8/16/63

Memorandum No. 63-41

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article I. General Provisions)

YOu will receive with this memorandum a study on the preliminary provisions of the URE. This study is a consolidation of several memoranda prepared by Professor Chadbourn on these general provisions. Discussion of some of the general provisions appears also in other studies which you have. For example, Rule 1(1) is discussed in the study on presumptions at pages 56-59. Where such other studies are pertinent they will be referred to in the body of this memorandum.

RULE 1

Rule 1 consists of definitions used in the URE.

Subdivision (1). The word "evidence" that is defined by subdivision (1) appears in the following rules in the URE: Rules 2, 3, 4, 5, 6, 7, 8, 10, 14, 19, 20,,21, 22, Revised Rules 22.3, 24, 25, 27.5, 28, 36.5, 38, 39 URE Rules 41, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, Revised Rules 63, 63(1), 63(3), 63(9), 63(14), 63(21.1), 63(22), 63(26), 63(27), 63(28), 63(32), 65, 66, 66.1, URE Rules 67, 68, and 70.

Professor Chadbourn points out that there is an existing definition of "evidence" in the Code of Civil Procedure. The study on page 6 and on pages 11 and 12 sets forth several sections defining different kinds of evidence. So far as the basic definition is concerned, the URE definition seems superior because it does not require that the evidence be "sanctioned by law" as is required by the existing statutory definition. A reference to the rules in which the definition appears indicates that the word is frequently used to mean matters that are inadmissible and, therefore, are not

"sanctioned by law". Hence, it would appear to be necessary to accept the URE definition of the word.

On pages 56-59 of the presumptions study, Professor Chadbourn points out, and in the comment to Rule 1 the Uniform Law Commissioners point out, that Rule 1 subdivision (1) means "that presumptions are not evidence". Thus, Rule 1 subdivision (1) will make a substantial change in the existing California law of presumptions. If Rule 1 is adopted, not only should Section 1823 be repealed, but Section 1957 should be repealed also. Section 1957 of the Code of Civil Procedure provides:

> 1957. Indirect evidence is of two kinds:
> 1. Inferences; and
> 2. Presumptions.

You may wish to defer approval of the definition of "evidence" until the presumptions study is considered. It would, however, be possible to adopt the definition as a working definition for the purposes of the URE and to discuss presumptions in terms of their actual function--that is, give consideration to whether a presumption should shift the burden of proof or the burden of producing evidence or should perform some other function in a trial.

If the definition of "evidence" is approved, the Commission should consider the statutes set forth in pages 11 and 12 of the study and decide whether they should be repealed or not. Professor Chadbourn recommends their repeal as superfluous.

Subdivision (2). References to "relevant evidence" appear in Rules 3, 6, and 8 (the reference in 8 is to "evidence relevant . . ."). In the revised rules on privileges the word "relevant" is used many times to describe particular communications, but the defined term "relevant evidence"

is not used.

Subdivision (3). The word "proof" appears in several places in Rule 1 and also in Rules 8, 16, Revised Rules 28.5, and 63(9).

Professor Chadbourn indicates that the definition is virtually indistinguishable from the analagous provision in Code of Civil Procedure Section 1824. He therefore suggests the approval of this definition.

Subdivisions (4) and (5). Professor Chadbourn suggests deferring consideration of these definitions until the study on presumptions is considered. However, the terms are not used in that article except in Rule 16. Rule 16 uses only the term "burden of proof". "Burden of proof" also appears in Rule 8, and Revised Rule 28.5 (placing burden of proof to show nonconfidentiality on person opposing claim of privilege). "Burden of producing evidence" is also used in Rule 8. No other reference to it has been found. The staff believes that it would be desirable to approve the definitions at this time so that the defined terms may be used where pertinent without confusion as to their meaning. For example, we have used the term "burden of proof" in Revised Rule 28.5 in its defined sense. We may find other occasions to use either of these terms.

Subdivision (6). There are apparently no problems in connection with this definition. We have found the following references to the defined term: Rule 22, Revised Rule 27, URE Rules 41, 46, 47, 48, 51, Revised Rules 62(1), 63(12), and 65.

Subdivision (7). No problems are apparent in connection with this definition. The term is used in Rule 3, Revised Rules 62, 63, 63(1), 63(3), 63(3.1), 63(5), 63(9), and Rule 70.

Subdivision (8). We have found no references to "finding of fact" except in Revised Rules 34 and 36 where the term has been used in subdivisions authored by the Commission. Throughout the URE, there are many references to "finding". For example, see Rules 4, 5, 50, 56, 67, 68, and 69. The definition in subdivision (8) should be amended to indicate that "finding" means the same as "finding of fact" or the references to "finding" in the URE should be changed so that the defined term is used.

