

#34(L)

10/13/64

Memorandum 64-70

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--
Preliminary Portion of Recommendation of Proposed Evidence Code)

Attached are two copies of a rough draft of the preliminary portion of the recommendation on the proposed Evidence Code. This portion will consist of:

Title Page (to be prepared later)

Letter of Transmittal (attached)

Acknowledgments (attached) (We will be correcting and adding names to this list.)

Table of Contents (to be prepared later)

Recommendation

Background (attached)

Recommendations (attached)

Proposed Legislation (will consist of text of statute and Comments to each section)

Various Tables (We will discuss these at the meeting in connection with a separate memorandum)

Index (to be prepared later)

We suggest that all of you read the attached material and mark any editorial changes you believe should be made on one copy to turn in to the staff at the October meeting. In addition, any suggestions for reorganization of the material, additions or deletions, etc., should be made on the copy you turn in to the staff or should be brought up at the October meeting.

We do not plan to send this material to the printer until after the November meeting. We are already aware of some errors in the material and will further check it prior to the meeting. Nevertheless, we are sending it to you now so that you will have an opportunity to read it in connection with the particular divisions of the Evidence Code that you are checking.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

UNIFORM RULES OF EVIDENCE

PROPOSED EVIDENCE CODE

January 1965

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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LETTER OF TRANSMITTAL

January 1965

To His Excellency, Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits its recommendation on this subject. The legislation recommended by the Commission consists of (1) a proposed Evidence Code that includes the best features of the Uniform Rules and of the existing California law and (2) the necessary conforming adjustments in existing statutory law.

The proposed Evidence Code is not the product of the Commission's efforts alone. Professor James H. Chadbourn (formerly of the School of Law, University of California at Los Angeles, now of the Harvard Law School) prepared comprehensive studies for the Commission of the Uniform Rules of Evidence and the corresponding California law. In addition, the Commission considered other published materials relating to the Uniform Rules, including legislation and court rules based on the Uniform Rules that have been adopted in other states. Several comprehensive reports of committees appointed by the New Jersey Supreme Court and by the New Jersey Legislature were particularly helpful.

Utilizing this research material, the Commission drafted preliminary revisions of the Uniform Rules and submitted them to a special committee of the State Bar of California appointed to work with the Commission on the evidence project. The Commission made further revisions of the Uniform Rules in response to the State Bar committee's analysis and criticism of the Commission's preliminary proposals. A revised version of each article of the Uniform Rules was then published as a tentative recommendation of the Commission in a report which also contained the related research study prepared by Professor Chadbourn. Nine tentative recommendations and research studies relating to the

A C K N O W L E D G M E N T S

A number of former members of the Law Revision Commission participated at the early stages in the formulation of this recommendation: John D. Babbage, Frank S. Balthis, Leonard J. Dieden, George G. Grover, Roy A. Gustafson, Bert W. Levit, Charles H. Matthews, Stanford C. Shaw, Vaino H. Spencer, and Samuel D. Thurman.

Professor James E. Chadbourn and Professor Ronan E. Degnan, the Commission's research consultants, prepared the research studies that were used in formulating the recommendation.

Many other persons and organizations also assisted in this project, primarily by providing the Commission with critical evaluations of all or a portion of its tentative proposals. The following deserve special mention for their substantial contributions.

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LOCAL BAR ASSOCIATIONS

The following local bar associations appointed committees or designated members to study the Commission's proposals. Some of them submitted comments for Commission consideration in formulating this recommendation.

Alameda County Bar Association

Beverly Hills Bar Association

Colusa County Bar Association

Compton Judicial District Bar Assn.

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The California Law Revision Commission has substantially completed its work on the proposed Evidence Code which the Commission will recommend for enactment at the next session of the Legislature. The proposed new code is the product of almost eight years of research and study by the Commission.

The Commission today released a summary of its recommendation to the 1965 Legislature. This summary is set out at the end of this article.

A preliminary draft of the proposed code was published in September as Preprint Senate Bill No. 1 and was distributed to members of the bench and bar at the 1964 Annual Meeting of the State Bar in Santa Monica. The proposed code was also discussed by a panel of experts on evidence law at the Santa Monica meeting.

