Memorandum 64-58

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 2--Words and Phrases Defined)

We have received comments from the Judges' Committee on the definitions contained in this division. These are attached as Exhibit I and are discussed below in connection with the particular section involved. (The remainder of the Committee's comments concerns sections compiled in Division 3 (General Provisions); these comments are separately considered in Memorandum 64-59.) Any section not specifically mentioned in this memorandum was approved by the Judges' Committee and the staff raises no question concerning it.

Section 110--"Burden of producing evidence"

The Committee recommends the deletion of the word "peremptory" from this definition, stating that "it adds nothing." The staff strongly opposes this recommendation because "peremptory" is the very heart of the definition. Logically, it cannot be said that a party has a burden to produce evidence unless a finding against him on the issue is required in the absence of his production of any evidence. If no finding against him is required on the issue, the party does not have a burden of producing evidence because he can just as easily rely on the weakness of the evidence in the case against him. Under the present draft of Section 110, the burden of producing evidence is placed upon a party when that party stands to lose on the issue in the absence of evidence; it is a question for the judge to determine. The suggested deletion of the word "peremptory" would eliminate the idea that the burden of producing evidence is an obligation that the party must discharge to avoid losing

the case before getting to the jury, and would make a jury question out of what is now a question for the judge. We recommend against making any change in this definition.

Section 115 - "Burden of proof"

The Committee recommends a revision in this definition to eliminate a specific reference to the various degrees of proof that may be required and, also, to eliminate the sentence that reads "Burden of proof is synonymous with burden of persuasion." The Committee suggests that the definition be revised to read:

> "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that he prove the existence or nonexistence of a fact. Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of evidence.

The Commission has struggled long and hard over this definition and has arrived at a precise statement in the first paragraph that is logically unassailable. If a party's burden is to raise a reasonable doubt concerning the existence or nonexistence of a fact, it cannot properly or logically be said that the party has the obligation to "prove the existence or nonexistence of a fact." The party need prove nothing; he need only "raise a reasonable doubt concerning the existence or nonexistence of a fact." The remainder of the first paragraph explicitly recognizes the varying quantums (quanta!) of proof, which we believe to be desirable to retain. We recommend no change in this paragraph.

The second paragraph of the present definition is substantively the same as that suggested revision. We recommend no change in this paragraph.

The staff concurs in the Committee's suggestion to delete the third paragraph in this definition. To say that "the burden of proof is synonymous

with the burden of persuasion" seems a misnomer when applied to the burden of raising a reasonable doubt concerning a fact. There is no "persuasion" involved (except to "persuade" the trier of fact that a reasonable doubt exists, which we believe may be a subtle distinction too easily subject to misinterpretation). We recommend the deletion of this paragraph.

Section 120 - "Civil action"

The Committee recommends a substantive definition of criminal action (see Section 130, infra) and then suggests revising the definition of civil action to read "every action other than a criminal action." The Commission previously rejected this scheme (i.e., substantive definitions of "civil action" and "criminal action") in favor of using these definitions simply to insure the inclusion of civil and criminal proceedings. The staff concurs in the current scheme and recommends against a return to substantive definitions.

Section 125 - "Conduct"

The Committee suggests that this definition be revised by adding "assertive and nonassertive" thereto. No reason is given for the addition and the staff does not see what such an addition would add to the substance of the definition. At the same time, no harm is perceived in the addition. Hence, we make no specific recommendation in regard to this suggestion other than to offer the following language to effectuate such addition if approved by the Commission:

> "Conduct" includes all active and passive behavior, both verbal and nonverbal, assertive and nonassertive.

Section 130 - "Criminal action"

As indicated above (see Section 120, supra), the Committee recommends a substantive definition of "criminal action" in substantially the same language as Penal Code Section 683, to read:

> "Criminal action" means an action prosecuted by the state against a party charged with a public offense for the punishment thereof.

The present definition studiously avoids the possibility of any conflict between the Evidence Code definition and the Penal Code definition (present or future), and is included merely to insure that criminal proceedings are covered. The Commission previously rejected a formerly approved substantive definition of criminal action, and we assume there will be no strong inclination to return to the former scheme. Hence, we recommend against approval of the Committee's suggestion.

Section 150 - "The hearing"

The Committee suggests that this definition be revised to read:

> "The hearing" means the hearing at which a question concerning the admissibility of evidence is raised.

