

Memorandum 64-55

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--
Division 4--Judicial Notice)

Attached to this memorandum is a report of the special committee of the Conference of California Judges relating to the Commission's tentative recommendation on Judicial Notice.

Also attached to this memorandum is a revised version of the Division of the Evidence Code on Judicial Notice. This revision reflects the changes made by the Commission at the July meeting. We have not revised the comments to conform to the changes made. We expect to revise them after the August meeting to reflect all changes made at and before that meeting.

The following matters should be considered:

Organization

The judges' recommendations on organization are directed toward the rule format of our tentative recommendation. They recommend that Rules 9, 9.5, and 10 be combined in one rule. Since we have broken the rules into a number of separate sections, the judges' suggestion seems no longer appropriate. Such a consolidation would be inconsistent with the theory of codification, which is to express the law in brief, single-subject sections.

Section 450

The judges approve this section.

Section 451

English common law. The judges suggest that a general reference to "the common law" be added to subdivision (a). "The Committee believes that the common law as it exists in England and in this country should be judicially noticed and should be included within [Section 451(a)]."

We intended to use the term "decisional law" to refer to the nonstatutory or common law. The URE refers to "the common law . . . in force in every state, territory, and jurisdiction of the United States." The New Jersey report substitutes "decisional", and we accepted the New Jersey terminology as an improvement. Apparently, the judges wish to go further than the URE and extend mandatory judicial notice to the decisional or common law of England.

The only time when this extension would be significant would be when a decision in a particular case required application of the law of England. If it is necessary to consider the law of England as of some authoritative value in determining what the law of California is, we think that the power of the judge to do so is covered in the requirement that the judge notice the law of California. This is more fully explained in our comment relating to "legislative facts." But when it is necessary to apply the law of England to decide a particular case, we believe that English decisional law should be treated the same as English statutory law.

Regulations; rules of court. The judges recommend that rules of court and state and federal regulations be made the subject of discretionary judicial notice (unless requested) under Section 452 instead of mandatory judicial notice under Section 451.

We think that the reference to the statutes mentioned in subdivision (c) is required by the statutes referred to. Government Code Section 11383 provides, "the courts shall take judicial notice of" Government Code Sections 11384 and 18576 contain similar language. 44 U.S.C. § 307 provides that the "contents of the Federal Register shall be judicially noticed." There is some uncertainty whether this mandatory language applies to state courts, but there is some respectable opinion that it does. See Comment to this section on

pages 401 and 402. We do not recommend any change in the Government Code Sections, and we are powerless to do anything about the section in the United States Code. Accordingly, we think that the reference to these sections should be retained in Section 451.

We believe, too, that the rules of court of California and the United States should be retained in Section 451 because these are as easy to determine as the regulations referred to in subdivision (c) are. Perhaps, the judges object to required notice of the rules of individual courts as distinguished from the general court rules applicable to all California and federal courts. If so, the objection could be met by tightening the reference in subdivision (d) to refer specifically to "the California Rules of Court, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure"; and we recommend that the specific reference to these sets of rules be substituted for the general reference that now appears in subdivision (d). To require a judge to take judicial notice of the rules adopted by and promulgated only by the United States District Court for the District of Florida seems to us to be too onerous a requirement. Similarly, to require a judge in Santa Clara County to take judicial notice of the rules adopted by and promulgated only by the Superior Court in and for the County of Inyo seems too onerous a requirement. We think that a party, to obtain judicial notice of the rules of such individual courts, should be required to supply the judge with sufficient information for him to determine what the rules are.

Section 452

Preliminary language. The judges recommend that Sections 452 and 453 be combined by revising the preliminary language of Section 452. Because this revision involves a substantive change in Section 453, we will discuss it in connection with that section.

Subdivisions (a), (b), and (c). The judges suggest some language changes in subdivisions (a), (b), and (c). However, no substantive change is recommended. The judges' version of subdivision (c) is limited to "official acts of the legislative, executive, and judicial departments of this State and of the United States"; but that was the version of subdivision (c) presented in our tentative recommendation. They have not reviewed the Commission's present proposal to include the official acts of such governmental departments of any state of the United States. The language change in these subdivisions that is suggested by the judges is to insert "state, territory, or possession" in the place of "state". The change, however, is unnecessary because we have defined "state" to include these other entities.

