

8/16/63

## Memorandum No. 63-43

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

The URE Article on Witnesses consists of six rules, Rules 17-22. These are set out in the attached exhibit (pink pages) for your convenience.

Professor Chadbourn's study of this article is divided into two parts, each of which you will receive with this memorandum. Also included in the study is a separate section dealing with suggested amendments and repeals; pertinent California statutes are set out in this section. Page references herein refer to the applicable portions of the study.

## RULES 17, 18 AND 19

Together with Rule 7 (which removes all disqualifications of witnesses), these rules provide a complete scheme for the qualifications of witnesses. Thus, Rule 7 provides, in part, "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and . . . (c) no person is disqualified to testify to any matter . . . ." With the same effect as Rule 42 (conditional disqualification of presiding judge) and Rule 43 (absolute disqualification of trial juror), Rules 17-19 prescribe conditions of disqualification of witnesses by way of limitation on Rule 7. Hence, Rules 17-19 are rules of competency.

Rule 17

This rule provides that a person is disqualified to be a witness if (a) he is incapable of understandable communication, or (b) he is incapable of understanding the duty to tell the truth. It applies as well to interpreters.

Professor Chadbourn analyzes this rule in terms of requisite standards of mental competence (see Study, pages 2-11) and concludes as follows:

- (1) Insofar as the rule deals with the requisites of communication and an apprehension of the obligation of an oath, the rule preserves the present California law. (See Study, page 11.)
- (2) The mental competence of a witness required under present law also embraces the ability to perceive and to recollect, as evidenced, for example, by specific disqualification for insanity and infancy. Cal. Code Civ. Proc. § 1880(1) and (2). Adoption of the rule, therefore, would abandon these requisites of mental competence insofar as a rule of witness competency is concerned, treating them instead as matters going only to credibility.

Does the Commission approve the principle of Rule 17? Professor Chadbourn notes that, considered alone, this rule's "modification is substantial to the point of becoming ridiculous." (See Study, page 13 (example of blind man's delusion regarding color perception).) Yet, when considered with Rule 19 (stating knowledge requisites; see page 3 infra), the rule is not such a ridiculous departure from present law and, in fact, is in accord with the modern trend of removing disqualifications re competency that properly go to credibility. Accordingly, Professor Chadbourn recommends this rule for adoption.

#### Rule 18

This rule requires a proposed witness to take an oath or affirmation as may be "required by law." This is in accord with the present California law. The present law, however, also provides that a witness "can be heard only in the presence and subject to the examination of all of the parties, if they choose to attend and examine." Cal. Code Civ. Proc. § 1846. Thus, the present law

deals with more than the "oath or affirmation" with which Rule 18 is concerned. It is for this reason that Professor Chadbourn recommends (see the portion of the study on amendments and repeals, page 18) against adoption of Rule 18.

Should Rule 18 be approved? The fact that this rule covers only a part of the matter covered under present law should not deter from its inclusion, with appropriate amendment, in the revised rules. Accordingly, Rule 18 might be preserved with the addition of the following substantive language of Code of Civil Procedure Section 1846: "A witness can testify only in the presence of and subject to the examination by all of the parties, if they choose to attend and examine."

With respect to the language of the rule itself, the following New Jersey revision of the rule is commended to your attention for its simplicity:

Every witness before testifying shall be required to take an oath or make an affirmation or declaration in the form provided by law.

#### Rule 19

This rule deals with requisites of knowledge respecting the matter under investigation. It is in accord with present law in all respects save one: Under Rule 19, "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." While the principle of incredibility is recognized in current law, the power given the trial judge under Rule 19 apparently never has been recognized in California.

Should Rule 19 be approved? As Professor Chadbourn notes, the grant of power to the trial judge to exclude incredible testimony is merely a logical extension of the acknowledged existence of the principle at the appellate level. As such, there is no reason to restrict the principle of evidence being incredible as a matter of law to the appellate level of the judiciary.

Accordingly, approval of the rule in its entirety is recommended by Professor Chadbourn.

With respect to language, the following form suggested by New Jersey should be considered:

**Rule 19. Prerequisites of Personal Knowledge and Experience.**

As a prerequisite for the testimony of a witness there must be evidence that he has personal knowledge of the matter, or experience, training or education, if such be required. Such evidence may be provided 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. In exceptional circumstances the judge may receive the testimony of the witness conditionally, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

**RULES 20, 21 AND 22**

These rules deal with impeachment and support of witnesses. The format basically is that Rule 20 states a broad rule of permissible impeachment and support of witnesses, while Rules 21 and 22 write limitations upon this general proposition.

