#34(L) 2/17/64

Memorandum 64-9

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

REVISED RULE 8: PROBLEMS

At the last meeting, the Commission tentatively approved the recommendation on General Provisions, but it requested that Rule 8 be brought back for further consideration. Rule 8 as revised to date and the revised comment thereto are attached to this memorandum as Exhibit I (pink pages).

We note the following problems with Rule 8 which should be considered by the Commission:

The comment to Rule 8 says that the rule prescribes the judge's function in ruling on the existence of a preliminary fact upon which the admissibility of evidence depends only if the rule under which the question arises is explicitly stated conditionally. In this way, the comment seeks to justify the omission of any reference to the nature of the preliminary fact finding process when relevancy depends on the existence of a preliminary fact. This was the justification given at the last meeting when the reference to relevancy problems was deleted.

If the analysis in the comment is correct, Rule 8 is very inadequate to deal with the function of the judge in ruling on all of the preliminary questions of fact that may arise under the rules. Many of the rules are not worded conditionally. For example, the only explicit condition stated in Rule 26--the lawyer-client privilege--is that the claimant must be the holder, his representative, or the lawyer. The existence of the lawyer-client relationship and the confidentiality of the communication are not stated as conditions. Similarly in Rule 27.5 the fact that a witness is the wife

of a party is not stated to be a condition for the invocation of the marital testimonial privilege. The death of the declarant is not stated explicitly to be a condition of the admissibility of a dying declaration in Rule 63(5). The unavailability of the declarant is not stated as an express condition in Rule 63(12)(b), but it is in Rule 63(10).

Thus, if the analysis in the comment is correct, a large number of preliminary fact questions may arise under the rules for which Rule 8 will prescribe no procedure--the preexisting law must be looked to in order to discover the applicable procedure. If this is so, we think that Rule 8 is seriously defective, for we believe it should clarify the procedure to be followed on all preliminary fact questions, it should not provide a procedure to be followed on only a few random issues.

Rule 8 can be interpreted in another way, however. We think that it can be fairly interpreted to apply to any condition of admissibility established by these rules, whether or not the condition is introduced by "if" or "unless". Thus, we think that the existence of a lawyer-client relationship is a condition of the lawyer-client privilege. We think the existence of a marriage is a condition of the exercise of marital-testimonial privilege.

But this interpretation of Rule 8 raises more problems. As now drafted, the only conditions established by the rules that may be satisfied by evidence sufficient to sustain a finding of the condition are the condition of personal knowledge (Rule 19) and the condition of authenticity of a writing (Rule 67). For all other conditions established by the rules, the judge must be persuaded of the existence of the preliminary fact.

Thus, the judge must be persuaded that the condition of relevancy is satisfied. Rule 7. He must be persuaded that the witness actually made a

prior consistent or inconsistent statement. Rule 63(1). The testimony of a witness that the prior statement was made is insufficient. The judge must be persuaded that a party made a statement before it may be introduced as an admission. Rule 63(7). The judge must be persuaded that lay opinion is based on personal knowledge. Rule 56.

This view would deprive a party of a right to a jury decision on a wide variety of matters when he is entitled to a jury decision under existing law. For example, if P sues D on an oral contract, P may seek to introduce evidence of negotiations with X. Such evidence is irrelevant unless X was D's agent. Under existing law, P is entitled to a jury decision on both the question of X's agency and the question whether the negotiations were as claimed by P. But under this interpretation of Rule 8, the judge would have to decide the question of agency before admitting the evidence of the negotiations; and if the judge were not persuaded of the agency, the evidence of the negotiations would never be presented to the jury.

Because of the serious curtailment of the right of trial by jury this view would entail, we suggest that it is of dubious constitutionality.

During the discussion at the January meeting, some expression was given to the view that the URE rules (except for Rule 7) deal with problems of the competency of evidence, not relevancy; and it is so obvious that relevancy questions must be given to the jury that Rule 8 need not express any procedure governing the determination of preliminary fact questions when the issue is relevancy. Therefore, Rule 8 should be construed to deal only with conditions of admissibility prescribed by URE rules other than the condition of relevancy (Rule 7).

This interpretation of Rule 8 seems to cause even more problems. Relevancy questions can arise under rules dealing generally with the competency

of evidence, such as Rule 63 (hearsay). For example, under existing law, whether a witness made a prior inconsistent statement (Rule 63(1)), whether a witness made a prior consistent statement before or after a bias arose (Rule 63(1)), whether a witness actually recorded his memory as claimed (Rule 63(1)), whether a party actually made an alleged admission (Rule 63 (7)), and whether a party adopted a statement of another as an admission (Rule 63(8)) or authorized another to make a statement admissible as an admission (Rule 63(8), Rule 63(9)(b)), are treated as relevancy questions and the proffered evidence is admissible upon prima facie evidence of the preliminary fact. But, under the suggested interpretation of Rule 8, the issue in each case would be the existence of a condition established by these rules and, hence, the proponent of the evidence would have to persuade the judge of the existence of the preliminary fact.

The trial judge, then, would be required to distinguish quickly and accurately between evidence of a party's conduct after hearing a statement when such evidence is offered as circumstantial evidence of the party's knowledge or state of mind (the issue arises under no particular rule and involves the relevancy of the evidence) and when it is offered as an adoptive admission (the issue arises under Rule 63(8) and the condition of admissibility must be found by the judge). If a prior inconsistent statement of a witness is offered for its truth under Rule 63(1), the issue is the existence of the conditions of admissibility under Rule 63(1) and the judge must be persuaded the witness made the statement; but if the offer of the evidence is limited to credibility, no URE rule is involved, the issue is one of relevancy only, and the evidence should be admitted upon a prima facie showing the witness made the statement. Accordingly, if the judge is not persuaded that the

witness made the statement, he probably is required to give a limiting instruction under Rule 6.

You will note that the New Jersey Committee decided that the correct procedural rule on relevancy questions should be specified in Rule 8. We agree, and recommend that such provisions be added to Rule 8 in order to avoid the interpretive problems suggested above.

There is one further problem in regard to Rule 8. Neither the URE rule, the New Jersey rule, nor any previous Commission version of the rule, specifies what preliminary fact questions are questions of relevancy and are questions of competency. "Relevancy" here is used to denote those questions that should be decided by the jury; the judge's preliminary function is merely to see that there is evidence sufficient to permit the jury to decide the issue.