Subdivision (9). Professor Chadbourn suggests that the term "guardian" be amended to include a "conservator" although the definition is broad enough to include a conservator anyway. He suggests that the amendment would clarify the matter. The term is used principally in the privileges article where the Commission has used the terms "guardian" and "conservator". See Revised Rules 26, 27, 27.5, and 28.

Subdivision (10). No problems are apparent in regard to this definition. It appears throughout the URE in virtually every rule. We have found the following references: Rules 5, 6, 8, 9, 10, 11, 12, 15, 17, 19, 22, Revised Rules 23, 25, 34, 36, 36.5, 39, 42, 45, 47, 56, 57, 58, 59, 60, 61, Revised Rules 62, 63(3), 63(3.1), 63(4), 63(5), 63(6), 63(9), 63(10), 63(12), 63(13), 63(14), 63(15), 63(16), 63(18), 63(19), 63(23), 63(24), 63(27), 63(27.1), 63(29), 63(30), URE Rules 67, 68, and 70.

Subdivision 11. No problems are apparent in connection with this definition. We have used the term in its defined sense in connection with our revisions of these rules. We have found the following references to the term: Rules 11, 12, 19, Revised Rules 23, 25, 39, URE Rules 56, 61, and 70.

Subdivision (12). Again we know of no problems in connection with this definition. The only reference to the term that we have found in the URE is in Revised Rule 62 where it is used in the form "non-verbal".

Subdivision (13). The defined term is used in Rule 22, Revised Rules 26, 27, 27.5, 63(1), 63(13), 63(15), 63(16), 63(17), 63(29), 63(29.1), URE Rules 67, 68, 69, 70, 71, and 72.

Professor Chadbourn points out that the definition in subdivision (13) is considerably broader than the comparable definition in Section 17 of the Code of Civil Procedure. He suggests, therefore, that the comparable definition in Code of Civil Procedure Section 17 be deleted. See pages 9 and 10 of the study.

Definitions Not in Rule 1. Professor Chadbourn suggests the repeal of several sections set forth on pages 10 through 13 of the study. The staff recommends that action upon these sections be deferred until we have received a study on the disposition of the remaining sections of Part IV of the Code of Civil Procedure that are not superseded by URE provisions. Repeal of these sections, however, should be considered to the extent that they touch upon the same matters that are defined in the URE.

RULE 2

Professor Chadbourn points out no problems in regard to Rule 2. He suggests that section 2103 of the Code of Civil Procedure be repealed as superfluous if Rule 2 is approved. It provides:

> The provisions contained in this part of the code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

In view of the action taken by the Commission in regard to privileges the exception expressed at the beginning of Rule 2 might be worded "except as otherwise provided by statute . . . ." This reference would pick up not only those rules and statutes relaxing the rules of evidence but also those rules and statutes extending their applicability.

During the consideration of the URE, we have been concerned on repeated occasions with the meaning of a proceeding "conducted by or under the supervision of a court." The question is whether these rules apply in grand jury proceedings--since a grand jury is regarded as an arm of the Superior Court--and in administrative proceedings--since they are reviewed (and, hence, supervised) by a court. Statewide administrative agencies granted adjudicatory power by the Constitution have been held to be exercising judicial power (so that their proceedings can be reviewed by certiorari instead of mandamus). The staff suggests that the language be amended so that it applies only to the Supreme Court, the District Courts of Appeal, the Superior, Municipal and Justice Courts, and only to proceedings in those courts conducted by a judge or referee or similar officer.

RULE 3

Please refer to the study on pages 16 to 21. The discussion there will not be repeated here. This rule permits the judge to admit evidence which, but for the rule, would be inadmissible. Professor Chadbourn recommends that the rule be amended so that it applies only in civil actions or proceedings.

RULES 4 and 5

Rule 4 provides that verdicts or findings may not be set aside and judgments may not be reversed for the erroneous admission of evidence unless a timely objection was made, so stated as to make clear the specific ground of objection, and the error was prejudicial. Rule 5 similarly provides that verdicts or findings may not be set aside and judgments may not be reversed for the erroneous exclusion of evidence unless an appropriate offer of proof has been made and the error was prejudicial. Professor Chadbourn concludes that these rules are declarative of existing law. See the study on pages pages 22 and 23. However, he does not recommend approval of the rules because the existing constitutional and statutory law seems adequate.

The Constitution and the code sections cited appear to state the doctrine of prejudicial error sufficiently, but they do not set forth the rules requiring specific objection and offer of proof. Hence, it might be desirable to approve these rules to provide a specific statutory basis for these doctrines.