**Rules 20 and 21**

Rule 20 states the broad proposition that, subject to the limitations in Rules 21 and 22, any party may impeach or support any witness with any evidence relevant upon the issue of the witness' credibility. Rule 21 limits impeachment evidence in the form of prior convictions to convictions for crimes involving "dishonesty or false statement"; the second sentence of the rule further restricts permissible impeachment of a defendant in a criminal case by the prosecution. Rule 20, of course, is subject to the discretionary exclusion power granted the judge by Rule 45. Accordingly, the prime effect of this rule upon current California law would be to transform present mandatory

exclusionary rules (see list of these rules in the Study at 3-4, discussed at length on pages 4-36, and summarized at 36-38) into discretionary power exercised by the judge. Adoption of Rules 20 and 21, therefore, would present the following specific questions:

(1) Should the rule against impeaching one's own witness be abolished? (See Study, pages 4-7.) Present restrictions upon impeachment of one's own witness include surprise and damage; these would be removed under Rule 20.

(2) Should the so-called "collateral matter" limitation on impeachment by specific contradiction be removed? (See Study, pages 8-11.) This restriction, now fraught with ambiguity, would become discretionary under Rule 45.

(3) Should the so-called "collateral matter" limitation on impeachment by self-contradiction be removed? (See Study, page 12.)

(4) Should the foundation requirement limitation on impeachment by self-contradiction be removed? (See Study, pages 12-17; see also the Commission's Tentative Recommendation Relating to Hearsay Evidence, Rule 65, pages 569-575.) This limitation is twofold in requiring (a) that a witness be afforded the opportunity to deny, or to admit and explain, any inconsistencies, and (b) that inconsistent statements in writing be shown to the witness, before a witness may be impeached. Under Rule 20, these foundation requirements would be discretionary only. (See also Rule 22(a) and (b) and Rule 45.)

(5) Should permissible character evidence for impeachment purposes include reputation, opinion and certain criminal convictions? (See Study, pages 18-29.) Character for impeachment purposes involves traits of "honesty or veracity or their opposites" under the Uniform Rules and traits of "truth, honesty, or integrity" under the present law. Reputation evidence as to these traits is

admissible under the present law; this is preserved under the Uniform Rules. Opinion evidence as to these traits is inadmissible under present law; it would be admissible under the Uniform Rules. (Note, however, that exclusion of opinion evidence under present law is more theory than fact. Thus, questions framed in terms of reputation but calling in fact for opinion are proper and admissible.) With respect to convictions for crime, the present law permits impeachment by showing conviction of any felony (unless lesser punishment imposed or unless pardoned) but not a misdemeanor (even if specifically relating to traits of honesty, veracity, and the like). (See specific examples of the present law in the Study at 21-23.) Conviction of a crime (whether felony or misdemeanor) involving only the traits of "dishonesty or false statement" would be permitted for impeachment purposes under the Uniform Rules. (Rule 21.)

(6) Should it be permissible to prove a criminal conviction by examination of the witness to be impeached? (See Study, pages 23-26.) Professor Chadbourn notes (see Study, pages 23-26) a procedural problem involved in the proof of conviction itself and recommends amending Rule 21 to incorporate the substance of a commendable suggestion offered by the State Bar Committee on the Administration of Justice. The text of the proposal is as follows:

The conviction of a witness for a crime not involving dishonesty or false statement shall not be shown for the purpose of impairing his credibility. Except as hereinafter provided in this Rule, the conviction of a witness for a crime involving dishonesty or false statement may be shown for the purpose of impairing his credibility by examination of the witness or the record of the judgment, if the party proposing to examine the witness or to offer the record has satisfied the court in proceedings had outside the presence of the jury (1) that the crime in question involves dishonesty or false statement and (2) that competent evidence of the record of conviction is in the possession of such party or can be procured, if required.

(7) Should the defendant in a criminal case be given a preferred position regarding impeachment by conviction of crime as is afforded by Rule 21, second sentence? (See Study, pages 26-29.) The rationale in support of the preferred position is the dilemma faced by the defendant in regard to "priors." Under the revised privilege rules, failure to take the stand would not result in the adverse inferences mentioned in the Study, page 27. Notwithstanding this protection, however, it is the policy of the Uniform Rule to encourage criminal defendants to take the stand; Rule 21, second sentence, seeks to accomplish this purpose by making impeachment evidence inadmissible until evidence in support of credibility is introduced. (If this principle is approved, references to "accused" should be changed to "defendant.")

