

34 (L)

5/19/64

Memorandum 64-36

Subject: Study No. 34(L) - Uniform Rules of Evidence (New Evidence Code--
Division 2)

Attached (buff pages) are the comments to the sections in Division 2 (Words and Phrases Defined) of the New Evidence Code. We would like to approve Division 2 and the Comments thereto at this time. References are to the New Code of Evidence.

We plan, at a later time, to check each section of the Evidence Code to determine that words are used in their defined sense. When we make this check, we may find also that additional definitions are needed or that some of the definitions are unnecessary.

The following matters are called to your attention:

Comments

Note that we have written the comments so that they will make sense (without editorial revision) when inserted under the new code sections in the annotated codes. Thus, we refer to "former" sections of the Code of Civil Procedure. Is this satisfactory?

Section 115

We suggest that the word "either" in the second line of this section be deleted as unnecessary.

Section 130

This section should be deleted and the words "city and county" inserted in Section 215.

Section 160

This section should read:

160. "Governmental subdivision" includes any public entity.

Section 190

We suggest that this section read:

190. "Person" includes a natural person, firm, association, organization, partnership, business trust, or corporation.

Section 215

The phrase "city and county," should be added after "county," in this section.

Section 235

The second sentence of this section should be revised to read: "In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States."

The suggested language is taken from proposed amendments to the Federal Rules of Civil Procedure. These amendments were developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure.

Section 255

The revision of this section is discussed in Memorandum 64-31.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DIVISION 2. WORDS AND PHRASES DEFINED

COMMENT

§ 100

This section is a standard provision found in the definitional portion of recently enacted California Codes. It makes the definitions in this division applicable to the entire Evidence Code unless a particular section or its context otherwise requires.

COMMENT

§ 105

Unless the provision or context of a particular code section otherwise requires, the word "action" includes both a civil action or proceeding and a criminal action or proceeding. Defining "action" eliminates the necessity for repeating "civil action or proceeding and criminal action or proceeding" in numerous code sections.

COMMENT

§ 110

The phrases defined in Sections 110 and 115 are useful because they provide a convenient means for distinguishing between the burden of proving a fact and the burden of going forward with the evidence. They recognize a distinction that is well established in California. WITKIN, CALIFORNIA EVIDENCE §§ 53-60 (1958). The practical effect of the distinction is discussed in the comments to Division 4 (commencing with Section 500).

Section 115 makes clear that "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier burden of proof is specifically required in a particular case by statutory or decisional law.

Sections 110 and 115 are based on subdivisions (4) and (5) of Rule 1 of the Uniform Rules of Evidence.

COMMENT

§ 115

See Comment to Section 110.

COMMENT

§ 120

The phrase "civil action" includes a proceeding of a civil nature. The definition eliminates the necessity of repeating "action or proceeding" in every instance in which "civil action" is used.

COMMENT

§ 125

This broad definition of "conduct" is the same as Rule 1(6) of the Uniform Rules of Evidence.

COMMENT

§ 135

Grand juries are specifically excluded from the definition of "court." As a result, except to the extent otherwise provided by statute, the provisions of this code do not apply to grand jury proceedings. But see Section 910 (privileges division of this code applicable in all proceedings, including grand jury proceedings) and Penal Code Section 939.6 (evidence admissible in grand jury proceedings in the investigation of a charge).

COMMENT

§ 140

This definition makes it clear that the phrase "criminal action" includes both a criminal action and a criminal proceeding.

COMMENT

§ 145

"Declarant" is used to distinguish a person who makes a hearsay statement from the witness who testifies as to the content of the statement. The definition is the same as Rule 62(2) of the Uniform Rules of Evidence. See also Comment to Section 1200.

"Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered whether or not it is technically inadmissible and whether or not it is received. For example, Division 10 (commencing with Section 1200) uses "evidence" to refer to hearsay which may be excluded as inadmissible, but which may be admitted if no proper objection is made. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, there will be no doubt under this definition that it constitutes evidence.

Section 150 is a better statement of existing California law than former C.C.P. Section 1823, which defined "judicial evidence." Although Section 1823 by its terms restricted "judicial evidence" to that "sanctioned by law," the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if offered and received without proper objection or motion to strike. E.g., People v. Alexander, 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963) ("illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary evidence violating the best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parole evidence rule"). See WITKIN, CALIFORNIA EVIDENCE §§ 723-724 (1958).

Under this definition a presumption is not evidence. See also Section 600.