RULE 6

Rule 6 is also declarative of the existing law. Professor Chadbourn recommends its approval to give express statutory recognition to the doctrine.

Under existing law, and under URE Rule 45, the judge would be permitted to exclude such evidence if he deemed it so prejudicial that a limiting instruction would not protect a party adequately and the matter that the evidence is admissible to prove can be proved sufficiently by other evidence.

RULE 7

Rule 7 is dicusssed on pages 25-28 of the study. It is also discussed on pages 407 and 408 of the hearsay study, and pages 1 and 2 of the privileges study.

The purpose of Rule 7 is to wipe the slate clean of all disqualifications of witnesses, privileges and other limitations on the admissibility of relevant evidence. Rule 7 permits the remainder of the URE to be given full effect.

Professor Chadbourn recommends that the preliminary language of Rule 7 be modified to read:

> Except as otherwise provided in these rules or by other law of this state . . . .

See page 26 of the study. The reason for the suggested change is that there are many existing statutes restricting the admissibility of relevant evidence the effect of which should be preserved. For example, there are many statutory privileges. These relate generally to official information and their effect would be preserved by Revised Rule 34's reference to existing statutes; but Professor Chadbourn believes it desirable to indicate their

continued validity here. Then, too, there is the motor vehicle speed trap law, and there are other laws making specific items of evidence inadmissible under certain circumstances. The validity of these laws should be retained; hence, Rule 7 should be amended to indicate that they remain unimpaired. Rule 7's effect, then, would be to wipe the slate clean of all judicially created rules restricting the admissibility of relevant evidence.

If the policy underlying this recommendation is approved, the staff recommends that the preliminary language read:

Except as otherwise provided by statute . . . .

This is the form we have used elsewhere.

The staff, too, recommends this amendment. If it is not made, it will be impossible to determine the law without going to the Supreme Court. The later enacted statute--the URE--may not be deemed to repeal by implication the prior statutes for the reason that the court may believe that the specific controls the general. On the other hand, the court might feel that the last expressed intent of the sovereign governs and the prior statutes have been repealed by implication. Statutory revision should not be undertaken to create uncertainty; therefore, in order to avoid the uncertainty that would be created by the adoption of the Uniform Rules without the suggested modification, the staff recommends with Professor Chadbourn that Rule 7 be amended as indicated.

Rule 7(a) appears to supersede Section 1879 of the Code of Civil Procedure, which provides:

> All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in Section 1847.

Should Section 1879 be repealed?

Section 2065 of the Code of Civil Procedure reads as follows:

> A witness must answer questions legal and pertinent to the matter is issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based on a certificate of rehabilitation.

In the recommendation relating to privileges we have recommended the deletion of the clause reading "but he need not give an answer which will have a tendency to subject him to punishment for a felony." The first clause, "the witness must answer the questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself", appears to have been superseded by Rule 7 . Should the section be amended to delete this clause, too?

RULE 8

Rule 8 provides that the judge rules on preliminary questions of admissibility. Professor Chadbourn points out that later rules--such as the rules on authentication of writings--qualify the proposition stated in Rule 8 by providing that the judge determines those questions only as a prima facie matter. That is, he determines whether there is sufficient evidence to warrant a finding that a document is authentic, but the ultimate question of the genuineness of the document is left for the trier of fact. But, unless a rule requires the judge to determine admissibility upon the basis of a prima facie showing only, Rule 8 requires him to determine the question of admissibility upon the basis of evidence produced by both sides. His determination of the admissibility of the evidence is not subject to redetermination by the jury.

Professor Chadbourn points out that Rule 8 modifies the California practice in some respects. On questions of the admissibility of dying declarations, confessions and spontaneous statements, the California rule is

that the judge's determination is preliminary only. The jury must then determine as an ultimate matter whether the dying declaration was in fact made in contemplation of death and whether the spontaneous statement was in fact spontaneous and whether the confession was in fact voluntary. If their conclusions do not agree with those of the judge, they are to exclude the admitted evidence from their consideration. Under Rule 8, the admission of the evidence is conclusive. They must consider the evidence. Evidence that might bear on its admission under existing law may be considered on the issue of credibility only by the trier of fact under Rule 8.