(8) Should the foundation requirement now limiting impeachment by evidence of bias be removed? (See Study, pages 28-29.)

(9) Should the cross-examination limitation on impeachment for "mental disease or mental derangement" be eliminated? (See Study, pages 30-33.) Though arguably not the case (see Study, pages 30-31), impeachment on this ground seems limited to cross-examination under present law. Under the Uniform Rules, of course, impeachment may be by any evidence, including extrinsic evidence, relevant to the issue of credibility and not specifically excluded.

(10) Should the rule precluding support of a witness until an attack is made on credibility be abolished? (See Study, pages 33-35.) As with the admissibility of impeachment evidence, admissibility of supporting evidence is discretionary with the judge under the Uniform Rules; Rule 20 makes no distinction in regard to the order in which such evidence is admitted, nor is supporting evidence conditioned upon impeachment. Note, however, that removal

of this barrier to introduction of supporting evidence probably will not affect the present inadmissibility of prior consistent statements until credibility is in issue.

(11) Is the language of Rule 20 sufficient to accomplish the purpose intended? It should be noted that New Jersey recommended the inclusion of a reference to "any other Rule," in addition to Rules 21 and 22, intending thereby to pick up any other applicable rule, e.g., Rule 45.

#### Rule 22

This rule merely states further limitations upon the admissibility of evidence for the purposes mentioned in Rule 20. Some of the matters dealt with in this rule are necessarily included in the specific questions set out above. Thus, Rule 22(a) specifically eliminates the foundation requirement in regard to a prior inconsistent writing (and to this extent is merely repetitious of Rule 20, though more detailed), but provides that the judge may require that "the time and place of the writing and the name of the person addressed, if any," be indicated to the witness.

Rule 22(b) grants the judge discretion to exclude extrinsic evidence of prior contradictory statements "unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement." As already mentioned, this is in accord with the present mandatory foundation requirement, but transfers direction into discretion.

Rule 22(c) limits relevant character traits to "honesty or veracity or their opposites." The present law refers to "truth, honesty, or integrity." The policy here is a mere language choice with respect to providing an exclusive class of admissible evidence.

Rule 22(d) excludes "evidence of specific instances of his conduct relevant



only as tending to prove a trait of" the witness' character. Though not made clear in the Uniform Rules, it is obvious that the "specific instances" of conduct mentioned in Rule 22(d) refer to conduct other than conviction of a crime involving "dishonesty or false statement" admissible under Rule 21. Hence, the rule affirmatively excludes all other specific instances of conduct and excludes expansion upon (i.e., detailed facts regarding conduct, etc.) convictions for crimes involving the mentioned traits. The effect, therefore, is to treat conviction of a crime as a factual item, i.e., the fact of conviction is admissible, but to exclude evidence regarding specific instances of conduct, including instances of conduct which led to conviction for crime involving dishonesty or false statement. This is in accord with the present law.

In its consideration of the Privileges Article, the Commission disapproved the inclusion of Uniform Rule 30 (Religious Belief) because the matters there dealt with actually concern the admissibility of evidence on the issue of credibility. (See Tentative Recommendation Relating to Privileges, Rule 30 Comment, page 76.)

Should evidence of religious belief or lack thereof be admissible for impeachment purposes? Impeachment by this means would be permitted under Rule 20, and there would be no distinction between impeachment by cross-examination (which would have been prohibited under Rule 30) and by extrinsic evidence. The present law excludes such evidence as being incompetent for impeachment purposes. People v. Copsey, 71 Cal. 548 (1887). If protection against impeachment by this means is desired, thus preserving the present law, it could be accomplished by adding a subdivision to Rule 22 to read as follows:

(e) evidence of religious belief or lack thereof shall be inadmissible.

With respect to language generally, it is suggested that "shall be" be replaced with "is" in each subdivision of this rule.

Respectfully submitted,

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EXHIBIT I

IV. WITNESSES

RULE 17. DISQUALIFICATION OF WITNESS. INTERPRETERS.

A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

RULE 18. OATH.

Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.

RULE 19. 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.

RULE 20. 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.

RULE 21. 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.

RULE 22. 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.