

Date of Meeting: May 16-17, 1958

Date of Memo: May 9, 1958

Memorandum No. 8

Subject: Study No. 34(L) - Uniform Rules of Evidence

Professor Chadbourn will be with us on Friday, May 17 for a further discussion of the Uniform Rules of Evidence.

I suggest that we plan to discuss the following:

1. New matter - Professor Chadbourn's memoranda on Rules 20, 21 and 22, Rule 65, and Rule 66. (These memoranda have been sent to you.)
2. Old matter - The following subdivisions of Rule 63:
 - 31 (We have sent you material received from the State Bar relating to this matter);
 - 6 (If Mr. Gustafson's memorandum has been received);
 - 15 and 16 (If the Staff memorandum is completed in time - which is doubtful as of this date)
3. Whether we should not, during the next few months, make completion of our work on Rule 63 and related Rules the first (though not only) order of business on the Uniform Rules of Evidence study. This would necessitate our taking the leadership in discussing and resolving differences of opinion with the State Bar Committee and trying to get action by the Board of Governors so that we would have the State Bar position in mind in taking final action. I will state at the meeting my reasons for believing that this should be done. I will send you shortly, as background material for this discussion, a summary of our current situation, vis-a-vis the two Sections of the State Bar Committee, on the work upon which we have been jointly and severally engaged to date.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:imh

May 14, 1958

SUMMARY OF ACTION TAKEN ON VARIOUS
OF THE UNIFORM RULES OF EVIDENCE
BY LAW REVISION COMMISSION AND
NORTHERN AND SOUTHERN SECTIONS
OF STATE BAR COMMITTEE TO STUDY
UNIFORM RULES OF EVIDENCE.

Rule 19

1. As proposed:

Prerequisites of Knowledge and Experience.

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

2. Action of Commission:

Has not considered Rule itself. In connection with consideration of opening paragraph of Rule 63, proposed to add following paragraph to Rule 19:

As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

3. Action Northern Section:

Approved first two sentences. Disapproved last two sentences. Did not consider amendment proposed by Commission.

4. Action Southern Section:

Considered preliminarily and referred to Messrs. Patton and Selvin for redraft.

Rule 20

1. As proposed:

Evidence Generally Affecting Credibility.
Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

2. Action of Commission:

Not yet considered.

3. Action Northern Section:

Found rule acceptable in principle except for inclusion of words "or supporting"; would limit supporting evidence to cases where credibility has been attacked. Referred Rule 20 to Mr. Baker to draft an amendment or a separate rule to cover admissibility of evidence to support the credibility of a witness.

4. Action Southern Section:

Not yet considered.

Rule 21

1. As proposed:

Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

2. Action of Commission:

Not yet considered.

3. Action Northern Section:

Proposed following as substitute for first sentence:

Evidence of the conviction of a witness of a misdemeanor, or of a felony not involving dishonesty or false statement, shall be inadmissible for the purpose of impairing his credibility.

Made several suggestions for changes in second sentence; referred to Mr. Baker to draft revision.

4. Action Southern Section:

Not yet considered.

Rule 22

1. As proposed:

Further Limitations on Admissibility of Evidence Affecting Credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

2. Action of Commission:

Not yet considered.

3. Action Northern Section:

Approved (a) by divided vote.

Concluded subdivision (b) unclear and referred to Mr. Baker to redraft for clarification.

Approved subdivision (c) with amendment to insert "reputation for" after "than".

Approved subdivision (d).

4. Action Southern Section:

Not yet considered.

Subdivision (1) Rule 62

1. As proposed:

Rule 62. Definitions. As used in Rule 63 and its exceptions and in the following rules,
(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

2. Action of Commission:

Approved.

3. Action Northern Section:

Not yet considered.

4. Action Southern Section:

Suggested that Rules should contain affirmative statements (1) that a statement not offered to prove the truth of the matter asserted therein is not excluded as hearsay; (2) that evidence of nonassertive conduct is admissible. Messrs. Kaus and Selvin will redraft 62(1).

Rule 63

1. As proposed:

Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

2. Action of Commission:

Approved but in connection therewith recommended following addition to Rule 19:

[Same as one set forth on page entitled
"Rule 19"]

3. Action Northern Section:

Approved Rule; did not act upon proposed addition to Rule 19.

4. Action Southern Section:

Approved Rule; rejected Commission's proposed addition to Rule 19.

Subdivision (1), Rule 63

1. As proposed:

(1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

2. Action of Commission:

Proposed substitute, to read:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further:

- (a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
- (b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or
- (c) The statement concerns a matter as to which the witness has no present recollection.

3. Action Northern Section:

Approved Commission substitute with exception of subdivision (c) thereof, which would redraft to read:

- (c) The statement concerns a matter as to which the witness has no present recollection, and the statement is evidenced by a written memorandum which (1) was made by the witness, himself or under his direction,

(ii) was made at a time when the facts recorded in the memorandum actually occurred or at such other time when the facts recorded in the memorandum were fresh in the witness's memory, (iii) is verified by the witness as having been true and correct when made.

4. Action Southern Section:

Approved Commission's (a); but does not necessarily approve Rule 22.

Approved Commission's (b) with addition after "fabricated" of following: "or when his testimony has been impeached by evidence of a prior inconsistent statement".

Recommended following modification of Northern Section's proposed substitute for Commission's (c):

- (c) The statement is written or otherwise mechanically recorded and concerns a matter as to which the witness has no present recollection, and the statement is evidenced by a written memorandum which (i) was made or recorded by the witness himself or under his direction, (ii) was made at a time when the facts recorded in the memorandum actually occurred or at such other time when the facts recorded in the memorandum were fresh in the witness's memory, (iii) is verified by the witness as having been true and correct when made.

Subdivision (2), Rule 63

1. As proposed:

(2) Affidavits. Affidavits to the extent admissible by the statutes of this state;

2. Action of Commission:

Proposed following substitute:

(2) To the extent otherwise admissible by the statutes of this State:
(a) Affidavits.
(b) Depositions.
(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

3. Action Northern Section:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed new subdivision 2.1:

To the extent admissible by the statutes of this State:

(a) Depositions taken in the action in which they are offered.

(b) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

4. Action Southern Section:

Concurred in action of Northern Section.

Subdivision (3), Rule 63

1. As proposed:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

2. Action of Commission:

Proposed following as substitute (part of substance having been incorporated in Commission substitute for Subdivision (2)):

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

- (a) The testimony is offered against a party who offered it in his own behalf on the former occasion or against the successor in interest of such party, or
- (b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

- (c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

3. Action Northern Section:

Proposed following as substitute (part of substance having been incorporated in Subdivision 2.1 proposed by Section):

(3) Depositions and Prior Testimony in Another Action. Subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action, providing the judge finds that the declarant is unavailable as a witness at the hearing, and when:

- (i) such testimony is offered against a party who offered it on his behalf in the other action, or against the successor in interest of such party, or
- (ii) in a civil action, the issue is such that the adverse party in the other action had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or
- (iii) in a criminal action, the present defendant was a party to the other action and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action in which the testimony is offered. However, testimony given at a preliminary hearing in the other action is not admissible.

4. Action Southern Section:

Approved Northern Section substitute with modifications as shown:

(3) Depositions and Prior Testimony in Another Action. Subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another ~~action~~ judicial proceeding, or in a deposition taken in compliance with law in another ~~action~~ judicial proceeding, provided the judge finds that the declarant is unavailable as a witness at the hearing, and when:

- (i) such testimony is offered against a party who offered it in evidence on his own behalf in the other ~~action~~ proceeding or against the successor in interest of such party but only to the same extent and for the same purpose for which it was offered in the other proceeding, or
- (ii) in a civil action, the issue is such that the adverse party in the other ~~action~~ proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the ~~action~~ proceeding in which the testimony is offered, or
- (iii) in a criminal ~~action~~ proceeding the present defendant was a party to the other ~~action~~ proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the ~~action~~ proceeding in which the testimony is offered; however, testimony given at a preliminary hearing in the other ~~action~~ proceeding is not admissible.

Subdivision (4), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modifications as shown:

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the judge finds that the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

3. Action Northern Section:

Approved (a) with two modifications: (1) add "spontaneously" after "made"; (2) admit only if witness is unavailable.

Approved (b) if limited to cases where witness is unavailable.

Disapproved (c).

4. Action Southern Section:

Not yet considered.

Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

3. Action Northern Section:

Concurred in Commission action.

4. Action Southern Section:

Not yet considered.

Subdivision (7), Rule 63

1. As proposed:

(7) Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved tentatively but inclines to view that "and if the latter, who was acting in such representative capacity in making the statement" should be stricken. Mr. Erskine to make further report on desirability of including this language.

4. Action Southern Section:

Approved.

Subdivision (8), Rule 63

1. As proposed:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Re 8(a): Approved as amended. / No record of amendment presently available. /

Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

3. Action Northern Section:

Approved (a).

Disapproved (b) and proposed, in lieu thereof, the following as subdivision 9.1:

9.1 After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

Approved (c) as amended by Commission.

4. Action Southern Section:

Approved (a).

Deferred final action on (b).

Approved (c) as amended by Commission.

Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action Northern Section:

By divided vote concurred in Commission action except:

- (1) would eliminate "or created such risk of making him an object of hatred, ridicule or social disapproval in the community"
- (2) would require declarant to have personal knowledge.

4. Action Southern Section:

Not yet considered.

Subdivision (11), Rule 63

1. As proposed:

(11) Voter's Statements. A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

2. Action of Commission:

Disapproved.

3. Action Northern Section:

Not yet considered.

4. Action Southern Section:

Not yet considered.

Subdivision (12), Rule 63

1. As proposed:

(12) Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view of treatment, and relevant to an issue of declarant's bodily condition;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a).

Approved (b) if limited to unavailable witness; recommends there be separate rule re available witness which would permit such statements to come in only as foundation for opinion testimony of doctor and not as substantive evidence and which would not incorporate a bad faith limitation.