Copies of the preliminary draft have also been distributed to a large number of persons and organizations who have signified an interest in reviewing and criticizing the preliminary draft. These include a Special Subcommittee on the Rules of Evidence of the Senate Fact Finding Committee on Judiciary; a Special Subcommittee on Law Revision of the Assembly Interim Committee on Judiciary--Civil; a Special Committee of the State Bar; a Special Subcommittee of the Judicial Council; a Special Committee of the Conference of California Judges; a Special Committee of the Municipal Court Judges' Association of Los Angeles County; the Office of the Attorney General; the Department of Public Works; the State Office of Administrative Procedure; the Office of the Legislative Counsel; the District Attorneys' Association of California; the League of California Cities; 19 local bar associations; and a number of individual judges and lawyers.

The Commission is now reviewing the criticisms of these interested persons and organizations and making the necessary revisions in the preliminary draft of the proposed code.

Early in January 1965, the Commission plans to publish a pamphlet containing the text of the proposed code, together with a Comment following each section to explain in some detail the purpose and effect of the section. Copies of this pamphlet may be obtained from the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

The Commission already has published nine pamphlets containing tentative recommendations and research studies relating to the Uniform Rules of Evidence. Except as indicated below, these may be obtained without charge from the Commission's office at Stanford:

- Article I. General Provisions
- Article II. Judicial Notice
Burden of Producing Evidence, Burden of Proof, and Presumptions
- Article IV. Witnesses
- Article V. Privileges [Price \$5.20 including tax]
- Article VI. Extrinsic Policies Affecting Admissibility
- Article VII. Expert and Other Opinion Testimony
- Article VIII. Hearsay Evidence [Price \$5.20 including tax]
- Article IX. Authentication and Content of Writings

The two reports that are being sold may be ordered from the Documents Section of the General Services Administration, P. O. Box 1612, Sacramento, California 95807. Sales are subject to payment in advance of shipment of publications.

The summary of the Law Revision Commission's recommendation follows:

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

proposing an
EVIDENCE CODE

BACKGROUND

The California Law Revision Commission was directed by the Legislature in 1956 to make a study to determine "whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

Pursuant to this directive, the Commission has made a study of the California law of evidence and the recommendations of the Commissioners on Uniform State Laws. The Commission has concluded that the Uniform Rules should not be adopted in the form in which they were proposed but that many features of the Uniform Rules should be incorporated into the law of California. The Commission has also concluded that California should have a new, separate Evidence Code which will include the best features of the Uniform Rules and the existing California law.

The Case for Recodification of the California Law of Evidence

In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections--stating the correct grounds--must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference. The California codes provide such statements of the law in many fields--commercial transactions, corporations, finance, insurance--where the need for immediate information is not nearly as great as it is in regard to evidence. A similar statement of the law of evidence should be available to those who are required to have that law at their fingertips for immediate application to unanticipated problems. This can best be provided by a codification of the law of evidence which would provide practitioners with a systematic, comprehensive, and authoritative statement of the law.

An attempt at codification of the California law of evidence was made by the draftsmen of the 1872 Code of Civil Procedure. Part IV of that code, entitled "Of Evidence," was apparently intended to be a comprehensive codification of the subject. The existing statutory law of evidence still consists almost entirely of the 1872 codification. Isolated additions to or amendments of Part IV have been made from time to time, but the original 1872 statute has remained as the fundamental statutory basis of the California law of evidence.

Although Part IV of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of evidence, in fact it falls far short of that. Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a

trial. Necessarily, therefore, the courts have had to develop many, if not most, of the rules of evidence with but partial guidance from the statutes.

Illustrative of the deficiencies in the existing code is the treatment of the hearsay rule. Perhaps no rule of evidence is more important or more frequently applied; yet, there is no statutory statement of the hearsay rule in the code. On the other hand, several exceptions to the hearsay rule are given explicit statutory recognition in the code. But the list of exceptions is both incomplete and inaccurate. The Commission has identified and stated in the Evidence Code a number of exceptions to the hearsay rule that are recognized in case law but are not recognized in the existing code, including such important exceptions as the exception for spontaneous statements and the exception for statements of the declarant's state of mind.