There is no comment indicating the reason for the suggested change; hence, it is not clear whether the Judges' Committee has considered the latest draft of this definition (and, therefore, is recommending a return to the previous scheme) or whether the Committee disapproves the language in the present draft stating "and not some earlier or later hearing." In any event, the Commission previously disapproved the substance of the Committee's suggested revision because it is unnecessarily restricted to questions regarding the admissibility of evidence. The present draft relates to any question that may be in dispute and, further, ties down the hearing referred to by eliminating "earlier or later" hearings. The staff

Section 210 - "Relevant evidence"

The Committee raises a problem with respect to this definition that has troubled the Commission in the past and that is revolved in the present draft by combining the concepts of "relevancy" and "materiality" in a single definition of "relevant evidence." The Committee suggests a separate definition for "relevant evidence" ("evidence having any tendency in reason to prove or disprove any disputed fact") and for "material evidence" ("evidence which is relevant to the issues in the case"). We believe that the language suggested by the Judges' Committee does not meet the problem presented, particularly since the suggested definition of "material evidence" is stated in terms of relevancy only.

The principle of separating these concepts might be considered by the Commission. However, we have spent considerable meeting time in the past in trying to resolve this problem and we believe it would not be profitable to attempt a change at this time. All of the problems mentioned are happily resolved in the present draft by combining the concepts in a single definition.

Section 215 - "Rule of law"

In preparing several divisions for printing, we discovered a defect in the use of "rule of law" and substituted where appropriate a more correct reference to "law."

The artificial use of "rule of law proved unworkable and confusing." The phrase is frequently used in judicial decisions to refer not to a specific constitutional, statutory, or case law provision but rather to a principle or concept that is recognized by or through such means. In other words, courts speak in terms of a "rule of law" in the same way as they speak of a "rule of

construction" or a "rule of pleading or practice." It is a principle, a concept, rather than a specific embodiment of that principle or concept. Section 215 should be revised to conform with these changes. The definition could be either exactly as it presently appears (i.e., "law" includes constitutional, statutory, and decisional law) or could be revised to use language similar to that used in defining "law" in our soveriegn immunity legislation (i.e., "law" includes not only constitutional and statutory law but also the decisional law applicable within this State as determined from time to time by the courts of this State of of the United States).

Section 235 - "Trier of fact"

The Committee suggests that this definition be revised to read:

> "Trier of fact" means the judge or jury depending on which has the responsibility of determining an issue of fact.

One defect in the suggested revision is that it fails to identify the issue of fact involved. Thus, although there may be a jury trying the ultimate issue of fact, the judge will frequently be trying subsidiary issues of fact relating to the admissibility of evidence. The Committee recognizes this distinction in commenting that "it is implicit in [Section 145" that the admissibility of evidence sometimes depends on a finding of fact by the judge." Thus, the suggested revision in Section 235 purposely relates to the ultimate fact only. The staff believes that an explicit recognition of the judge's role in determining preliminary issues of fact is desirable in the definition of "trier of fact" and, hence, recommends against the Committee's suggested revision.

Section 245 - "Verbal"

The Committee recommends deleting the reference to "written words" in this definition and revising the definition to read:

"Verbal" means oral communication or expression.

The definition of "verbal" is important not so much for its use in the substantive provisions of the statute as in other definitions. Thus, "verbal" is used in the definition of "conduct" (Section 125) and in the definition of "statement" (Section 225). Particularly as to the latter definition, it would change the entire concept of the statute to limit "statement" to "oral communication or expression." Hence, the suggested revision might be accomplished only if several other changes were made in existing definitions. The substantive effect of any such changes would be with a view to accomplishing precisely the same goal that is presently achieved with the existing definition of "verbal." Hence, we recommend against approval of this suggested revision.

Section 250 - "Writing"

The Committee recommends that the word "sounds" be deleted from this definition. It is included in the present draft specifically to include tape recordings, sound motion pictures, and any other means of recording sounds upon tangible objects. Serious problems in the best evidence rule (Sections 1500-1510_ would result from the deletion of this word from the definition of "writing." We strongly recommend against approval of this suggestion.