COMMENT

§ 155

The terms "finding of fact," "finding," and "finds" are used interchangeably in this code. Although judicial notice is not evidence, this section makes it clear that a finding may be based on judicial notice as well as on evidence. Section 155 is substantially the same as Rule 1(8) of the Uniform Rules of Evidence.

The second sentence of Section 155 is consistent with existing law. Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414 (1948)(where evidence is properly received, the ground of the court's ruling is immaterial); San Francisco v. Western Air Lines, Inc., 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962)(where evidence is excluded, the ruling will be upheld if any ground exists for the exclusion).

COMMENT

§ 160

"Governmental subdivision" is sometimes used to refer to public entities in foreign countries.

COMMENT

§ 165

"The hearing" is defined to mean the hearing at which the particular question arises and, unless the context otherwise indicates, not some earlier or later hearing. The definition is the same as Rule 1(7) of the Uniform Rules of Evidence.

COMMENT

§ 170

See Comment to Section 1200.

COMMENT

§ 175

"Judge" is broadly defined to include every authorized person conducting a court proceeding.

COMMENT § 180

This definition is self-explanatory.

COMMENT § 185

This definition is self-explanatory.

COMMENT § 190

This definition is similar to that used in other codes. E.g., GOVT. CODE § 17, VEH. CODE § 470. See also C.C.P. Section 17.

COMMENT § 195

This definition is the same as the definition in C.C.P. Section 17(3).

COMMENT § 200

This definition is the same as the definition in C.C.P. Section 17(1).

COMMENT § 205

This definition is the same in substance as the definition of "proof" in former C.C.P. Section 1824.

COMMENT § 210

This definition is self-explanatory.

COMMENT § 215

The broad definition of "public entity" includes every form of public authority and is not limited to public entities in this State unless otherwise indicated by the context or specific language.

COMMENT § 220

This definition is the same as the definition of "real property" in C.C.P. Section 17(2).

COMMENT

§ 225

This definition restates existing California law. E.g., Larson v. Solbakken, 221 Cal. App.2d ___, ___, 34 Cal. Rptr. 450, 455 (1963); People v. Lint, 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, 102-103 (1960). Thus, under Section 225, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute, but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of former C.C.P. Section 1870. In addition, Section 225 makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is "relevant evidence." This retains existing law. See former C.C.P. Sections 1868, 1870(16)(credibility of witnesses) and Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 339-340, 569-575 (1963) (credibility of hearsay declarants).

COMMENT

§ 230

This definition provides a convenient short reference for "constitutional, statutory, and decisional law."

COMMENT

§ 235

This definition is more precise than the comparable definition found in C.C.P. Section 17(7). For example, it makes it clear that "state" includes Puerto Rico, even though Puerto Rico is now a "commonwealth" rather than a territory.

COMMENT

§ 240

The significance of this definition is indicated in the Comment to Section 1200.

COMMENT

§ 245

This definition makes it clear that a reference to "statute" includes a constitutional provision.

COMMENT

§ 250

"Trier of fact" is defined to distinguish between jury trials and trials conducted by the court sitting without a jury. The definition is substantially the same as Rule 1(11) of the Uniform Rules of Evidence.

COMMENT

§ 255

The phrase "unavailable as a witness" is used in this code to state the condition which must be met whenever the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The definition is based on Rule 62(1) of the Uniform Rules of Evidence.

"Unavailable as a witness" includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable, i.e., where he is prevented from testifying by a claim of privilege or is disqualified from testifying. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in Division 10 (commencing with Section 1200) do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law--such as privilege--which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Accordingly, the hearsay exceptions permit the

introduction of evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

Section 255 substitutes a uniform standard for the varying standards of unavailability provided by former C.C.P. sections providing hearsay exceptions. The conditions constituting unavailability under former law varied from exception to exception without apparent reason. Under some exceptions the evidence was admissible if the declarant was dead; under others, the evidence was admissible if the declarant was dead or insane; under others, the evidence was admissible if the declarant was absent from the jurisdiction.

COMMENT

§ 260

The word "verbal" is defined to avoid the necessity of repeating "oral or written" in various sections of the code. The definition is the same as Rule 1(12) of the Uniform Rules of Evidence.

COMMENT

§ 265

"Writing" is defined very broadly and, unless the particular section or its context otherwise requires, includes pictures and sound recordings. The definition is the same as Rule 1(13) of the Uniform Rules of Evidence.