#34(L) 4/17/64

Memorandum 64-21

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

Attached to this memorandum are two exhibits containing State Bar Committee comments on the tentative recommendation relating to General Provisions. Exhibit I, the buff sheet, contains the comments of the Northern Section of the State Bar Committee. Exhibit II, the green pages, contains the comments of the Southern Section of the Committee.

The Northern Committee approved Rules 1 through 7.

The Southern Committee approved Rules 2 through 6. The Committee received a report on Rule 1, which is attached to Exhibit II, but there is no indication of the action taken on this report except in regard to Rule 1(2). However, since the report raises questions concerning other subdivisions of Rule 1, we present these questions to you.

Rule 1(2). The Southern Committee recommends the deletion of Rule 1(2) and the incorporation of its provisions in Rule 7. Revised Rule 7(f) would then read:

> Except as otherwise provided by statute . . . (f) all evidence tending in reason to prove or disprove any disputed fact is admissible.

In the first supplement to this memorandum, the staff has recommended modifications of Rules 1(2) and 7. Please read the first supplement to this memorandum in connection with this problem.

Rule 1(3). The report appended to Exhibit II objects to the definition of "proof". There is no indication, however, whether the committee approved or disapproved the report in this regard. The objection is made that

"proof" is not used in its defined sense in our Revised Rules.

It appears to us, however, that the word "proof" is used in its defined sense in Rule 1(4). It is used there in the phrase "burden of proof", which is defined as the obligation to establish the fact in question to the satisfaction of the trier of fact. The word "proof" appears once in Rule 1(4) when it is not contained in the expression "burden of proof". This additional reference to "proof" also seems to use the word in its defined sense.

The use of the word "proof" in the expression "offer of proof" in Rule 5 seems to be a use of the term that is not consistent with the definition. The report seems correct in suggesting that an offer of proof is an offer of "evidence" as that word is defined in Rule 1(1). In Sections 5150 and 5155 (the proposed codification of our Hearsay recommendation) the word is used in the term "order of proof". Here again, the term seems to be used in a manner inconsistent with the definition. The word as used in "order of proof" also seems to connote "evidence" as that term is defined in Rule 1(1). The URE definition of the word "proof"--all of the evidence before the trier of fact tending to prove the existence or nonexistence of a material fact--doesn't seem to fit these expressions any better than the approved definition. The inconsistency is not disturbing, however, for the expressions "order of proof" and "offer of proof" are well understood and frequently used, and in their context the meaning can hardly be misunderstood.

Section 5150 contains another use of the word "proof" which should be changed. This section permits vicarious admissions of a coconspirator, made in furtherance of the conspiracy, to be admitted after proof of the existence

of the conspiracy. Under existing law, the conspiracy does not have to be proved or established. Under existing law, the proponent of the evidence merely needs to introduce evidence sufficient to sustain a finding of the existence of the conspiracy. Upon the introduction of such preliminary evidence, the vicarious admission is admissible. People v. Robinson, 43 Cal.2d 132 (1954); People v. Steccone, 36 Cal.2d 234 (1950). Rule 8 reiterates this existing law. To avoid a conflict between Rule 8 and Section 5150 in this regard, the word "proof" in Section 5150 should be changed to "the introduction of evidence sufficient to sustain a finding".

Rule 28.5 also contains the word "proof" in the expression "burden of proof". As indicated above, we believe this use of the term to be consistent with the definition.

We originally adopted the existing California definition of the word "proof" instead of the URE definition because the URE definition seemed to fit none of the uses of the term in the Rules. Moreover, the California definition will permit ready integration of these rules with the existing California statutes. Although we recognize that the term is not used in its defined sense in such expressions as "order of proof" and "offer of proof", we think the context in those expressions makes the meaning intended clear. All of these definitions apply "unless the context otherwise requires". Hence, we recommend retention of the definition in Revised Rule 1(3).

Rule 1(10). The report attached to the Southern Section comment states that the definition of "judge" is unnecessarily restrictive. The report suggests that "judge" should include the officer "authorized to

conduct and conducting a fact finding tribunal." The suggestion is made because of the definition of "evidence" in Rule 1(1), which defines "evidence" in terms of the matters offered to a fact finding tribunal.