Moreover, the exceptions that are mentioned in the existing code sometimes bear little relationship to the actual state of the law. For example, portions of the common law exception for declarations against interest may be found in several scattered sections--Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). Yet, all of these sections taken together do not express the entire common law rule,

nor do they reflect the law of California. Each requires that the declarant be dead when the evidence is offered. Nonetheless, the courts have admitted declarations against interest when the declarant is neither dead nor otherwise unavailable. None of these sections permits an oral declaration against pecuniary interest, not relating to real property, to be admitted except against a successor of the declarant. The courts, however, follow the traditional common law rule and admit such declarations despite the limitations in the code. Recently, too, the Supreme Court decided that declarations against penal interest are admissible despite the fact that the code refers only to declarations against pecuniary interest.

In the area of privilege, the existing code is equally obscure. It does state in general terms the privileges that are recognized in California, but it does nothing more. It does not indicate, for example, that the attorney-client privilege may apply to communications made to persons other than the attorney himself or his secretary, stenographer, or clerk. It does not indicate that the privilege protects only confidential communications. The generally recognized exceptions to the privilege--such as the exception for statements made in contemplation of crime--are nowhere mentioned. Nor does the code mention the fact that the privilege may be waived. Nonetheless, the courts have recognized such exceptions, have protected communications to intermediaries for transmittal to the attorney,

have required the communication to have been in confidence, and have held that the privilege may be waived.

On the question of the termination of a privilege, however, the courts have deemed themselves strictly bound by the language of the code. One case, for example, held that a physician's lips are forever sealed by the physician-patient privilege upon the patient's death--even though it was the patient's personal representative that desired to use the evidence. This strange result was deemed compelled because the code provides that a physician may not be examined "without the consent of his patient," and a dead patient cannot consent. That decision was followed by an amendment permitting the personal representative or certain heirs of a decedent to waive the decedent's physician-patient privilege in a wrongful death action; but, apparently, the law stated in that case still applies in all other actions and to all of the other communication privileges.

Other important rules of evidence either have received similarly cursory treatment in the existing code or have been totally neglected. Such important rules as the inadmissibility of evidence of liability insurance, the rules governing the admissibility and inadmissibility of various kinds of character evidence, and the requirement that documents be authenticated before reception in evidence are entirely nonstatutory. The best evidence rule, while covered by statute, is stated in three sections--Code of Civil Procedure Sections 1855, 1937, and 1938. The code states the judge's duty to determine all questions of fact upon which the admissibility of evidence depends; but there is no indication that, as to some of these facts, a party must persuade the judge of their existence while, as to others, a party need present merely enough evidence to sustain a finding of their existence.

These and similar deficiencies call for a thorough revision and recodification of the California law of evidence. It is true that the courts have filled in many of the gaps contained in the present code. They have also been able to remedy some of the anomalies and inconsistencies in the code by construction of the language used or by actual disregard of the statutory language. But there is a limit on the extent to which the courts can remedy the deficiencies in a statutory scheme. Reform of the California law of evidence can be achieved only by legislation thoroughly overhauling and recodifying the law.

Previous California Efforts to Reform the Law of Evidence

Efforts at legislative reform of the law of evidence in California have been made on several occasions. A substantial revision of Part IV of the Code of Civil Procedure--clarifying many sections and eliminating inconsistent and conflicting sections--was enacted in 1901; but the Supreme Court held the revision unconstitutional because the enactment embraced more than one subject and because of deficiencies in the title of the enactment. About 1932, the California Code Commission initiated a thoroughgoing revision of this field of law. The Code Commission placed the research and drafting in the hands of Dean William G. Hale of the University of Southern California Law School, assisted by Professor James P. McBaine of the University of California Law School and Professor Clarke B. Whittier of the Stanford Law School. The Code Commission's study continued until the spring of 1939, when it was abandoned because the American Law Institute had appointed a

committee to draft a Model Code of Evidence and the Code Commission thought it undesirable to duplicate the Institute's work.

National Efforts to Reform the Law of Evidence

Efforts at reform in the law of evidence have also been made at the national level, for California's law of evidence has been no more deficient than the law of most other states in the union. The widespread deficiencies in the state of the law of evidence caused the American Law Institute to abandon its customary practice of preparing restatements of the common law when it came to the subject of evidence. "[T]he principal reason for the [American Law Institute] Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification." MODEL CODE OF EVIDENCE, Introduction, p. viii (1942).