4. Action Southern Section:

Not yet considered.

Subdivision (13), Rule 63

1. As proposed:

(13) Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

Subdivision (14), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(14) Absence of Entry in Business Records.
Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

3. Action Northern Section:

Concurred in Commission action.

4. Action Southern Section:

Not yet considered.

Subdivision (15), Rule 63

1: As proposed:

(15) Reports and Findings of Public Officials.
Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions 15 and 16 which will embody the substance of C.C.P. §1920.

3. Action Northern Section:

Disapproved; will consider Commission redraft.

4. Action Southern Section:

Not yet considered.

Subdivision (16), Rule 63

1. As proposed:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions (15) and (16) which will embody the substance of C.C.P. §1920.

3. Action Northern Section:

Approved tentatively; will consider new subdivision to be prepared by Commission.

4. Action Southern Section:

Not yet considered.

Subdivision (17), Rule 63

1. As proposed:

(17) Content of Official Record. Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved on understanding that Rule 68 will be amended as proposed by Professor Chadbourn (Re latter, believes amendment to Rule 68(d) should read "and is not an office of the United States Government".)

4. Action Southern Section:

Not yet considered.

Subdivision (18), Rule 63

1. As proposed:

(18) Certificate of Marriage. Subject to Rule 64 certifies that the maker thereof performed a marriage ceremony to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

2. Action of Commission:

Approved.

3. Action Northern Section:

Proposes following as substitute:

(18) Certificate of Marriage. Subject to Rules 64 and 67, a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

- (a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies, and
- (b) the certificate was issued at that time or within a reasonable time thereafter.

4. Action Southern Section:

Not yet considered.

Subdivision (19), Rule 63

1. As proposed:

(19) Records of Documents Affecting an Interest in Property. Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

(20) Judgment of Previous Conviction.
Evidence of a final judgment adjudging a
person guilty of a felony to prove, against
such person, any fact essential to sustain
the judgment;

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

Subdivision (21), Rule 63

1. As proposed:

(21) Judgment against Persons Entitled to Indemnity. To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

2. Action of Commission:

Approved (as making admissible; not as creating presumption).

3. Action Northern Section:

Not yet considered.

4. Action Southern Section:

Not yet considered.

Subdivision (22), Rule 63

1. As proposed:

(22) Judgment Determining Public Interest in Land. To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

2. Action of Commission:

Approved (as making admissible; not as creating presumption).

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

Subdivision (23), Rule 63

1. As proposed:

(23) Statement Concerning One's Own Family History. A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved.

4. Action Southern Section:

Not yet considered.

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another. A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

2. Action of Commission:

Approved with following punctuation changes in clause (a) to make clear that clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage: (1) inserted comma after "marriage"; (2) deleted comma after "declared".

3. Action Northern Section:

Approved (without consideration of punctuation changes proposed by Commission).

4. Action Southern Section:

Not yet considered.

Subdivision (25), Rule 63

1. As proposed:

(25) Statement Concerning Family History Based on Statement of Another Declarant. A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

2. Action of Commission:

Approved.

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

Subdivision (26), Rule 63

1. As proposed:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved on understanding relates to statements of witness on stand, not statements of out-of-court declarant.

4. Action Southern Section:

Not yet considered.

Subdivision (27), Rule 63

1. As proposed:

(27) Reputation--Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

2. Action of Commission:

Approved.

3. Action Northern Section:

(a) and (b) not yet considered.

Approved (c) with elimination of "or of his personal status or condition".

4. Action Southern Section:

Not yet considered.

Subdivision (28), Rule 63

1. As proposed:

(28) Reputation as to Character. If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

2. Action of Commission:

Approved with addition of "a person's character or" after "If".

3. Action Northern Section:

Approved as amended by Commission and with further amendment to add "general" before "reputation".

4. Action Southern Section:

Not yet considered.

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with amendment as shown:

(29) Recitals in Documents Affecting Property.
Evidence of a statement relevant to a material matter: (a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or (b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness;

3. Action Northern Section:

Approved objectives; believes should be made subject to Rule 64 and that should be amended to include the ancient document rule as recommended by Commission. Final action postponed pending receipt of Commission redraft [not before Section when action taken].

4. Action Southern Section:

Not yet considered.

Subdivision (30), Rule 63

1. As proposed:

(30) Commercial Lists and the Like.

Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

2. Action of Commission:

Approved.

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

Subdivision (31), Rule 63

1. As proposed:

(31) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

2. Action of Commission:

Discussed but did not take final action.

3. Action Northern Section:

Disapproved.

4. Action Southern Section:

Not yet considered.

Rule 68

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

RULE 68. Authentication of Copies of Records. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state or is an office of the United States government whether within or without this state, and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, or is not an office of the United States government, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular

agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

3. Action Northern Section:

Concurred in Commission action except would make first word in underlined part of (d) "and" instead of "or".

4. Action Southern Section:

Not yet considered.