Despite the use of the term "fact finding tribunal" in Rule 1(1), Rule 2 confines the application of the rules to court proceedings. Rule 1(10) extends the definition of "judge" to a court commissioner, referee or similar officer because Rule 2 applies to court proceedings conducted by a court commissioner, referee or similar officer. The only presiding officers to whom the definition will not apply are those presiding over proceedings to which the privilege rules are applicable. But in Rule 22.3 we defined "presiding officer" to mean the person authorized to rule on a claim of privilege in such a proceeding. Even in the privilege rules we use the term "judge" to mean the presiding officer of a court proceeding only.

Rule 1(18). The report attached to Exhibit II points out the inconsistency of including two definitions of "State" in the Revised Rules. When the definition of "State" was put in Rule 62(5), we had not worked on the General Provisions and had no definition of "State" to rely on. We have deleted the definition of "State" from the Hearsay title as it appears in proposed statutory form.

Rule 7. The Southern Section suggested an amendment to Rule 7(f) to include the definition of "relevant evidence"; but this matter was discussed above in connection with Rule 1(2).

Rule 8. Both the Northern and Southern Sections of the State Bar Committee expressed concern over Rule 8. The Northern Section recommended retention of URE Rule 8. The Southern Section unanimously agreed that

the Commission should reconsider Rule 8. But there was considerable lack of unanimity in suggesting what should be done with it. Apparently the Southern Section considered in detail the examples in the comments. The report indicates that the discussion was "heated" and left the members with the uneasy feeling that we might be losing the "simplicity" and "flexibility" inherent in the present situation "wherein the body of law pertaining to this determination has been determined on an ad hoc basis." There was unanimous agreement in the Southern Section upon the following points:

1. Rule 8(5) should be eliminated entirely.

Comment: Rule 8(5) probably can be eliminated without harm to the rule. Rule 8(5) restates the holding in Cohen v. Superior Court, 173 Cal. App.2d 61, 343 P.2d 286 (1959). As the incriminatory nature of the testimony to be elicited is obviously a "preliminary fact" within the meaning of Rule 8(1), the deletion of Rule 8(5) would apparently require the judge to be persuaded of the incriminatory nature of the information before he could uphold the privilege. However, the holding in the Cohen case is probably based on the requirements of the Constitution. Hence, the deletion of Rule 8(5) would not change anything inasmuch as the Constitution would continue to dictate the proper rule. The deletion of Rule 8(5) would merely mean that Rule 8 would be misleading as to the nature of the determination to be made in self-incrimination cases and the parties would be required to find the law in the cases rather than in the statute.

2. The Southern Section recommends that if the preliminary fact coincides with an ultimate fact in the case, the existence of the preliminary fact should be submitted to the jury with appropriate instructions even though the trial judge "has determined the existence or the nonexistence of the preliminary fact."

Comment: This recommendation would work a substantial change in the existing California law. Under the existing law, for example, if the marital testimonial privilege is claimed, the judge must determine preliminarily whether the parties are married or not. His determination on this question is final so far as the admissibility of evidence is concerned even though the marriage of the party with the witness is in issue in the case. The judge does not instruct the jury to decide whether the parties are validly married and to disregard the testimony if the jury decides that they are. See, e.g., People v. Macdonald, 24 Cal. App.2d 702 (1938), where the defendant was prosecuted for an incestuous marriage. He objected to the testimony of his alleged daughter on the ground that she was his wife and could not testify against him. The judge overruled the objection after hearing evidence and deciding that the witness' marriage to defendant was void because she was his daughter. The defendant complained on appeal that in overruling the objection and determining that the witness was the defendant's daughter the trial judge "thereby took that most important question of fact away from the jury." The appellate court upheld the ruling and pointed out that the ultimate question of fact was not taken from the jury. There is some misleading language in the opinion which attempts to use the confession

rule as an analogy, but it seems apparent from the nature of the appellant's objection and the development of the case that the issue of admissibility was not again submitted to the jury although the question of the relationship between the witness and the defendant was.