In 1942, after three years of careful study and formulation by some of the country's most distinguished judges, practicing lawyers, and professors of law, the Institute's Model Code of Evidence was promulgated. It was widely debated, in California and elsewhere. The State Bar of California referred it to the Bar's Committee on the Administration of Justice, which recommended that the Bar oppose the enactment of the Model Code into law. Reaction elsewhere was much the same, and by 1949 adoption of the Model Code was a dead issue.

But the need for revision of the law of evidence was as great as ever. The National Conference of Commissioners on Uniform State Laws began working on a revision of the law of evidence. The work of the Conference was based largely on the Model Code, but the Conference hoped both to simplify that code and to eliminate proposals that were objectionable. Four additional years of study and reformulation resulted in the promulgation of the Uniform Rules of Evidence.

In 1953, the Uniform Rules were approved by both the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Since that time, many of the Uniform Rules have been followed and cited with approval by courts throughout the country, including the California courts. The Uniform Rules of Evidence, with only slight modification, have been adopted by statute in Kansas and the Virgin Islands. In other states, comprehensive studies of the Uniform Rules have been undertaken with a view to their adoption either by statute or in the form of court rules. In New Jersey, as a result of such a study, a revised form of the privileges article was adopted by statute and the remainder of the Uniform Rules, also substantially revised, was adopted by court rule.

RECOMMENDATIONS

The Uniform Rules of Evidence

The Uniform Rules of Evidence are the product of years of careful, scholarly work and merit careful consideration. Nonetheless, the Commission recommends against their enactment in the form in which they were approved by the National Conference of Commissioners on Uniform State Laws. Several considerations underlie this recommendation.

First, in certain important respects, the Uniform Rules would change the law of California to an extent that the Commission considers undesirable. For example, the Uniform Rules would admit any hearsay statement of a person who is present at the hearing and subject to cross-examination. In addition, they do not provide a married person with a privilege to refuse to testify against his spouse. In both respects--and in a number of other respects as well--the Commission has disagreed with the conclusions reached by the Commissioners on Uniform State Laws. Sometimes the disagreement has been upon matters of principle; in others, it has been upon matters of detail. In total, the disagreements have been substantial and numerous enough to persuade the Law Revision Commission that the Uniform Rules of Evidence should not be adopted in their present form.

Second, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. If the Uniform Rules of Evidence were approved in their present form, segregated from the remainder of the statutory law of evidence, California's statutory law of evidence would be seriously complicated.

Yet, the contrasting formats of the Uniform Rules of Evidence and the California evidence statutes make it impossible to integrate these two bodies of evidence law into a single statute while preserving the Uniform Rules in the form in which they were approved by the Commissioners on Uniform State Laws.

Third, the draftsmanship of the Uniform Rules is in some respects defective by California standards. The Uniform Rules contain several rules of extreme length that are reminiscent of several of the cumbersome sections in the 1872 codification. For example, the hearsay rule and all of its exceptions are stated in one rule that has 31 subdivisions. Moreover, different language is sometimes used in the Uniform Rules to express the same idea. For example, various communication privileges (attorney-client, physician-patient, and husband-wife) are expressed in a variety of ways even though all are intended to provide protection for confidential communications made in the course of the specified relationships.

Fourth, the need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other con-

siderations. The law of evidence--unlike the law relating to commercial transactions, for example--affects only procedures in this State and has no substantive significance insofar as the law of other states is concerned. Thus, although the adoption of the Uniform Rules elsewhere indicates that they are deserving of weighty consideration, such adoption is not in and of itself a reason to adopt the rules in California.

For all these reasons, the Commission has concluded that California's need for a thorough revision of the law of evidence cannot be met satisfactorily by adoption of the Uniform Rules of Evidence.