Subdivisions (d) and (e). Should there be a difference in the courts covered by subdivisions (d) and (e)? The present version permits judicial notice of the records of courts of this State or of the United States and permits judicial notice of the rules of court of any state of the United States. We suggest that judicial notice be permitted of both the rules and records of any court of any State or of the United States.

Section 453

The judges suggest that this section be included in Section 452 by revising the preliminary language of Section 452 to read:

To the extent that they are not embraced within Section 451, judicial notice may be taken of each of the following matters, and if a party requests it and furnishes the judge sufficient information for that purpose, judicial notice shall be taken of each of said matters:

The suggested revision would eliminate subdivision (c) of Section 453. The substance of subdivision (b) and the preliminary language of Section 453 would be included in the preliminary language of Section 452, and a separate section would

express the requirement of subdivision (a). The policy questions presented by the suggested revision are: 1. Should subdivision (b) and the preliminary language of Section 453 be incorporated in Section 452? 2. Should subdivision (c) be eliminated? 3. Should subdivision (a) be revised as suggested? These questions are discussed below:

1. We believe that the drafting of the sections is simplified and the meaning of the sections is clearer if the requirements of Section 453 and the requirements of Section 452 are separately stated. It may be that the judges would agree upon seeing the present draft of the judicial notice division. They were, of course, working with the RURE.

2. There may be some merit in the elimination of subdivision (c). At best, it seems to be a truism. Obviously, a person must persuade the judge that he ought to take judicial notice before he is going to take judicial notice. And just as obviously, no judge is going to take judicial notice unless he is persuaded that he should. At worst, the subdivision sets up a subjective standard before notice of the matters stated in Section 452 is required. This subjective standard is not as readily reviewable as is the objective standard stated in subdivision (b). If the judge declines to take judicial notice on the ground that he is not persuaded, although there is sufficient information to enable him to determine the matter, Section 458 then states that the appellate court is not required to take judicial notice of the matter either. Of course, the judge has committed no error because he was not persuaded. Perhaps, subdivision (c) means that a judge's decision not to take judicial notice of a matter is never erroneous unless the appellate court finds that no reasonable judge would not have been persuaded by the presentation made. But it does not say so explicitly. We suspect, however, that such a determination may well be academic anyway because if the appellate court thinks that the matter should be noticed, it will probably

take notice of the matter under Section 458 anyway. In any event, the question raised is: If an appellate court thinks that a matter is within Section 452 and that the trial judge was provided with sufficient information to determine the matter, should it be required to notice the matter under Section 458?

3. The judges suggest a substantially more elaborate procedure for giving notice of a request to take judicial notice than we have spelled out. See the judges' proposed subdivision (5) on pages 3 and 4 of their attached comments. The procedure recommended by the judges is somewhat similar to the procedure recommended by New Jersey. The New Jersey version of this rule is as follows:

Judicial notice shall be taken of each matter specified in [Section 452] if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party notice thereof in the pleadings, or at or before the pretrial conference, or at least 10 days before the trial when there is not pretrial conference. The judge, however, may permit such notice to be given at any time in the interest of justice. In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this state and of the United States, the judge shall apply the law of this state.

The staff is unable to make a recommendation on the proposal because we are not sufficiently familiar with the actual practice to know whether such procedural requirements are either necessary or desirable.

Sections 454 and 455

The judges recommend that Sections 454 and 455 (b) be combined in one section reading as follows:

In determining the propriety of taking judicial notice of a matter or the tenor thereof, any source of pertinent information may be consulted or used, including the advice of persons learned in the subject matter. If the latter course is followed, such evidence shall be presented at the trial and shall be subject to cross-examination. The opposite party may submit other sources of pertinent information or offer rebuttal evidence.

This revision eliminates subdivision (b) of Section 454. Apparently, the revision also eliminates the requirement of Section 455(b) that information other than the advice of persons learned in the subject matter be made a part of the record if the information is not obtained in open court. So far as the advice of learned persons is concerned, the judges' revision prohibits private consultation and, instead, requires that such advice be presented at the trial and subject to cross-examination.

The staff recommends the separate statements of Sections 454 and 455 for several reasons:

1. We believe the retention of Section 454(b) is desirable.
2. We believe that the judge should note for the record the source of information and the nature of such information which is not received in open court, whether or not that information consists of the advice of learned persons.
3. We think that the requirement that the judge receive the advice of learned persons only in open court and subject to cross-examination is too restrictive, so long as the requirement is retained that the judge must afford each party reasonable opportunity to meet such information.