We think that, insofar as it is possible to do so, relevancy questions should be specifically identified. We make this recommendation because it is not always easy to determine what is a relevancy question. For example, the view was expressed at the last meeting that authentication of documents is not a relevancy question. Yet Professor Mason Ladd states that he regards the authentication of writings as a relevancy question. Ladd, Cases and Materials on Evidence 855-56 (2d ed. 1955). Wigmore does, too, as is indicated in the summary of his work that appears in the comment underneath Rule 67. Or again, we believe that whether or not a person has made a statement which is offered either as an admission or as a prior inconsistent statement is a question of relevancy. I believe the Commission has agreed with us in the past on this question. We also have the support of Professors Maguire and Wigmore. See Maguire and Epstein, Preliminary Questions of Fact,

40 Harv. L. Rev. 392, 405, note 44 (1927); Wigmore, Evidence (3d ed. 1940) § 1048 et seq. (classifying admissions under the principle of relevancy generally). On the other hand, Professors Ladd and Morgan apparently regard the question of the admissibility of an admission as one of competency only. Their theory is that the evidence is offered as hearsay, and hearsay is a rule of competency not relevancy. See 2 Morgan, Basic Problems of Evidence 244 (1957); Ladd, op. cit. at 858. On analysis, I think we are correct. An admission comes in not because it bears any indicia of verity--it may have been a self-serving statement when made, a repetition of a rumor, or any other sort of unreliable statement--but because it is a statement inconsistent with the position of the party at the trial and the opposing party is entitled to confront him with it and to force him to explain the inconsistency. See Wigmore § 1048 et seq. Thus, its relevancy depends upon the fact that it was the party who made it. Take a simple case for example:

> A and B have a dispute concerning the amount that B owes A for certain services that A has performed. A sends B a bill for $100 which B refuses to pay. A sues B for $500. B seeks to introduce the bill for $100 that A sent him as an admission by A that his services were worth no more than $100. Clearly, the relevancy of the proffered evidence is dependent solely upon the fact that A made the prior statement. If the bill had been sent by some stranger it would have nothing at all to do with the law suit before the court. It would be totally irrelevant.

Thus, in the usual case, an alleged admission is irrelevant if not made by the party and is relevant if made by the party. The only possible issue--whether it was made by the party--is an issue on the relevancy of the evidence.

As a matter of fact, both Professors Morgan and Ladd seem to take an inconsistent position when the statement offered as an admission is in writing. In that case they seem to regard the question as one of authentication of the writing--relevancy--and not a question of competency under the hearsay rule.

See Ladd, op. cit. 868-71; Morgan, Law of Evidence (1941-1945), 59 Harv. L. Rev. 481, 489-91 (1946).

The inconsistency among the legal scholars is reflected in the judicial opinions. The portion of Ladd's book just cited contains an English decision, Boyle v. Wiseman, 11 Exch. 360 (1855). That was a libel case in which the issue was publication of the libel. The plaintiff sought to introduce a copy of a letter from the defendant to a third party containing admissions. The third party, a priest, refused to deliver the letter; hence, the plaintiff sought to introduce a copy. The defendant produced what he asserted was the original letter and objected to the introduction of the copy because the original was the best evidence. The plaintiff asserted that the original produced had been altered and persisted in his offer of the copy. The judge first ruled that the copy could be admitted and the defendant could go into the question of its accuracy on cross-examination. He granted a new trial on the ground that he had been in error and that he should have determined before the admission of the secondary evidence whether the original had been altered and, therefore, whether the copy offered was in fact a copy of the original. If it was not, he should have excluded it. This was affirmed on appeal. Morgan calls this an

> unwarranted interference with the right of trial by jury. Surely if two documents were produced, the plaintiff claiming one to be the original and the defendant the other, the dispute must be settled by the jury. If the plaintiff has lost his document so that he is unable to produce it, does that make the question of the authenticity of the defendant's document for the judge? If both sides grant that there was an original and one presents a document which the other disputes, by what line of reasoning can either be deprived of the right to have the jury determine whether the presented document is the original? [59 Harvard Law Review 481, 490 (1946).]

Gila Valley, Globe and Northern Railway v. Hall, 232 U.S. 94 (1914)

involved a question of notice to the plaintiff of a particular defect. A witness was offered to testify that a third party had spoken of the defect in the plaintiff's presence. The trial judge excluded the evidence because he was not persuaded that the plaintiff had heard it. This was affirmed by the U.S. Supreme Court upon the theory that questions of the admissibility of evidence are for the determination of the court, not for the jury. Says Morgan:

> The only possible ground for excluding this evidence was its irrelevancy. One way to give a man notice of a fact is by the utterance of words in his hearing. Suppose the witness had been willing to testify that R had shouted the words in the plaintiff's ear and the plaintiff had offered to testify that R had not done so, or that he had not heard R, would the court have then undertaken to decide the fact? By applying the reasoning of the court, wherever notice is in issue, the judge may take from the jury the question of communication. If the notice is alleged to be oral, the judge may determine whether it was heard. If it is alleged to be written, the judge may determine whether it was served or received or posted, on the ground that such a determination is a necessary preliminary to the ruling on evidence. [43 Harvard Law Review 165, 173.]

Other cases reflecting a similar uncertainty concerning the appropriate rule to apply when the relevancy of evidence depends on the determination of a preliminary fact are collected in the books and articles already cited. We suggest, therefore, that whether a particular question is a relevancy question is not always as clear as it might be, and our rules should clarify the matter to the extent that it is possible to do so. We believe that it is possible to clarify the matter to a considerable extent by drafting Rule 8 to cover all situations in which the admissibility of evidence depends upon the determination of some preliminary fact.

ALTERNATIVE WAYS OF REVISING RULE 8

There are several ways in which Rule 8 could be modified to clarify the nature of the preliminary fact-finding process. The Commission should consider each of the following approaches:

> Whenever the qualification of a witness, the existence of a privilege, or the admissibility of evidence, is conditioned on the existence of some preliminary fact:
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> 1. The judge shall permit the evidence to be admitted if there is evidence sufficient to sustain a finding which would warrant admission of the evidence. Thus, the judge would overrule a privilege objection upon evidence sufficient to sustain a finding that the privilege is inapplicable.
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> 2. The judge shall rule as required by the appropriate rule upon being persuaded, on the basis of all of the evidence presented either in the hearing or on voir dire, of the existence of the preliminary fact. If he is not persuaded, he should rule against the proponent of the evidence if the proponent has the burden of proof on the preliminary fact (as on personal knowledge, authentication, relevancy, and the hearsay exceptions) and against the objector if the objector has the burden of proof on the preliminary fact (as on privileges, testimonial capacity).
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> 3. If the rule under which the question arises is one designed to assure the reliability of evidence or is the rule of relevancy (including personal knowledge and authentication), the judge shall admit the evidence if there is evidence sufficient to sustain a finding which would warrant admission of the evidence. If the rule is one designed to suppress evidence for reasons of public policy (privilege, confessions, offers to compromise), the judge shall find the existence of the preliminary fact if persuaded by the party with the burden of proof and find against the existence of the preliminary fact if not persuaded.
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> 4. If the rule under which the question arises places the burden of showing the preliminary fact on the proponent of the evidence, the judge shall admit the evidence upon evidence sufficient to sustain a finding warranting admission of the evidence. If the rule under which the question arises places the burden of showing the preliminary fact on the objector, the judge shall exclude the evidence only if persuaded by a preponderance of the evidence that the proffered evidence is inadmissible.
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> 5. (The Orthodox Rule) If the preliminary fact issue is whether the witness has personal knowledge (Rule 19), whether the

> evidence is relevant (Rule 7), whether the writing is authentic (Rules 67, 67.5, 68), whether a statement or verbal act was made by the person claimed by the proponent of the evidence (or by another regarded in law as acting for such person), the judge shall admit the evidence if there is evidence sufficient to sustain a finding of the preliminary fact. If the preliminary fact issue is any other, the judge shall determine the preliminary fact to exist if persuaded by the party with the burden of proof on the issue and admit or exclude the evidence in accordance with his determination.

Whatever rule is adopted generally, the Commission should give separate consideration to the determination of the admissibility of confessions and the existence of the privilege against self-incrimination.

We assume that on the voluntariness of a confession the burden of proof by a preponderance of the evidence should be on the prosecution; and the judge's decision should be final, the jury getting no "second crack". The Commission has approved this in principle already.

What should be the allocation of the burden insofar as the privilege against self-incrimination is concerned? In regard to privileges generally, it seems likely that the URE places the burden on the objector to persuade the judge of the existence of the facts which bring the privilege into operation, and the proponent has the burden of proof on the exceptions. We suggest, however, that where the self-incrimination privilege is claimed, the witness should have the burden of producing evidence on the question of incrimination, but the witness should be required only to make a prima facie showing of the likelihood of incrimination in order to justify the claim of privilege.

Under existing law, the witness apparently is required to make only a prima facie showing that he is likely to be incriminated. A complete discussion of the appropriate rule appears in Cohen [Mickey] v. Superior Court, 173 Cal. App.2d 61, 343, P.2d 286 (1959). Cohen had been held in

contempt for failure to answer questions on a C.C.P. § 2055 examination in a civil suit, and he petitioned the district court of appeal for a writ of prohibition to restrain enforcement of the contempt judgment. The court granted the writ and said:

> [68] In this case the petitioner has the burden of showing that the testimony which was required might be used in a prosecution to help establish his guilt. . . . The witness does not have to demonstrate conclusively that the answers to the questions will make him subject to prosecution nor need he demonstrate that he likely would be convicted.
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> [70] "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself . . . . It is for the court to say whether his silence is justified, . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' . . . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. . . ."
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> [72] In this setting "it was not perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency."

Thus, although the witness has the burden of producing evidence on the preliminary fact question, the claim must be upheld if he shows a possibility of incrimination. The judge cannot overrule the claim unless it is "perfectly clear" that the answers sought are not incriminating.

We recommend, therefore, that Rule 8 be so drafted as to restate the rule of the Cohen case, above.

Subject to the special rules on confessions and the privilege against self- incrimination, we offer the following comments on the alternatives suggested:

Alternative #1. This is essentially the motion that was made by Commissioner Selvin at the last meeting and which did not carry. Professor Morgan supports this theory in 43 Harv. L. Rev. 165, 189-91 (1929):

> In their modern application, with their numerous refinements and qualifications, [the exclusionary rules] do not appear to exhibit a much closer approach to the perfection of human wisdom than the now obsolete canons of common law pleading. . . . It is now generally conceded that the doctrines at the basis of most of the common law rules making numerous classes of witnesses incompetent, if not originally the expression of a mistaken judicial psychology, have long since ceased to accord with reality. . . . A somewhat better paper argument can be made for preserving some common law privileges to refuse or prevent testimony and their legislative extensions. Yet they are all granted on mere a priori notions of sound social policy; and they serve almost invariably to suppress the truth. Under these circumstances, it would seem that the incompetency or the privilege should be sustained only where the foundation upon which it must stand clearly exists. A dispute in the evidence as to the existence of such foundation might well require a denial of the claim of incompetency or privilege. Such a rule frankly announced and consistently applied would have much to commend it.
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> If the rules excluding relevant testimony tendered by competent witnesses had their origin in a supposed inferiority of jurors to judges, they need serious re-examination in this country. The vast increase in literacy among the classes from which jurors are drawn, and the political selection and popular election of judges have greatly narrowed the gap between the capacities of the two. Insofar as the exclusions are to be justified by the assumed inability of any trier to evaluate the excluded items, all doubts should be resolved in favor of ability. It would not be calamitous for the courts here also to formulate and enforce the rule that where evidence is in dispute as to any fact, the existence of which would bring the challenged item within the limits of legitimate evidence, the challenged item must be received.

Professor Morgan goes on to state that the "second crack doctrine" may accomplish the same result as the suggested rules but it is "a clumsy and intellectually dishonest expedient".

This solution recognizes that the judge's finding as to the existence or non-existence of the preliminary fact, when the evidence is conflicting, is not necessarily correct. The judge merely makes his best estimate on

the basis of the conflicting evidence. The preliminary fact may in fact exist even though the judge is not persuaded as to its existence. Therefore, in the interest of presenting all relevant evidence to the trier of fact, the rule would admit all evidence whenever the existence of the preliminary fact is in substantial dispute. Evidence would be excluded only when it is clear that it does not meet the test of admissibility.

Alternative #2. Except for authentication and personal knowledge, this is Rule 8 as it now reads. Making all evidence admissible upon the persuasion of the judge as to the existence or non-existence of the preliminary fact would substantially impair the right of trial by jury. Gone would be the right to have a jury decision on the authenticity of questioned documents, gone would be the right of a jury trial on the issue of agency when the principal is sought to be held for some act of the agent, gone would be the right to have the jury determine whether the witness knew what he was talking about. Such a substantial impairment of jury trial might be constitutionally objectionable.