The Evidence Code

A new Evidence Code is recommended instead of a revision of Part IV of the Code of Civil Procedure for several reasons. Mechanically, it would be difficult to include a revision of the rules of evidence in Part IV of the Code of Civil Procedure because much of Part IV does not concern evidence at all.¹ Logically, the rules of evidence do not belong in the Code of Civil Procedure because these rules are concerned equally with criminal and civil procedure. But the most important consideration underlying the recommendation that a new code be enacted is the desirability of having the rules of evidence available in a separate volume that will be, in effect, an official handbook of the law of evidence--a kind of evidence bible for busy trial judges and lawyers.

The Evidence Code recommended by the Commission contains provisions relating to every area of the law of evidence. In this respect, it is more comprehensive than either the Uniform Rules of Evidence or Part IV of the Code of Civil Procedure. The code will not, however, stifle all court development of the law of evidence. In some instances--the Privileges division, for example--the code to a considerable extent precludes further development of the law except by legislation. But, in other instances, the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts

¹ Part IV includes, for example, provisions relating to the safekeeping of official documents, provisions requiring public officials to furnish copies of official documents, provisions creating procedures for establishing the content of destroyed records, provisions on the substantive effect of seals, and the like. By placing the revision of the law of evidence in a new code, the immediate need to recodify these sections is obviated. Of course, the remainder of Part IV should be reorganized and recodified. But such a recodification is not a necessary part of a revision and recodification of the law of evidence.

to work toward greater admissibility of evidence but does not permit the courts to develop additional exclusionary rules. Of course, the code neither limits nor defines the extent of the exclusionary evidence rules contained in the California and United States Constitutions. The meaning and scope of the rules of evidence that are based on constitutional principles will continue to be developed by the courts.

The proposed Evidence Code is to a large extent a restatement of existing California statutory and decisional law. The code makes some significant changes in the law, but its principal effect will be to substitute a clear, authoritative, systematic, and internally consistent statement of the existing law for a mass of conflicting and inaccurate statutes and the myriad decisions attempting to make sense out of and to fill in the gaps in the existing statutory scheme.

The proposed Evidence Code is divided into 11 divisions, each of which deals comprehensively with a particular evidentiary subject. Several divisions

are subdivided into chapters and articles where the complexity of the particular subject requires such further subdivision in the interest of clarity. Thus, for example, each individual privilege is covered by a separate article. A Comment follows each provision

of the proposed legislation set out herein to explain in some detail the reason for the inclusion of each section in the Evidence Code and the reasons underlying any recommended changes in the law of California. The format of the code and its overall impact on existing law are discussed below.

Division 1 - Preliminary Provisions and Construction. Division 1 contains certain preliminary provisions that are usually found at the beginning of the modern California codes. Its most significant provision is the one prescribing the effective date of the code--January 1, 1967. This delayed effective date will provide ample opportunity for the lawyers and judges of California to become familiar with the code before they are required to use it in practice.

Division 2 - Words and Phrases Defined. Division 2 contains the definitions that are used throughout the code. Definitions that are used in only a single division, chapter, article, or section are placed in the particular part of the code where the definition is used.

Division 3 - General Provisions. Division 3 contains certain general provisions governing the admissibility of evidence. It declares the

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admissibility of relevant evidence and the inadmissibility of irrelevant evidence. It sets forth in some detail the functions of the judge and jury. It states the power of the judge to exclude evidence because of its prejudicial effect or lack of substantial probative value. The division is, for the most part, a codification of existing law. Section 402 makes a significant change, however: It provides that exclusionary rules of evidence, except privileges, do not apply when the judge is determining the admissibility of evidence.

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Division 4--Judicial Notice. Division 4 covers the subject of judicial notice. It makes minor revisions in the matters that are subject to judicial notice. For example, city ordinances may be noticed under the code while, generally speaking, they may not be noticed under existing law. But the principal impact of Division 4 on the existing law is procedural. Thus, the division specifies some matters that the judge is required to judicially notice, whether requested to or not--for example, California, sister-state, and federal law. It specifies other matters that the judge may notice; but he is not required to take judicial notice of any of these matters unless he is requested to do so and is provided with sufficient information to determine the matter. The division also guarantees the parties reasonable notice and an opportunity to be heard before judicial notice may be taken of any matter that is of substantial consequence to the determination of the action.