On the merits, the privilege rules are created theoretically because of the need to keep information secret, not merely to permit the privilege holder to win the particular case. Hence, if the judge overrules the claim of privilege, the damage is done. No useful purpose underlying the privilege can be served at that point by submitting the issue of admissibility again to the jury. Of course, if the preliminary fact determined by the judge on the privilege question is an ultimate question in the lawsuit as well, the jury must decide that fact question again--but not for purposes of determining admissibility.

When the issue is the admissibility of a vicarious admission, or when any other objection is made on the ground of the relevancy of the evidence (and I include in that concept questions involving the authenticity of documents and the personal knowledge of witnesses) it would be appropriate to instruct the jury to disregard the evidence if they find the preliminary fact does not exist. In most instances, however, this will be unnecessary. Their disregard of the evidence will necessarily follow from their disbelief of the preliminary fact. For example, if the issue is the authenticity of a deed, it would hardly be necessary to instruct the jury to disregard the deed if they find that it is not genuine. It would be inconceivable that

a rational jury could find the deed not genuine yet still effective to transfer the title of the purported maker. In conspiracy and agency cases, however, it is not so apparent that the statements of the agent or coconspirator should be disregarded if not made in the scope of the agency or in furtherance of the conspiracy. As the theory upon which the statements are admitted is that the party is vicariously responsible for the acts and statements of his agents within the scope of their authority, it would be appropriate to instruct the jury to disregard the statements if they find that the requisite authority did not exist.

We believe that the suggestion of the Southern Section would be an undesirable one insofar as the judge's rulings on the competency of evidence are concerned. So far as his rulings on relevancy under subdivision (4) are concerned, however, the following provision (taken from the New Jersey Rule 8) might be added to subdivision (4) to meet the objection:

> If the judge admits the proffered evidence, he shall on request instruct the jury to determine the existence of the preliminary fact and to disregard the evidence if they find that the preliminary fact does not exist. The judge shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.

3. The Southern Section also objects to the rule that removes from the jury the right to determine ultimately the admissibility of a confession.

Comment: The Commission has consistently refused to continue the "second crack" doctrine as to confessions. The argument against the "second crack" doctrine is summarized by Professor Morgan as follows:

> Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion [guilt?] be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. Neither the due process clause of the Federal Constitution nor any other of its provisions requires any particular division of function between judge and jury. The result is that in New York and in a few other jurisdictions, the orthodox rule has been abandoned in the one situation where it is most needed. The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed. [Morgan, Some Preliminary Problems of Proof 104-05 (1956).]

We recommend, accordingly, that the "second crack doctrine" be rejected.

Rule 8 generally. The Northern Section recommends approval of the original URE Rule 8. Their specific objection to the Revised Rule is that subdivisions (3) and (4) do not make sufficiently clear that the judge's determination under subdivision (3) is final but that his determination under subdivision (4) is not.

We believe that the amendment to subdivision (4) (suggested above) will indicate more clearly that the judge's determination under subdivision (4) is not final and that the trier of fact gets to determine the preliminary fact and reject the proffered evidence if it determines that the preliminary fact does not exist.

Although Rule 8 as revised is complex, we do not believe that either

URE Rule 8 or the lack of any rule would be an improvement. URE Rule 8 is less complex simply because it does not face up to the problems that the Revised Rule does. The "simplicity" and "flexibility" that is "inherent in the present situation", we believe to be largely illusory. The comment to Rule 8 indicates that subdivisions (3) and (4) are in large part, if not totally, a declaration of existing law. To permit these matters to be "determined on an ad hoc basis" seems to us to be declaring that it is every judge for himself. The degree of proof necessary to get your evidence in would depend to a far greater degree than is permitted by Rule 8 on the particular judge trying the case and on (as Commissioner Selvin says) the state of his digestion.

Accordingly, despite its complexities, we believe Revised Rule 8 should be retained in substantially its present form. We do suggest, however, that subdivisions (3) and (4) be revised to meet the Northern Section's objection that the finality of the judge's preliminary determination is not clearly spelled out. Our proposed revision is set out in Exhibit III (pink pages).

We are also sending out with this memorandum a copy of the latest version of the recommendation on general provisions. It should be considered in connection with this memorandum and the first and second supplements to this memorandum.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo 64-21

EXHIBIT I

March 26, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met at 4:30 P.M. on March 24, 1964, to consider Article I - General Provisions - Rules 1 to 8.

The Committee approved Rules 1 to 7, inclusive, as revised by the Law Revision Commission.

With respect to Rule 8, Preliminary Inquiry By Judge, the Committee is of the opinion that the additions by the Law Revision Commission are confusing and will be puzzling to both bench and bar. Furthermore, the distinction between subdivisions (3) and (4), as set forth in the comments is most difficult to find on reading these two sections. In other words, nothing clearly indicates that under subdivision (3) the determination by the judge is final but is not final under subdivision (4).

The Committee is of the opinion that Rule 8, as originally proposed by the Commissioners on Uniform Laws should be adopted.

Sincerely yours,

Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence

Memo 64-21

EXHIBIT II

Law Offices

NEWELL & CHESTER

650 South Grand Avenue - Suite 500
LOS ANGELES 17, CALIFORNIA

April 7, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Southern Section of the Committee to Consider Uniform Rules of Evidence met on March 31, 1964, to consider Article I - General Provisions - Rules 1 to 8.

Rule 1 - Definitions

Mr. Robert Henigson submitted a written report on this rule which was approved by the committee members. A copy of his analysis is attached hereto.

Rule 2 through Rule 6

The committee members approved these rules.

Rule 7 - General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules

Rule 7 was approved except that the members felt that subsection (f) should be changed in accordance with Mr. Henigson's report. Therefore, it would read as follows:

> (f) All evidence tending in reason to prove or disprove any disputed fact is admissible.

Rule 8 - Preliminary Inquiry By Judge

The Committee unanimously felt that the Commission should reconsider Rule 8. The members appreciated the fact that the Commission in Rule 8 is attempting to distinguish between those matters on which the trial judge makes a conclusive determination of a preliminary fact from those in which he simply makes a determination that there is sufficient evidence to

sustain a finding that the preliminary fact probably does exist. The members felt that, since this is presumably an attempt to codify the law of evidence, such a question logically should be resolved and enunciated in the form of a statutory enactment. Nevertheless, a heated discussion of certain specific examples left the members with the uneasy feeling that in attempting to achieve legal symmetry we might be losing the simplicity, and indeed flexibility, that is inherent in the present situation wherein the body of law pertaining to this determination has been determined on an ad hoc basis. Mr. Henigson felt that an attempt to distinguish between the "relevancy group of facts" and the "competency group of facts" is worthwhile but that the revision needs revising. Mr. Robinson was of the opinion that as to any preliminary fact the trial judge on request should be able to instruct the jury to disregard the evidence should it find that the preliminary fact did not exist. The members were unanimous on these points:

1. Rule 8 (5) should be eliminated entirely. The law of self-incrimination as set forth in rules 24 and 25 should not be tinkered with.

2. If the determination of a preliminary fact coincides with an ultimate fact in the case, the question should be submitted to the jury with appropriate instructions even though the trial judge has determined the existence or the non-existence of the preliminary fact.

3. Notwithstanding the determination of the judge, the question of whether a confession is voluntary, or an admission in a criminal case was voluntarily given, should be submitted to a jury with appropriate instructions.

In short, it was the feeling of the Committee that Rule 8 needs to be reconsidered in depth before being approved by the Commission.

Very truly yours,

/s/ Robert M. Newell

Robert M. Newell

RMN:em
Enc.

Revised Rule 1(1) defining evidence is preferable both to Section 1823, C.C.P., and the URE Rule 1(1) in that it includes within the definition the kinds of evidence, i.e., testimonial, documentary and real. It also happily embraces all "fact finding tribunals" not merely the "judicial proceeding." Desirably, it excludes by omission judicial knowledge or judicial notice as a kind of evidence which our Section 1827, C.C.P., has erroneously included for many years.