Alternative #3. Making all evidence admissible upon a prima facie showing, except evidence objectionable on the ground of privilege or other public policy, meets all of the objections to the present version of Rule 8. The rule covers all preliminary fact controversies, it clearly identifies the issues to be decided by a preponderance of the evidence and the issues to be decided upon a prima facie showing, it deprives no one of the right to a jury determination of any issue upon which the rights and liabilities of the parties depend, and it is easily applied by the trial judge.

The trial judge does not have to make fine distinctions between verbal acts and hearsay, between admissions and other forms of hearsay; when the

best evidence rule is invoked he does not have to apply one standard of determination to the existence of the original or the accuracy of the copy and another to the existence of the best evidence rule exceptions.

It can be argued, however, that if the exclusionary rules have validity they should be applied by the trial judge with vigor. Otherwise a great deal of unreliable evidence which the jury cannot be trusted to hear will be presented to it. And they may evaluate the evidence even though neither the judge nor the jury believes that the foundational fact exists.

Alternative #4. This alternative lies about midway between the previous suggestion and the orthodox rule. It, too, has the virtue of being fairly simple to apply. It preserves the right of jury trial as well. To indicate how it would operate, we set forth the rules below and indicate who has the burden of showing the preliminary fact as they are now drafted.

In the following rules, the burden of making the requisite showing is on the proponent of the evidence. Under the alternative suggested, the evidence would be admitted upon introduction of evidence sufficient to sustain a finding of the preliminary fact:

Rule 7(f) - relevancy. Rule 19 - personal knowledge. Rule 21 - conviction of witness of crime affecting credibility. Rule 55.5 - qualification of expert witness. Rule 56 - opinion based on personal knowledge. Rule 62 - "unavailable as a witness" where basis for hearsay exception. Rule 63 - hearsay exceptions (except confessions (6) where preponderance should be required). Rules 67, 68, and 69 - authentication of writings. Rule 67.5 - ancient documents rule. Rule 70 - best evidence rule exceptions. Rule 71 - proof of execution of witnessed writings. Rule 72 - photographic copies of writings.

In the following rules, the burden of making the requisite showing is on the objector. Under the alternative suggested, the evidence would be excluded if the objector persuaded the judge of the existence of the preliminary fact:

Rule 17 - personal capacity of witness. Rule 21 - existence of pardon, etc., for conviction affecting credibility. Rules 23-40 - privileges, but proponent would have the burden of proof on exceptions. Rules 52-53 - statements made in course of settlement negotiations. Rule 62 - procurement of unavailability by proponent of hearsay evidence. Rule 63(12), (23), (24), (27.1) - bad faith, post litem motem limitations on hearsay exceptions.

Alternative #5. Logically, the orthodox rule seems to make most sense. But it is not so easy to apply in practice, as the foregoing memo has indicated. The judge is required to make quick distinctions between verbal acts and hearsay, to distinguish between hearsay objections based only on whether the purported declarant made the statement and based on lack of circumstantial evidence of trustworthiness, and to remember that in ruling on the best evidence rule he must be persuaded of the existence of the exception but must not decide whether the original existed or the copy is accurate.

However, we think the problems in application can be minimized by careful drafting. Attached to this memorandum as Exhibit II (yellow pages) is Rule 8 as revised to express this alternative.

ANALYSIS OF SUGGESTED RULE 8 (EXHIBIT II)

If the Commission approves alternative 5 (listed above), the following comments and policy problems pertinent to Rule 8 as set out in Exhibit II should be considered by the Commission:

Subdivision (1). We have defined "preliminary fact" to distinguish the facts upon which the admissibility of evidence depends from the facts sought to be proved by the evidence being offered. The URE uses the word "condition" to do this; but it seemed to us that the word is more difficult to understand and has caused some confusion in our past discussions. The use of the defined term makes clear that a rule does not have to be worded conditionally before Rule 8 applies.

We have defined "proffered evidence" in order to avoid confusion between the evidence whose admissibility is in question and the evidence offered on the preliminary fact issue.

Subdivision (2). This sets forth the general rule. The allocation of the various burdens of producing evidence and of proof is indicated in subsequent subdivisions.

The rules of evidence are made inapplicable to the preliminary determination only when the preliminary determination involves a question of the competency of evidence. These are questions that are of no concern to the jury. Relevancy questions (subdivision (3)) must ultimately be decided by the jury and are decided preliminarily by the judge in order to assure that there is sufficient competent evidence on the question to permit the question to go to the jury. Hence, the rules of evidence should apply.

Subdivision (3). This subdivision states the applicable rule when relevancy depends on a preliminary fact. We have listed by way of

illustration those preliminary fact questions that seem to us to be those that must be ultimately decided by the jury and, hence, are in our estimation "relevancy" questions. The Commission should, of course, consider each preliminary issue and decide whether it should be listed here or in subsequent subdivisions. The illustrative matters listed in subdivision (3) are:

Rule 19--the requirement of personal knowledge.

Rule 21(1)--conviction of a witness for a crime, offered to attack credibility. The only preliminary fact issue would be whether the person convicted was actually the witness. This seems to involve the relevancy of the evidence and should be a question to be resolved by the jury. The judge should not be able to decide finally that it was the witness who was convicted and prevent a contest of that issue before the jury. The Commission may, as a policy matter, believe that the proponent should initially persuade the judge of the preliminary fact. Under existing law, however, prima facie evidence seems to be sufficient to warrant admission of the evidence. See People v. Theodore, 121 Cal. App.2d 17, 28, 262 P.2d 630 (1953)(relying on presumption of identity of person from identity of name [presumption is to be repealed]).

Any decision made here will not affect the special procedural rule in Rule 21 itself requiring the proponent of the evidence to make the preliminary showing out of the hearing of the jury.

Rule 56(1)--requires lay opinion to be based on personal perception. This is merely a specific application of the personal knowledge requirement in Rule 19.

Rule 63(1)--pretrial statements of witnesses. These are prior inconsistent statements, prior consistent statements made before bias arose, and recorded memory. In each case, the evidence is relevant and probative if the witnesses to the statements are credible, and we think that the credibility of the witnesses testifying to these statements should be decided by the jury. Hence, evidence should be admitted upon prima facie evidence of the preliminary fact.

Rule 63(7)--direct admissions. We have previously discussed the reasons we think this is a relevancy question.