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Division 5--Burden of Proof, Burden of Producing Evidence, and Presumptions. Division 5 deals with the burden of proof, the burden of producing evidence, and presumptions. It makes one significant change: Section 600 abolishes the much-criticized rule that a presumption is evidence. The division

also provides that some presumptions affect the burden of proof while others affect only the burden of producing evidence. Under existing law, presumptions also have these effects; but Division 5 classifies a large number of presumptions as having one effect or the other and establishes certain criteria by which the courts may classify any presumptions not classified by statute.

Division 6 - Witnesses. Division 6 relates to witnesses and makes several significant changes in the existing law. The Evidence Code contains no provision that disqualifies a juror from giving evidence concerning jury misconduct while, under existing law, a juror may give such evidence only when the misconduct consists of the making of a chance verdict or the giving of false answers on voir dire. There is no Dead Man Statute in the code. A party is permitted to attack the credibility of his own witness without showing either surprise or damage. The nature of a criminal conviction that may be shown to impeach a witness has been substantially changed.

There are also several minor revisions of existing law that, while important, will have less effect on the manner in which cases are tried. For example, the conditions under which a judge or juror can testify have been revised, and the foundational requirements for the introduction of a witness' inconsistent statement have been modified.

Despite these changes, the bulk of Division 6 is a recodification of well-recognized rules and principles of existing law.

Division 7 - Opinion Testimony and Scientific Evidence. Division 7 sets forth the conditions under which opinion testimony may be received from both lay and expert witnesses. The division restates existing law with but one significant change. If an expert witness has based his opinion in part upon a statement of some other person, Section 804 permits the adverse

party to call the person whose statement was relied on and examine him as if under cross-examination concerning the subject matter of his statement.

Division 8--Privileges. Division 8 covers the subject of privileges and, unlike most of the other provisions of the code, applies to all proceedings where testimony can be compelled to be given--not just judicial proceedings. The Division makes some major substantive changes in the law. For example, a new privilege is recognized for confidential communications made to psychotherapists; and, although the privilege of a married person not to testify against his spouse is continued, the privilege of a spouse to prevent the other spouse from testifying against him is not. But the principal effect of the division is to clarify--rather than to change--existing law. The division spells out in five chapters, one of which is divided into 11 articles, a great many rules that can now be discovered, if at all, only after the most painstaking research. These provisions make clear for the first time in California law the extent to which doctrines that have developed in regard to one privilege are applicable to other privileges.

Division 9--Evidence Affected or Excluded by Extrinsic Policies. Division 9 codifies several exclusionary rules that are recognized in existing statutory or decisional law. These rules are based on considerations of public policy without regard to the reliability of the evidence involved. The division states, for example, the rules excluding evidence of liability insurance and evidence of subsequent repairs. The rules indicating when evidence of character may be used to prove conduct also are stated in this division. The division expands the existing rule excluding evidence of settlement offers to exclude also admissions made in the course of settlement negotiations.

Division 10 - Hearsay Evidence. Division 10 sets forth the hearsay rule and its exceptions. The exceptions are, for the most part, recognized in existing law. A few existing exceptions, however, are substantially broadened. For example, the former testimony exception in the Evidence Code does not require identity of parties as does the existing exception. Dying declarations are made admissible in both civil and criminal proceedings. A few new exceptions are also created, such as an exception for a decedent's admissions in an action for his wrongful death and an exception for prior inconsistent statements of a witness. The division permits impeachment of a hearsay declarant by prior inconsistent statements without the foundational requirement of providing the declarant with an opportunity to explain. The division also permits a party to call a hearsay declarant to the stand (if he can find him) and treat him in effect as an adverse witness, i.e., examine him as if under cross-examination.

Division 11 - Writings. Division 11 collects a variety of rules relating to writings. It defines the process of authenticating documents and spells out the procedure for doing so. The division substantially simplifies the procedure for proving official records and authenticating copies, particularly for out-of-state records. The best evidence rule appears in this division; and there are collected here several statutes providing special procedures for proving the contents of certain writings with copies. For the most part, the division restates the existing California law.

Thus, the bulk of the Evidence Code is existing California law that has been drafted and organized so that it is easy to find and to understand. There

are some major changes in the law, but in each case the change has been recommended only after a careful weighing of the need for the evidence against the policy to be served by its exclusion.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure: