#34 12/16/63

Memorandum 63-58

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rule 8)

Rule 8 has been revised in accordance with the Commission's instructions. The scheme of the revised rule is as follows: Subdivision (1) merely states the general requirement that the judge makes preliminary decisions as to the admissibility of evidence. The quantum of evidence necessary to warrant admission of evidence is not stated in subdivision (1). Subdivisions (2) and (3) cover the quantum of evidence question and indicate the extent to which the judge's determination of the preliminary question is binding.

Subdivision (2) covers questions of relevancy. Here, the Commission asked the staff to indicate that the judge's determination is based on the proponent's evidence only and is not final. The subdivision expressly refers to questions of relevancy, and, because it may not always be clear when a preliminary question is one of relevancy and one of competency, the subdivision also refers to any rule conditioning admissibility on "sufficient evidence to sustain a finding." Thus, by including these words in any rule, we can bring that rule within the terms of subdivision (2) and preclude the application of the standard prescribed by subdivision (3). The language of the subdivision was taken from the second paragraph of Rule 67 (authentication) which was deleted at the last meeting as unnecessary. You should compare the language of Rule 8(2) as approved in New Jersey.

Subdivision (3) prescribes the functions of judge and jury on questions of competency.

Rule 8 as it is now drafted follows strictly what might be called the "orthodox" view on the functions of the judge and jury in ruling on the admissibility of evidence. See Morgan, Basic Problems of Evidence 42-48 (1957). The orthodox view is that when an objection is made to the admissibility of evidence on the ground that it is incompetent even though relevant, the judge finally decides the question, and if necessary he receives evidence from both sides and resolves conflicts in the evidence. On the other hand, when the objection is to the relevancy of the evidence, the judge admits the evidence upon a prima facie showing of its admissibility and permits the jury to rule on its weight and sufficiency. See Morgan, Functions of Judge and Jury in the Determinations of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929).

Unfortunately, the cases do not follow this view with any consistency. In Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927), seven different views that have been applied by the courts are identified.

Professor Chadbourn pointed out the California rule on confessions, dying declarations and spontaneous declarations. He indicated that under existing California law the judge determines whether the declaration was in fact voluntary, was made under a sense of impending death, or was spontaneous, and the question of admissibility is again decided by the jury at the close of the case. Rule 8 would change the California rule in these cases, and the judge would determine admissibility upon the basis of a preponderance of the evidence.

There are other areas, however, where the scheme approved under Rule 8 also will change the law; and the Commission should be aware of these before making its final decisions in regard to Rule 8.

Under existing California law, the declaration of a co-conspirator is admitted conditionally upon a prima facie showing of the conspiracy; the judge does not exclude the evidence if he is not persuaded as to the existence of the conspiracy. People v. Steccone, 36 Cal. 234 (1950); People v. Talbott, 65 Cal. App.2d 654, 663 (1944). But under Rule 8 and the principles approved by the Commission, the judge would decide the preliminary question as to the existence of the conspiracy upon the basis of a preponderance of the evidence.

Similarly, under existing California law, other vicarious admissions are admitted upon prima facie evidence of the authority of the person making the statement.

> It is, of course, a well settled and just principle of law that no person is bound by the declarations of another who is not his agent and expressly or by implication authorized by him to make the declarations. Unless at least prima facie evidence of such authority appears, such conversations are not admissible. [Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 305 (1912).]

In the case just cited, a judgment for the defendant was reversed because the judge excluded evidence of a conversation on the ground that insufficient evidence of agency was introduced. The appellate court held that a prima facie case of agency had been shown and this was sufficient to warrant admission of the statements.

Morgan takes the position that the admissibility of a direct admission, too, is decided by the judge on the basis of a preponderance of the evidence--and it is his view that is embodied in Rule 8. Morgan, Basic Problems of Evidence 244 (1957). Here, too, the California rule differs. Under existing California law, prima facie evidence of the authorship of the statement is sufficient to warrant its reception in evidence as an admission. Eastman v. Means, 75 Cal. App. 537 (1925).

Insofar as the admissibility of a hearsay statement depends on its authorship by a particular person (as, for example, the admissibility of an admission depends solely on identification of a party as the author of the statement), the problem seems to be the same as that involved in the authentication of a writing; hence, it would seem that logically the same standard of preliminary proof should apply. This has been recognized in at least one California case:

> In order that a statement may be used against a party as an admission, there must be at least prima facie proof that it was made by him or by some person whose statements may legally affect him. Where the admission is a written one, there must be some proof of the authenticity of the writing. [Lewis v. Western Truck Line, 44 Cal. App.2d 455, 465 (1941).]

The problem is fundamentally different where the issue is as to the circumstantial evidence of the trustworthiness of the statement (voluntariness of a confession, spontaneity of a declaration, etc.), and a different rule as to the determination of the competency of the statement, as distinguished from its authenticity, may be proper.

If you wish to retain the existing California law in regard to the admissibility of vicarious admissions, the provisions of Rule 63(8) and (9) should be modified so that subdivision (2) of Rule 8 is clearly applicable to them instead of subdivision (3).

The staff does not suggest that Rule 63(6) and (7) be modified to indicate that an admission is admissible upon a prima facie showing that the statement was made by a party. The problem is one of authentication of oral statements and it pervades the entire URE. Were it not for Professor Morgan's comment (2 Basic Problems of Evidence 244 (1957)), we would have thought that preliminary rulings on the authenticity of oral admissions would have been handled precisely like preliminary rulings on the authenticity

of writings. It seems settled now that whether a witness actually made an alleged prior inconsistent statement is a question for the jury, not the judge. Schneider v. Market Street Ry., 134 Cal. 482, 492 (1901). Similarly, whether a party actually made an oral admission is now a question ultimately for the jury--the evidence is admitted on a prima facie showing that the party made the statement. Eastman v. Means, 75 Cal. App. 537 (1925). Logically, too, whether a declaration against interest was made at all or by the person claimed to have made it should be decided by the judge on the prima facie showing, for the problem is one of genuineness or authenticity. The strength of the preliminary showing required should not be different for written statements than it is for oral statements. Rule 8 might be modified to contain a specific statement of the rule on authentication, but we do not recommend that it be done.

We do recommend, however, that Rule 63(8) and (9) be modified as follows:

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

* * *

(8) As against a party, a statement if the judge finds that there is sufficient evidence to warrant a finding that:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter 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.

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement is that of an agent, partner or employee of the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made before the termination of such relationship, and (ii) the statement is offered after, or in the judge's discretion subject to, [~~proof by~~] admission of sufficient independent evidence to warrant a finding of the existence of the relationship between the declarant and the party; or

(b) The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after [~~proof by~~] admission of sufficient independent evidence to warrant a finding of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

* * *

Please note the "second-crack" doctrine specifically mentioned in subdivisions (2) and (3) of New Jersey's Rule 8--that is the doctrine that the question of admissibility is again submitted to the jury after the judge has made his preliminary determination.

It seems impossible to avoid application of the doctrine on questions of relevancy. For example, if a document is found by the jury not to be genuine, it should cause no great confusion for them to be told to disregard the document--after all, they decided it was irrelevant.

Similarly, no confusion should be engendered by telling the jury to disregard an alleged admission if they find that the defendant did not make the statement.

Application of the "second-crack" doctrine to vicarious admissions, however, has provoked some criticism. Here, the issue is not purely one of authentication, and the relevancy of the statement does not necessarily disappear if the appropriate relationship is not made out. The existing California law apparently requires application of the "second-crack" doctrine:

> The question of conspiracy was then submitted to the jury, with instruction to disregard the declarations of Alexander, unless the conspiracy was satisfactorily proved. This was the proper practice. [People v. Geiger, 49 Cal. 643, 649 (1875), quoted and applied in People v. Talbott, 65 Cal. App.2d 654, 663 (1944).]

But see Morgan's comment on the doctrine:

> The result of the application of this doctrine in prosecutions for conspiracy is difficult to characterize with due deference to the judiciary. The jury is instructed that they cannot use the evidence of the separate conduct of A or his hearsay statements against B unless upon the other evidence in the case they have found that B conspired with A as charged in the indictment. If the trial judge is very careful . . . he will explain that on the preliminary question the burden is on the Commonwealth to prove the conspiracy by a preponderance of the evidence but on the ultimate question it is to prove the conspiracy beyond a reasonable doubt.
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> . . . In short any departure from the orthodox view is likely to make the exclusionary rule degenerate into a rule concerning the value of the evidence, for to expect a jury actually to go through the process of separating the inadmissible evidence from the admissible and to eliminate its effect from their conscious minds and base their decision upon the admissible evidence only is to expect the impossible. Insofar as an instruction of this sort serves any purpose, it affects value, not admissibility. [Morgan, Some Problems of Proof 98-99, 103 (1956).]

Should there be an explicit statement of the second-crack doctrine as in the New Jersey rule? Should the doctrine be applicable to vicarious admissions?

Memorandum 63-46 is being redistributed with this memorandum so that you will all be sure to have a copy.

Respectfully submitted,

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