Rule 63(8)--authorized and adoptive admissions. Under existing law, both the question of authorized and the question of adoptive admissions are treated as relevancy questions. Sample v. Round Mountain Citrus Farm Co., 29 Cal. App. 547, 156 Pac. 983 (1916)(authorized admission); Southers v. Savage, 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961)(adoptive admission). We think this solution is correct. The statements are relevant because they are attributable to a party and are inconsistent with his position at the hearing. If not attributable to him, they are irrelevant. In some cases, a particular authorized admission may have independent relevance, but that is merely coincidental and is not the reason it is admitted.

Rule 63(9)(b)--authorized admission of a co-conspirator. Under existing law, this is treated as a relevancy problem. We think this treatment is correct for the same reason given in connection with Rule 63(8).

Rule 63(9)(c)--the present wording of Rule 63(9)(c) classifies it as a rule of relevancy. The rule is referred to here for completeness.

Rules 67, 68, 69--authentication of writings. We have all agreed so far that authenticity is a question for the jury so long as there is evidence sufficient to permit a jury determination of authenticity.

Rule 67.5--ancient documents rule. We regard this as a codification of the sufficiency of a certain kind of circumstantial evidence. Whether the circumstantial evidence is credible and is sufficiently probative in a particular case seems to us to be a question that should be decided by the jury.

Rule 71--proof of witnessed writings. The only question that can arise is whether a witness actually saw the writing executed. This is merely a specific application of the personal knowledge requirement of Rule 19.

Hearsay--only when the issue is the authenticity of the proffered declaration.

Subdivision (4). This states the general rule when the competence of the proffered evidence is contingent on the existence of a preliminary fact. Here, the proponent must carry the burden of proof as to the existence of the preliminary fact. We have made the rule subject to subdivision (3), because the clearest way to draft the rule seemed to be to place the burden of proof on the proponent whenever the applicable rule requires a showing of the preliminary fact before the proffered evidence becomes admissible. As relevancy generally meets this description, too, we made the subdivision "subject to subdivision (3)" to exclude the relevancy questions mentioned there.

The illustrative matters listed are:

Privilege exceptions--the burden of proof is on the proponent of the evidence to show that a communication otherwise within one of the communication privileges was made to facilitate the commission of a crime. Most of the exceptions to the privileges do not involve a preliminary fact question; the relevancy of the information sought determines the application of the privilege.

Rule 55.5--qualifications of an expert witness. The burden of proof is on the proponent of the expert's testimony to show that he is qualified as an expert.

Rule 70, 72--the best evidence rule and photographic copies as best evidence rule. We have listed these here because they are traditionally regarded as rules of competency. The Commission may, however, wish to reclassify them as rules of relevancy. Whether the proponent is producing the best evidence could well be decided by the jury under the general principle that inferior evidence should be viewed with distrust when the party has the power to produce better evidence. C.C.P. § 2061(6), (7). There seems to be a contradiction involved in requiring the judge to be persuaded that the original is lost when he is not convinced there was ever an original in existence.

Hearsay generally--the reference here is to all preliminary fact questions involving application of the hearsay rule except those relevancy questions mentioned in subdivision (3) and a few specific limitations on the admissibility of hearsay mentioned in subdivision (5). Thus, for example, the proponent would have the burden of proof on:

The spontaneity of a proffered declaration under Rule 63(4).

The death of the declarant and the declarant's sense of impending doom under Rule 63(5).

The voluntariness of a confession under Rule 63(6).

The fact of agency under Rule 63(9)(a).

The unavailability of the maker of a declaration against interest (Rule 63(10)) or any other rule requiring unavailability of the declarant as a condition of admissibility

The requisite trustworthiness of a business record (Rule 63(13)), a public record (Rule 63(15)), a certificate of marriage (Rule 63(18)), statement of family history (Rule 63(23) or (24)), or reputation evidence (Rule 63(27)).

The fact that dealings with property have not been inconsistent with a recital in a dispositive instrument. Rule 63(29).

The fact that a statement in an ancient document has been acted upon as true. Rule 63(29.1).

The reliance by persons in the trade upon a particular commercial list or tabulation. Rule 63(30).

Subdivision (5). This subdivision states the general rule when a preliminary fact is made a condition of the inadmissibility of evidence. Here, the burden of proof on the preliminary fact is on the person asserting the inadmissibility of the proffered evidence.

The subdivision is subject to subdivision (6), because subdivision (6) provides that a person objecting to evidence on the ground of the self-incrimination privilege does not have the burden of proof on the preliminary fact, he has merely the burden of producing evidence.

The illustrative matters set forth are:

Rule 17--disqualification of a witness for mental incapacity.

Rule 21(3)--conviction of a crime when offered to attack credibility and the disputed preliminary issue is whether a pardon has been granted.

Rule 52, 52.5, 53--admissions made during compromise negotiations. The objecting party has the burden of proof on the question whether an admission actually occurred during compromise negotiations.

Rule 63(7)--unavailable as a witness. The party objecting to hearsay evidence has the burden of showing that the proponent of the evidence procured the unavailability of the hearsay declarant.

Privileges generally--the objecting party has the burden of proof on the facts that show the proffered evidence is subject to a claim of privilege. This paragraph is subject to subdivision (4), because subdivision (4) provides that the proponent of the evidence has the burden of proof on the preliminary facts that show an exception applies.

Limitations on hearsay exceptions--bad faith under the state of mind exception in Rule 63(12), lack of motive to deceive under exceptions for statements concerning family history of declarant (Rule 63(23)) or another (Rule 63(24)) and for statements concerning boundary (Rule 63(27.1)).

Should the objector also have the burden of showing that community reputation concerning boundary, etc., did not arise before controversy as required by Rule 63(27). Rule 63(27) now requires the proponent of the reputation evidence to show that the reputation arose before controversy, so we listed that rule in subdivision (4).

Subdivision (6). Subdivision (6) states the rule enunciated in the Cohen case. The objector has the burden of producing evidence of the preliminary fact--that the proffered evidence is incriminating--but the judge must uphold the privilege if there is any reasonable possibility that the proffered evidence is incriminating.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT II

RULE 8.

(1) As used in this rule:

(a) "Preliminary fact" means a fact upon the existence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

(b) "Proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent on the existence of a preliminary fact.

