in addition:

> Only ultimate facts are required to be stated in the findings. . . . So when the court found, as a fact, that plaintiff was so employed, the requirement as to findings upon material issues was complied with. [Brea v. McGlashan, 3 Cal. App.2d 454, 467 (1934).]

These decisions are not inconsistent, because what is material for purposes of an appellant's statement in his brief is not necessarily the same as what is material for purposes of evidence. What is material for purposes of evidence is not necessarily the same as what is material for purposes of findings. Because findings on the material facts must relate only to the "ultimate facts" does not mean that "material facts" are always and only the "ultimate facts".

A person is guilty of perjury only if the "false testimony is material to the issues presented in the cause in which the alleged false testimony was given." People v. Brophy, 49 Cal. App.2d 15, 24 (1942); Penal Code § 118. In People v. Dunstan, 59 Cal. App. 574 (1922), Dunstan was prosecuted

for perjury during a prior bootlegging prosecution against one Heusers. In the Heusers prosecution, an enforcement officer, Budd, testified that Dunstan introduced Budd to Heusers. He further testified that they talked concerning the purchase of illicit liquor inside a particular cafe and then went outside the cafe and stood talking for a further time on the sidewalk. Heusers testified that he did not know Budd and had never talked with him. Dunstan then testified that he did not talk to Budd at the time and place in question and that the three of them had not had any conversation in front of the particular cafe on the night in question. On the basis of this testimony, Dunstan was then prosecuted for perjury.

Dunstan contended that his testimony was not material because whether Budd talked to Dunstan "was a mere incident occurring during the progress of the trial of J. H. Heusers, and had no bearing one way or the other upon the issue as to the guilt or innocence of the defendant, J. H. Heusers." The court answered the contention with the following language:

> It may be conceded that the testimony was upon a collateral question in the case, but it does not follow that the question to which it related did not involve a material issue within the meaning of the law. . . . It will . . . readily be perceived that the testimony of Dunstan denying that he was present with Budd and Heusers at the time and place mentioned involved a direct attack upon the credibility of the whole testimony of Budd in the Heusers case, and also involved the credibility of his own testimony. And, of course, it related to a matter most material to the case. If the jury had believed Dunstan, they could have justly repudiated the entire testimony of Budd and have returned a verdict of not guilty in the Heusers case, since it was principally upon Budd's testimony that the verdict in said case was founded. [582.]
>
> * * * * *
>
> In fine, the test of materiality is whether the statement could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acted, are material. In other words, evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action or to weaken the defense of his adversary and, therefore, such evidence is material. [584.]

Fuentes v. Tucker, 31 Cal.2d 1 (1947), further illustrates the meaning of the word "material" as it is used by the courts. That was a case in which the defendant admitted liability. The plaintiff sought to introduce testimony concerning the circumstances of the accident anyway. The Supreme Court held that it was error to receive evidence as to the circumstances of the accident because that matter was no longer material. At this point, the court was using the word "material" in a manner consistent with the definition given above in Professor Falknor's article (but the usage is also consistent with the ordinary dictionary definition). The court then went on to say that:

> This, of course, does not mean that an admission of liability precludes a plaintiff from showing how an accident happened if such evidence is material to the issue of damages. In an action for personal injuries, where liability is admitted and the only issue to be tried is the amount of damage, the force of the impact and the surrounding circumstances may be relevant and material to indicate the extent of plaintiff's injuries. . . . Such evidence is admissible because it is relevant and material to an issue remaining in the case. [31 Cal.2d at 5.]

Here, of course, the court is using the word only in its ordinary dictionary sense. Plainly enough, "relevant" and "material" are not regarded as mutually exclusive terms, for they are joined by the conjunctive "and." Moreover, the force of the impact is not directly involved in determining the amount of damage in a personal injury case and hence is not a "material" matter within Professor Falknor's definition. But, as indicated by the Supreme Court, it may be very important as a basis for the jury's inference as to the amount of damage.

A trial judge has shown a similar understanding of the term in an article in the State Bar Journal:

> The word "immaterial" as used in the objection, "irrelevant, immaterial and incompetent," if it be considered alone appears to mean something more than "relevancy" as that term is used by logicians. If an evidential

> fact is relevant under the rules of logic, it is nevertheless not "material" unless it has a legitimate and effective influence or bearing on the decision of the ultimate fact or facts in dispute. The word has other connotations which need not here detain us. However, it does seem that the objection that an evidential fact about to be elicited is not "relevant and material" should always be deemed by trial judges as raising the point that the fact does not possess the necessary "probative value," or, if it does, that it nevertheless should not be received if its reception will, in the language in the Model Code of Evidence (§ 303), necessitate undue consumption of time or create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or unfairly surprising the party who has not had reasonable ground to anticipate that such evidence would be offered. [Hanson, Is It Relevant, Material, and Competent?, 26 State Bar Journal 47, 53 (1951).]

It thus appears that in actual use the word "material", when used in relation to the admissibility of evidence, refers to that which is of importance or of some consequence to the case. It is understandable, therefore, that the words "irrelevant" and "immaterial" should be used interchangeably on occasion. In the ordinary meaning of the words, whatever is irrelevant must necessarily be immaterial also. Whatever is material must necessarily be relevant. However, some matters that may be relevant may be immaterial. That is, they may have some logical bearing on the case at hand, but the bearing may be so remote that the matters sought to be shown are of little or no consequence.

Unfortunately, however, the insistence of some writers upon an artificial definition of the word "material" has rendered it somewhat ambiguous for use in legal writing. We could attempt a definition of "material" for use in connection with evidence; but we have decided to avoid the ambiguity by avoiding the word.

Respectfully submitted,

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