Respectfully submitted,

Jon D. Smock
Associate Counsel

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:

GENERAL PROVISIONS

The Committee approves the tentative recommendations of the Commission on all rules relating to General Provisions not specifically mentioned herein:

RULE I

DEFINITIONS

(Section 100 et seq. Evidence Code)

Subdivision (2) (Section 210 Evidence Code) Relevant Evidence:

We believe that the definition of relevant evidence should be amended to read as follows:

"Evidence having any tendency in reason to prove or disprove any disputed fact."

We further believe that a definition should be added as to the meaning of "material evidence" which would be defined as follows:

"Evidence which is relevant to the issues in the case."

Subdivision (4) (Section 115 Evidence Code) Burden of Proof:

The Committee recommends that said definiation be amended to read as follows:

"Burden of proof means the obligation of a party to meet the requirement of a rule of law that he prove the existence or non-existence of a fact. Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a

preponderance of evidence."

Subdivision (5) (Section 110 Evidence Code) Burden of Producing Evidence:

The Committee believes that the word "preemptory" should be eliminated from the definition since it adds nothing.

Subdivision (6) (Section 125 Evidence Code) Conduct:

The Committee recommends that said subdivision be amended by adding thereto the words "assertive or non-assertive."

Subdivision (7) (Section 150 Evidence Code) The Hearing:

The Committee recommends that the definition be amended to read as follows:

> "The hearing means the hearing at which a question concerning the admissibility of evidence is raised."

Subdivision (8) (Section 145 Evidence Code) Finding of Fact:

The Committee believes that the definition in Section 145 of the Evidence Code is to be preferred.

Subdivision (9) Court:

The Committee notes in the Evidence Code that there is no definition of "Court". Is this an oversight?

Subdivision (10) (Section 160 Evidence Code) Judge:

The Committee believes that the definition in Section 160 of the Evidence Code is to be preferred.

Subdivision (11) (Section 235 Evidence Code) Trier of Fact:

We recommend that this subdivision be amended to read as follows:

"Trier of fact means the judge or jury depending on which has the responsibility of determining an issue of fact."

The reason we are eliminating the last phrase of the definition is that it is implicit in subdivision (8) that the admissibility of evidence sometimes depends on a finding of fact by the judge.

Subdivision (12) (Section 245 Evidence Code) Verbal:

The Committee recommends that this definition be amended to read:

"'verbal' means oral communication or expression."

Subdivision (13) (Section 250 Evidence Code) Writing:

The Committee recommends that the word "sounds" be eliminated from the definition.

Subdivision (15) (120 Evidence Code) Civil Action:

The Committee believes that this subdivision should first define Criminal Action substantially as stated in Section 683 of the Penal Code. Said subdivision as amended would read as follows:

"An action prosecuted by the state against a party charged with a public offense for the punishment thereof."

Subdivision (16) (Section 130 Evidence Code) Criminal Action:

The Committee believes this subdivision should be the definition of a Civil Action which should read substantially as follows:

"Every action other than a criminal action."

Section 175 (Evidence Code) (There is no Rule number) Person:

This definition includes firm, association, organization, partnership, business trust, or corporation.

The Committee believes that this definition is improper in view of the fact that in many of the Rules, as well as in the sections in the Evidence Code, the word "person" refers only to a natural person, particularly with respect to who may be a witness.

ALREADY DONE FROM HERE ON ↓ Memo 64-57 Memo 64-59.

RULE 4

EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE

(Section 353 Evidence Code)

The Committee believes that subdivision (b) should be amended to read as follows:

"The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated, and that the error or errors complained of has resulted in a miscarriage of justice."

COMMENT:

The Committee believes that said subdivision (b) should be drafted to contain substantially the language of Section 4-1/2 of Article VI of the California Constitution. Whether the error had a substantial influence in bringing about the verdict or finding is one of the questions that the court no doubt would wish to consider in determining whether there had been a miscarriage of justice.

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RULE 5

EFFECT OF ERRONEOUS EXCLUSION OF EVIDENCE

(Section 354 Evidence Code)

The Committee believes that the first paragraph of Rule 5 should be amended to read as follows:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence, if it appears of record that (1) the substance, purpose and relevancy of the excluded evidence was made known to the judge by the questions asked, an offer either of proof, or by any other means; or (2) the rulings of the judge made compliance with subdivision (1) futile; or (3) the evidence was sought by questions asked during cross-examination; and the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of has resulted in a miscarriage of justice."