(2) When the qualification or disqualification of a person to be a witness, or the admissibility or inadmissibility of evidence, or the existence or nonexistence of a privilege depends on the existence of a preliminary fact, and the existence of the preliminary fact is in dispute, the judge shall determine the existence of the preliminary fact as provided by this rule. The judge may hear and determine such matters out of the hearing of the jury, except that on the admissibility of a confession or admission of a defendant in a criminal action, the judge, if requested, shall hear and determine the question out of the hearing of the jury. In determining the existence of a preliminary fact under subdivisions (4), (5), and (6), exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege. This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

(3) Whenever the relevance of the proffered evidence depends on the existence of a preliminary fact, the proponent of the proffered evidence has the burden of producing evidence on the existence of the preliminary fact, and the proffered evidence is inadmissible unless there is evidence sufficient to sustain a finding of the preliminary fact. The judge may admit conditionally the proffered evidence, subject to the evidence of the preliminary fact being later supplied in the course of the trial. By way of illustration, and not by way of limitation, the proponent of the proffered evidence has the burden of producing evidence sufficient to sustain a finding of the preliminary fact in the following cases:

(a) When the disputed preliminary fact is one specified in Rule 19, 21(1), 56(1), 63(1), 63(7), 63(8), 63(9)(b), 63(9)(c), 67, 67.5, 68, 69, or 71.

(b) When the proffered evidence is hearsay and the disputed preliminary fact is whether the statement was made at all or was made by the claimed declarant.

(4) Subject to subdivision (3), whenever the admissibility of the proffered evidence depends on the existence of a preliminary fact, the proponent of the proffered evidence has the burden of proof as to the existence of the preliminary fact, and the proffered evidence is inadmissible if the proponent fails to meet the burden of proof. By way of illustration, and not by way of limitation, the proponent of the proffered evidence has the burden of proof as to the existence of the preliminary fact in the following cases:

(a) When the proffered evidence is claimed to be privileged and the disputed preliminary fact is whether the proffered evidence is within an exception to the privilege claimed.

(b) When the disputed preliminary fact is one specified in Rule 55.5, 70, or 72.

(c) When the proffered evidence is hearsay and the disputed preliminary fact is one that is not referred to in subdivision (3) or subdivision (5).

(5) Subject to subdivision (6), when the disqualification of a person to be a witness or the inadmissibility of evidence depends on the existence of a preliminary fact, the person objecting to the proffered evidence has the burden of proof on the preliminary fact, and the proffered evidence is admissible (if otherwise relevant and competent) if the person objecting to the proffered evidence fails to sustain the burden of proof as to the existence of the preliminary fact. By way of illustration, and not by way of limitation, the party objecting to the proffered evidence has the burden of proof as to the existence of the preliminary fact in the following cases:

(a) When the disputed preliminary fact is one required by Rule 17, 21(3), 52, 52.5, 53, or 62(7).

(b) Subject to paragraph (a) of subdivision (4), when the proffered evidence is claimed to be privileged.

(c) When the proffered evidence is hearsay and the disputed preliminary fact is whether the statement was made in bad faith as provided in Rule 63(12) or under such circumstances that the declarant had motive or reason to deviate from the truth as provided in Rule 63(23), Rule 63(24), or Rule 63(27.1).

(6) Whenever the proffered evidence is claimed to be privileged under Rule 25 and the disputed preliminary fact is whether the proffered evidence is incriminating, the person objecting to the proffered evidence has the

burden of producing evidence on the existence of the preliminary fact, and the proffered evidence is inadmissible if there is evidence sufficient to sustain a finding that the proffered evidence is incriminating.

Memo 64-9

EXHIBIT I

RULE 8. PRELIMINARY INQUIRY BY JUDGE.

(1) 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 as provided in this rule, 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.

(2) If the qualification of a witness to testify concerning a particular matter under Rule 19 or the admissibility of evidence under Rule 67 or 68 is subject to a condition, the judge shall find the witness qualified to testify about the matter or admit the evidence if there is sufficient evidence to sustain a finding of the condition. In such cases, a contention by the opponent that the condition has not been fulfilled is not an issue for determination by the judge, nor is a finding by the judge that the witness is qualified or the evidence is admissible to be deemed a finding that the condition has been fulfilled. Evidence offered by the opponent that the condition has not been fulfilled is to be submitted solely to the trier of fact, which shall determine the issue.

(3) Subject to subdivision (c), if the admissibility of evidence is stated in these rules to be subject to a condition or a finding by the judge

of a condition, the judge shall admit the evidence if he is persuaded that the condition has been fulfilled. In such cases, a contention by the opponent that the condition has not been fulfilled is an issue for determination by the judge and not by the trier of fact. In the determination of the issue, exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege. Evidence offered by the opponent that the condition has not been fulfilled is to be submitted solely to the judge and not to the trier of fact.

(4) [~~But~~] This rule [~~shall not be construed to~~] does not limit the right of a party to introduce before the [~~jury~~] trier of fact evidence relevant to weight or credibility.

COMMENT

Rule 8 generally. Rule 8 sets forth the well settled rule that preliminary questions of fact upon which the admissibility of evidence depends must be decided by the judge. Code Civ. Proc. § 2102; Reed v. Clark, 47 Cal. 194 (1873).

Under existing law, some evidence is admissible only if the judge is persuaded as to the existence of the preliminary fact, and his determination of the factual question is based on all of the evidence presented to him by both parties. See, for example, People v. Glab, 13 Cal. App.2d 528, 57 P.2d 588 (1936), in which the judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify. On the other hand, some preliminary determinations by the judge are made upon only a prima facie showing of the preliminary fact and the evidence is admitted if there is evidence sufficient to sustain a finding as to the existence of the preliminary fact. For

example, statements of an agent or co-conspirator are admissible against a defendant upon a prima facie showing of the agency or conspiracy. Union Constr. Co. v. Western Union Tele. Co., 163 Cal. 298, 125 Pac. 242 (1912); People v. Steccone, 36 Cal.2d 234, 223 P.2d 17 (1950).

Rule 8 has been expanded to define clearly those situations in which the judge must be persuaded of the existence of the preliminary fact and those situations where he must admit the evidence upon a prima facie showing of the preliminary fact.

Revised Rule 8, as well as URE Rule 8, applies only where the admissibility of evidence, the existence of a privilege, or the qualification of a witness "is stated in these rules" to be subject to a condition. Hence, Revised Rule 8 governs only those instances where the admissibility of evidence is stated explicitly in the rules to be subject to a condition. Throughout the rules, these explicit conditions are identified by the use of the introductory words "if the judge finds", "if", "unless the judge finds", or "unless". Revised Rule 8 does not prescribe the function of the judge when the admissibility of evidence is dependent upon the existence of a fact that is not stated explicitly in these rules to be a condition of admissibility.