The judges approved subdivision (a) of Section 455 in the form in which it appeared prior to the July meeting--that is, with the language of the preliminary part of Section 455 making the requirement applicable to all information listed in Section 452.

Sections 456 and 457

The judges approved these sections by failing to mention them in their report. See preliminary comment on report.

Section 458

Subdivision (a). The judges suggest that the following language be added to subdivision (a):

Provided the conditions set forth in the previous sections relating to procedures have been complied with.

There is nothing in Section 458(a) that indicates that the procedural requirements stated in the preceding sections might not be applicable; but, nevertheless, should the requirement be made explicit?

Subdivisions (b)--(e). The Committee disapproves subdivisions (b) through (e) on the ground that an appellate court should not be burdened with taking judicial notice of matters. "If it desires to do so the present rules on appeal give an appellate court all the necessary authority to make a finding of fact, or to remand the case to the trial court for that purpose."

The revision proposed by the judges goes much further than it needs to in order to meet the objection made in their comment. Certainly, an appellate court should be required to know the law of California and the law of the United States that it is required to apply. If there has been sufficient information presented to determine the matter, we think that it should be required to determine any other question of law necessary to decide the case. Probably, what the judges had in mind were the matters of fact specified in Section 451(e) and subdivisions (g) and (h) of Section 452. The judges' suggestion would change the law of California. Under existing law an appellate court can take notice of any matter that the court of original jurisdiction might have noticed. And "the failure of a trial court to take judicial notice of a fact does not prevent an appellate court from giving proper effect thereto." People v. Tossetti, 107 Cal. App. 7, 12 (1930). In Varcoe v. Lee, 180 Cal. 338, 343-344 (1919) the Supreme Court said:

In fact a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge and was probably assumed without strict proof for that very reason.

The judges' suggestion would at least obscure the right of appellate court to make this "salutary use" of the principle of judicial notice. Therefore, we recommend the retention of Section 458 to regulate the procedure for taking judicial notice at the appellate level.

Respectfully submitted,

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DIVISION 4. JUDICIAL NOTICE

450. Judicial notice may be taken only as authorized by statute.

450. Judicial notice may not be taken of any matter unless authorized or required by statute.

451. Matters which must be judicially noticed.

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of the United States and of every state of the United States.

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

(c) Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(d) Rules of court of this State and of the United States.

(e) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

452. Matters which may be judicially noticed.

452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of any state of the United States.

(b) Legislative enactments and regulations of (1) governmental agencies or public employees of the United States and (2) public entities or public employees of any state of the United States.

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

(d) Records of any court of this State or of the United States.

(e) Rules of court of any state of the United States.

(f) The law of foreign countries and governmental subdivisions of foreign countries.

(g) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

453. Compulsory judicial notice upon request.

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

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

(b) Furnishes the judge with sufficient information to enable him to take judicial notice of the matter; and

(c) Persuades the judge as to the propriety of taking such notice and as to the tenor thereof.

454. Information that may be used in taking judicial notice.

454. In determining the propriety of taking judicial notice of a matter or the tenor thereof:

(a) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(b) No exclusionary rule except a valid claim of privilege shall apply.

455. Opportunity to present information to judge.

455. With respect to any matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action:

(a) Before judicial notice of such matter may be taken, the judge shall afford each party reasonable opportunity to present to him information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the judge resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the judge shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

456. Noting for record matter judicially noticed.

456. The judge shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof if the matter judicially noticed:

(a) Is a matter that is reasonably subject to dispute and of substantial consequence to the determination of the action; and

(b) Is not a matter specified in subdivisions (a) or (b) of Section 451.

457. Instructing jury on matters noticed.

457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the judge may and upon request shall instruct the jury to accept as a fact the matter so noticed.

458. Judicial notice in proceedings subsequent to trial.

458. (a) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(b) The reviewing court shall judicially notice each matter specified in Sections 451 and 452 that the judge was required to notice under Section 451 or 453. The reviewing court may judicially notice any matter specified in Section 452 and has the same power as the judge under Section 311. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

(c) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the judge under Section 454.

(d) When taking judicial notice under this section of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action, the judge or reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(e) In determining the propriety of taking judicial notice of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or

not included in the record of the action, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.