COMMENT:

The Committee believes that the language of Rule 5 should be substantially the same as contained in Section 4-1/2 of Article VI, California Constitution, for the same reason stated in our comments to Rule 4.

RULE 7

GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGE OF WITNESSES, AND OF EXCLUSIONARY RULES.

The Committee believes that the definition of "proffered evidence", subparagraph (b), subdivision (1), of Rule 8, is too restrictive. Proffered evidence has long been used by the legal

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profession to refer to any evidence offered for admission and it is not dependent upon the existence of non-existence of a preliminary fact. We recommend that said subparagraph (b) be amended to read as follows:

> "'Proffered evidence' means any evidence offered for admission in evidence."

The Committee further believes that the last sentence of subparagraph (b) of subdivision (2) should be amended to read as follows:

> "On admissibility of other evidence of similar character, the judge may hear and determine the question out of the presence or hearing of the jury."

The Committee believes that subparagraph (b) of subdivision (3) should be eliminated upon the same grounds as stated in the last sentence of our comment with respect to Rule 19.

DATED: July 31, 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

100. Application of definitions.

100. Unless the provision or context otherwise requires, these definitions govern the construction of this code.

105. Action.

105. "Action" includes a civil action and a criminal action.

110. Burden of producing evidence.

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a peremptory finding against him as to the existence or nonexistence of a fact.

115. Burden of proof.

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Unless a rule of law requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

Burden of proof is synonymous with burden of persuasion.

120. Civil action.

120. "Civil action" includes civil proceedings.

125. Conduct.

125. "Conduct" includes all active and passive behavior, both verbal and nonverbal.

130. Criminal action.

130. "Criminal action" includes criminal proceedings.

135. Declarant.

135. "Declarant" is a person who makes a statement.

140. Evidence.

140. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered in a judicial proceeding.

145. Finding of fact, finding, finds.

145. "Finding of fact," "finding," or "finds" means the determination from evidence or judicial notice of the existence or nonexistence of a fact.

150. The hearing.

150. "The hearing" means the hearing at which the particular question is raised, and not some earlier or later hearing.

155. Hearsay evidence.

155. "Hearsay evidence" is defined in Section 1200.

160. Judge.

160. "Judge" includes a court commissioner, referee, or similar officer, who is authorized to conduct and is conducting a court proceeding or court hearing.

165. Oath.

165. "Oath" includes affirmation.

170. Perceive.

170. "Perceive" means to acquire knowledge through one's senses.

175. Person.

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

180. Personal property.

180. "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

185. Property.

185. "Property" includes both real and personal property.

190. Proof.

190. "Proof" is the effect of evidence.

195. Public employee.

195. "Public employee" means an officer, agent, or employee of the United States or of a public entity.

200. Public entity.

200. "Public entity" includes a state, county, city and county, city, district, public authority, public agency, and any other political subdivision or public corporation.

205. Real property.

205. "Real property" includes lands, tenements, and hereditaments.

210. Relevant evidence.

210. "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, including the credibility of a witness or hearsay declarant.

215. Rule of law.

215. "Rule of law" includes constitutional, statutory, and decisional law.

220. State.

220. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

225. Statement.

225. "Statement" means (a) a verbal expression, or (b) nonverbal conduct of a person intended by him as a substitute for a verbal expression.

230. Statute.

230. "Statute" includes a provision of the Constitution.

235. Trier of fact.

235. "Trier of fact" means (a) a jury and (b) a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

240. Unavailable as a witness.

240. (a) Except as otherwise provided in subdivisions (b) and (c), "unavailable as a witness" means that the declarant is:

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

(2) Disqualified from testifying to the matter;

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

(4) Absent beyond the jurisdiction of the court to compel his attendance by its process;

(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process; or

(6) Absent from the hearing because of imprisonment and the court is unable to compel his attendance at the hearing by its process.

(b) A declarant is not unavailable as a witness if the exemption, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

(c) A declarant is not unavailable as a witness if unavailability is claimed because he is absent beyond the jurisdiction of the court to compel appearance by its process and his deposition could have been taken by the proponent through the exercise of reasonable diligence and without undue hardship or expense, but this subdivision does not apply where the evidence offered is a deposition.

245. Verbal.

245. "Verbal" includes both oral and written words.

250. Writing.

250. "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.