For example, Revised Rule 7 provides that "All relevant evidence is admissible." The relevancy of certain evidence at times may be dependent upon the determination of a preliminary fact. The relevancy of a prior inconsistent statement of a witness is to show that the witness has equivocated and, hence, that his present testimony is not trustworthy; therefore, the statement is not relevant if the witness did not in fact make the statement. If the identity of the person making the alleged inconsistent statement is disputed, the judge determines the admissibility of the evidence

without regard to Revised Rule 8. Under existing law, the statement is admissible upon a prima facie showing that the witness made the statement and the jury determines whether the statement was actually made by the witness (Schneider v. Market Street Ry., 134 Cal. 482, 492, 66 Pac. 734 (1901)); this will remain unchanged by Revised Rule 8. Similarly, Revised Rule 63(7) provides that "a statement by a person who is a party to a civil action" is admissible against him as an exception to the hearsay rule. Although a statement offered as a direct admission is not admissible unless it was made by a party, the fact that the statement was made by the party is not explicitly "stated in these rules" to be a condition of admissibility. Hence, if there is a dispute as to the authorship of a statement offered as a direct admission, the judge determines such authorship without regard to the provisions of Revised Rule 8. Under existing law, a statement offered as a direct admission is admissible upon a prima facie showing that the statement was made by the party against whom it is offered (Eastman v. Means, 75 Cal. App. 537, 242 Pac. 1089 (1925)), and this will remain unchanged by Revised Rule 8.

Subdivision (1). This subdivision merely sets forth the general rule that preliminary questions of fact upon which the admissibility of evidence depends are to be decided by the judge.

Subdivision (1) will alter California law in one respect. Subdivision (1) provides that, on request, the judge is required to determine the admissibility of a confession out of the presence of the jury. Under

existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. People v. Gonzales, 24 Cal.2d 870, 151 P.2d (1944); People v. Nelson, 90 Cal. App. 27, 31, 265 Pac. 366 (1928).

The existing rule permits evidence that may be extremely prejudicial to be heard by the jury. For example, in People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. To avoid this kind of prejudice, subdivision (1) forbids the conduct of the preliminary hearing in the presence of the jury if the defendant objects.

Subdivision (2). Subdivision (2) has been added to cover those rulings by the judge that are made on the basis of a prima facie showing by the proponent of the evidence. Under subdivision (2), a judge's rulings on the personal knowledge of a witness or the authenticity of writings are preliminary only--that is, the factual questions decided by the judge are ultimately decided by the jury--because the judge is passing either on the basic issues in dispute between the parties or on matters that involve the credibility of witnesses. If the judge's rulings were final, he would deprive a party of a jury decision on a question that the party has a right to have the jury decide. For example, if the question of A's title to land is in issue, A may seek to prove his title by deed from a former owner, O. Rule 67 requires that the deed by authenticated, and the judge, under Rule 8, must rule on the question of authentication. If A introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the judge, on the basis of the adverse party's evidence, decided that the deed was spurious and not admissible, the judge would have resolved the basic factual issue in the case. A would be

deprived of a jury finding on the issue even though entitled to a jury decision and even though he had introduced sufficient evidence to warrant a jury finding in his favor.

Or, if the question before the court is how certain events occurred, plaintiff P might offer witness W to testify as to those events. If W testifies that he witnessed the events, the judge is required to permit him to testify. If the judge, on the basis of the adverse party's evidence, excluded W's testimony because he decided that W was not in fact present at the occurrence and, therefore, did not have personal knowledge, the judge would resolve the very issue of credibility that the jury must resolve ultimately in determining which witness to believe. P would be deprived of a jury finding as to the credibility of his witness even though he had introduced sufficient evidence to warrant a jury finding in his favor.

Thus, in ruling on the foundational requirement of the personal knowledge of the witness or the authenticity of a writing, the judge's rulings are preliminary only. He does not decide these questions finally on the question of admissibility; if he did so he would be usurping the function of the jury to pass on the ultimate issue in dispute and the credibility of the witnesses. The judge decides only whether there is sufficient evidence to go to the jury on the question.

So far as the question of personal knowledge is concerned, little discussion of the requisite foundational showing appears in the California cases. But the existing practice seems to be in accord with subdivision (2). See, for example, People v. Avery, 35 Cal.2d 487, 492, 218 P.2d 527 (1950) ("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code

of Civil Procedure."); People v. McCarthy, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910).

Subdivision (2) is declarative of the existing law relating to the functions of judge and jury upon questions of the authenticity of documents. Verzan v. McGregor, 23 Cal. 339, 342-43 (1863); Richmond Dredging Co. v. A., T. & Santa Fe Ry., 31 Cal. App. 399, 412 (1916).

Subdivision (3)--generally. Subdivision (3) prescribes the functions of the judge and jury in determining whether evidence--even though relevant--should be excluded because of the hearsay rule, the opinion rule, or some other rule governing the competency of relevant evidence.

Subdivision (3) provides that the judge, when ruling on a question of the competency of evidence, should receive evidence supporting the contentions of both the proponent and the opponent of the evidence and should finally decide whether the evidence is competent. The jury does not determine the question again when it finally decides the case. For example, if a witness is called to testify as an expert witness, the judge must determine finally whether or not the witness is in fact an expert. The jury does not again decide the issue at the close of the case and exclude his testimony from consideration if it determines that he is not an expert.

Subdivision (3) is generally in accord with existing California law. Code Civ. Proc. § 2102; Fairbank v. Hughson, 58 Cal. 314 (1881)(error to submit qualifications of an expert to jury); People v. Delaney, 52 Cal. App. 765, 199 Pac. 896 (1921)(competency of child to testify to be determined by trial judge).

Subdivision (3) will change existing California law, however, in three respects: It will change the function of the jury when questions arise

concerning the admissibility of confessions, spontaneous declarations, and dying declarations. It will change the function ofboth judge and jury when questions arise concerning the admissibility of the vicarious admissions of co-conspirators. And it will change the nature of the evidence that may be considered by the judge in ruling on preliminary fact questions relating to the admissibility of evidence. Subdivision (3) will also require a standard of foundational proof for vicarious admissions admissible under Revised Rule 63(9)(a) that is different from that required by the existing law relating to vicarious admissions; however, this does not involve a change in the existing law. See the discussion below.