Professor Chadbourn recommends the adoption of Rule 8. He recommends its modification in one respect. In the discussion in the hearsay study of Rule 63(4), Professor Chadbourn recommends that Rule 8 be amended to provide:

> In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

This language is intended to make the rules of evidence--other than the privilege rules--inapplicable when the judge is conducting a preliminary inquiry in order to determine the admissibility of an item of evidence. In the hearsay study, Professor Chadbourn points out that many spontaneous declarations would be inadmissible if this modification were not made and the formal rules of evidence applied to the preliminary inquiry. For example, if witness W hears X shout "help, I'm falling down the stairs", the statement is admissible only if the judge finds that X was actually falling down the stairs while the statement was made. The only evidence that he was falling down the stairs at that time, in the absence of eye-witness testimony, is the statement itself. If that statement is inadmissible on the preliminary inquiry, it must be excluded from evidence.

Professor Chadbourn reports that Wigmore states categorically that the rules of evidence do not apply during the preliminary inquiry by the judge. California, however, now follows the rule that the rules of evidence do apply during the preliminary inquiry.

Should Professor Chadbourn's suggested amendment be approved and the California law thus changed?

During our consideration of privileges, we became aware of the fact that subdivision (4)(a) of Revised Rules 26, 27, and 27.5, and subdivision (2)(a) of Rule 28 all provide that the judge must determine whether the confidential communication involved was made for the purpose of planning a crime or fraud "apart from the communication itself".

The staff suggested then that this limitation in these subdivisions is unwise because it creates the implication that the judge may inquire as to the nature of the communication itself in determining the applicability of the privilege or of any other exception thereto. If the rule of (4)(a) is desirable, the better way to express it would be to add an amendment to Rule 8 providing that the judge, in determining the applicability of any privilege or an exception thereto, may not require the revelation of the matter claimed to be privileged.

This suggestion would retain your present policy. It raises, however, the question whether that policy should be changed. Attached to this memorandum as Exhibits I, II and III are the exhibits that were attached to Memorandum 63-34 in regard to privileges. Even if you do not wish to resolve the question presented by Commissioner McDonough's proposal at the present time, the staff suggests that your present policy would be better expressed by the amendment proposed in Exhibit I.

We have noted that the New Jersey Supreme Court Committee on Evidence has eliminated almost, but not quite, all of the phrases appearing in the URE stating "the judge finds that". These phrases are redundant in the light of Rule 8. Should they be eliminated?

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

RULE 8. PRELIMINARY INQUIRY BY JUDGE

When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

The judge may not require disclosure of information claimed to be subject to a privilege in order to determine whether or not such information is privileged.

EXHIBIT II

RULE 37.5 RULING UPON PRIVILEGED COMMUNICATIONS

Whenever a privilege is claimed to refuse to disclose, or to prevent another from disclosing, a communication, the judge shall first attempt to determine whether or not the communication is subject to the claim of privilege as provided in Rule 8 without requiring disclosure of the communication itself. If the judge is unable to decide the question without requiring disclosure of the communication itself, he may require the person from whom the disclosure is sought or the holder of the privilege, or both, to disclose the communication itself out of the presence and hearing of all persons except the holder of the privilege and such other persons as the holder is willing to have present. If the judge determines that the communication is subject to the claim of privilege, neither the judge nor any other person present may ever disclose, without the consent of the holder, what was disclosed in regard to the communication in the course of the proceedings in chambers. A person who makes a disclosure prohibited by this section is guilty of a misdemeanor. Neither a disclosure prohibited by this section nor other evidence obtained as a result of such disclosure is admissible in any action or proceeding.

EXHIBIT III

RULE 37.7. RULING UPON PRIVILEGED COMMUNICATIONS IN NONJUDICIAL PROCEEDINGS

If a privilege is claimed in a proceeding not conducted by a court, whether or not the information sought to be disclosed is subject to the claim of privilege shall be determined without requiring disclosure of the information claimed to be privileged.

No person shall be held in contempt for failure to disclose information claimed to be privileged unless a court has determined that the information sought to be disclosed is not subject to the claim of privilege. In a proceeding brought to compel a person to disclose information claimed to be privileged, or in a proceeding where a person is charged with contempt for failure to disclose information claimed to be privileged, the judge shall determine whether the information is subject to the claim of privilege in accordance with Rule 37.5.

ARTICLE I. GENERAL PROVISIONS

RULE 1. DEFINITIONS.

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion,and hearsay.

(2) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent [or of a sui juris person having a guardian] and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

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

(12) "Verbal" includes both oral and written words.

(13) "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.

RULE 2. SCOPE OF RULES.

Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

RULE 3. EXCLUSIONARY RULES NOT TO APPLY TO UNDISPUTED MATTER.

If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.

RULE 4. EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE.

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

RULE 5. EFFECT OF ERRONEOUS EXCLUSION OF EVIDENCE

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 unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

RULE 6. LIMITED ADMISSIBILITY.

When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

RULE 7. GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES.

Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

RULE 8. PRELIMINARY INQUIRY BY JUDGE.

When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.