Subdivision (3)--confessions, dying declarations, spontaneous statements. Under existing California law, the rulings of the judge on the admissibility of confessions, dying declarations, and spontaneous statements are not final. If the judge decides preliminarily that the evidence is admissible, he submits the matter to the jury for a final determination whether the confession was voluntary, the dying declaration was made in realization of impending doom, or the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe the condition of admissibility has been satisfied. People v. Baldwin, 42 Cal.2d 858, 866-67, 270 P.2d 1028 (1954)(confession--see instruction at 866); People v. Gonzales, 24 Cal.2d 870, 876-77, 151 P.2d 251 (1944)(confession); People v. Singh, 182 Cal. 457, 476, 181 Pac. 987 (1920)(dying declaration); People v. Keelin, 136 Cal. App.2d 860, 871, 289 P.2d 520 (1955)(spontaneous declaration).

Under Revised Rule 8, the judge's rulings on these questions will be final. The jury will not get a "second crack." The change is desirable. The existing rule is a temptation to the weak judge to avoid difficult

decisions by "passing the buck" to the jury. The existing rule requires the jury members to perform the impossible task of erasing the hearsay statement from their minds if they conclude that the condition of admissibility has not been met. A complex instruction to this effect is needed. Frequently, the evidence presented to the judge out of the jury's presence must again be presented to the jury so that it can rule on the admissibility question intelligently.

Revised Rule 8 deals only with the admission of evidence at the trial level. Hence, the finality of the judge's rulings on the admissibility of confessions will have no effect on the well-settled rule that an appellate court will make an independent determination of the voluntariness of a confession upon the basis of the uncontradicted facts or the facts as found by the trial court. Watts v. Indiana, 338 U.S. 49, 50-52 (1948); People v. Trout, 54 Cal.2d 576, 583, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); People v. Baldwin, 42 Cal.2d 858, 867, 270 P.2d 1028 (1954).

Subdivision (3)--vicarious admissions. Under existing California law, the admissions of an agent are admissible against the principal, the admissions of a partner are admissible against another partner, and the admissions of a conspirator are admissible against his co-conspirators, if the admissions were specifically authorized to be made or if the admissions were made within the scope of the agency, partnership, or conspiracy and in furtherance of the purpose thereof. The underlying principle is that a person who chooses to act through another--whether as agent, partner, or co-conspirator--is responsible for whatever the other does within the scope of his authority to act in furtherance of the purpose of their relationship. See generally, Witkin, California Evidence, §§ 230-233, pp. 259-65; see

also 4 Wigmore, Evidence §§ 1078, 1079. Hence, a statement by an agent, partner, or co-conspirator of a party that is inconsistent with the party's position at the trial is admissible against him to the same extent that the party's own prior inconsistent statements are admissible. See 4 Wigmore, Evidence § 1048. The admissibility of most of these vicarious admissions is continued by Revised Rule 63(8). The admissibility of the admissions of a co-conspirator is continued by Revised Rule 63(9)(b).

Under existing law, the courts admit the vicarious admissions of agents, partners, and co-conspirators upon a prima facie showing of the agency, partnership, or conspiracy. Sample v. Round Mountain Citrus Farm Co., 29 Cal. App. 547, 156 Pac. 983 (1916)(agency); Union Constr. Co. v. Western Union Tele. Co., 163 Cal. 298, 125 Pac. 242 (1912)(agency); Bryce v. Joynt, 63 Cal. 375 (1883)(partnership); People v. Robinson, 43 Cal.2d 132, 137, 271 P.2d 865 (1954)(conspiracy).

Revised Rule 63(8) does not expressly condition the admissibility of authorized admissions upon a finding of the requisite relationship; hence, Revised Rule 8 will not apply and the existing law will be continued insofar as authorized admissions of agents and partners are concerned.

Revised Rule 63(9)(b) does explicitly condition the admissibility of a vicarious admission of a co-conspirator upon a finding of conspiracy. Hence, the admissibility of such an admission must be determined under the provisions of subdivision (3) of Revised Rule 8. Whereas existing law requires the judge to admit a co-conspirator's statement upon a prima facie showing, under Revised Rule 8(3) the judge will consider all the evidence relating to conspiracy--including that presented by the party objecting to the evidence--and if he is not persuaded that there was a conspiracy and the statement was made in furtherance thereof, he should exclude the statement.

Although existing law requires that statements of agents and partners be within the scope of the agency or partnership in order to be considered vicarious admissions, Revised Rule 63(9)(a) permits the statements of agents and partners to be admitted against a party merely when they relate to the subject of the agency or partnership. These vicarious admissions are admitted, not on the theory that the party himself has taken an inconsistent position prior to trial with which he should be confronted, but upon the theory that an agent or partner is unlikely to make an untrue statement concerning the agency or partnership that can be used against it. Revised Rule 63(9)(a) explicitly conditions the admissibility of these admissions upon the existence of the requisite relationship. Hence, the judge must find from all the evidence whether the condition of admissibility exists under the provisions of subdivision (3) of Revised Rule 8. Prima facie evidence of the requisite relationship will not suffice. No change in the existing law relating to the foundational showing is involved, however, for the statements admissible under Revised Rule 63(9)(a) are not admissible at all under existing law.

Subdivision (3)--admissibility of evidence on preliminary determination by judge. Subdivision (3) provides that most exclusionary rules of evidence do not apply during the preliminary hearing held by the judge to determine the competency of evidence. However, the privilege rules are applicable and the judge may exclude evidence under Rule 45 if it is cumulative or of slight probative value.

Under existing California law, the rules governing the competency of evidence do apply during the preliminary hearing. People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899)(affidavit cannot be used to show death of

witness at preliminary hearing to establish foundation for introduction of former testimony at trial).

This change in California law is desirable. Many reliable, and in fact admissible, hearsay statements must be held inadmissible if the formal rules of evidence apply to the preliminary hearing. 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 being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who can no longer be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.

The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. Thayer, Preliminary Treatise on Evidence, 509 (1898). The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. Morgan, Some Problems of Proof 106-17 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required and he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. Code Civ. Proc. § 2009 (general rule); Code Civ. Proc. § 657 subd. 2 (affidavits used to show jury misconduct); Buhl v. Wood Truck Lines, 62 Cal. App.2d 542, 144 P.2d 847 (1944)(jury misconduct); Church v. Capital Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956)(competency of juror); and see Cont.

Ed. Bar, California Condemnation Practice 208 (1960)(affidavits used to determine amount of immediate possession deposit in eminent domain case); see also Witkin, California Procedure 1648 (1954).

No reason is apparent for insisting on a more strict observation of the rules of evidence on matters to be decided by the judge alone when the question is raised during trial than when the question is raised before or after trial. In ruling on the admissibility of evidence, he should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, Revised Rule 8 is recommended in order to provide utmost assurance that all relevant and competent evidence will be presented to the trier of fact.