Revised Rule 1(2) - the definition of "relevant evidence" - has no precise counterpart in existing statutory law though, of course, Sections 1831 and 1832, C.C.P., (defining, respectively, direct and circumstantial evidence) necessarily imply that evidence must in reason establish or tend to establish the fact in dispute and Section 1868, C.C.P., requires that "Evidence must . . . be relevant to the question in dispute." The utility of the rule is in serious doubt since the term "relevant evidence" appears elsewhere in the Rules only once (Revised Rule 7) as follows: "Except as otherwise provided by statute: (f) All relevant evidence is admissible." Further, it is difficult to comprehend how evidence can be such unless it tends in reason to prove or disprove a material fact in issue. After all, a logical nexus between the offered item and the fact in dispute is the sine qua non of admissibility. Indeed, the Law Revision Commission itself recognizes in its discussion under Revised Rule 6 that "relevant" is wholly unnecessary as "evidence is admissible only if it is relevant." I suggest that Revised Rule 1(2) be deleted and Revised Rule 7(f) be amended to read:

> "(f) All evidence tending in reason to prove or disprove any disputed fact is admissible." [Underlining indicates suggested changes]

Revised Rule 1(3) defining "proof", while a satisfactory restatement of existing law (Section 1824, C.C.P.), adds nothing to the URE but a source of confusion. The word "proof" appears in the Revised Rules at 1(4) ["burden of proof"], 5(1) ["offer of proof"] and 63(9)(a)(ii) and 63(9)(b)(ii) ["proof by independent evidence"]. It also appears in URE Rule 16 ["proof beyond a reasonable doubt"] and apparently in Revised Rule 28.5 (of which I am without a copy). Reference to those Rules reveals that it seldom has a meaning as used consistent with its definition. E.g., the phrase "burden of proof" is given a special meaning by Revised Rule 1(4) which has no necessary relationship with the definition of "proof". Again, "offer of proof" (incidentally, nowhere in the Revised Rules defined) need not be the offer of conclusive evidence as the definition of "proof" denotes but merely the offer of "evidence" as defined by Revised Rule 1(1). In Revised Rules 63(9)(a)(ii) and 63(9)(b)(ii), the phrase "after"

. . . proof by independent evidence of the existence of the relationship [or conspiracy] . . . " does not and should not connote that the independent evidence of relationship or conspiracy (as the case may be) must establish the fact in evidence, i.e., must conclusively establish it. In URE 16 "proof beyond a reasonable doubt" suggests the URE definition of proof, not that of the Revised Rule. It seems curious to include a definition of "proof" in Revised Rule 1(3) which does not fit any use to which the word is otherwise put in the Rules and I suggest it be deleted.

Revised Rule 1(10) defining judge is unnecessarily restrictive in limiting "judge" to the officer presiding at a "court proceeding or court hearing." If, as Revised Rule 1(1) clearly suggests, the Rules may apply in fact finding tribunals (subject, of course, to the effect of Revised Rule 2 and other statutes) "judge" should include the officer "authorized to conduct and conducting a fact finding tribunal."

Revised Rule 1(18) defining State, while consistent with Section 83, Fish and Game Code, and Section 28, Insurance Code, differs from Revised Rule 62(5) ["'State' includes each of the United States and the District of Columbia"]. No good reason appears for two definitions of "State" in the Revised Rules (though Revised Rule 62(5) is restricted in its application to Revised Rules 62 through 66) and I think that if Revised Rule 1(18) is to be included, Revised Rule 62(5) should be deleted.

Memo 64-21

EXHIBIT III

SUGGESTED REVISION OF REVISED RULE 8(3) AND (4)

(Revisions from previously approved revised rule shown)

(3) Subject to subdivisions (4) and (5):

(a) When the existence of a preliminary fact is disputed, the judge shall indicate to the parties who has the burden of producing evidence and the burden of proof on the issue as implied by the rule under which the question arises. [~~and he~~] The judge shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule under which the question arises.

(b) If a fact in issue in the action is also a preliminary fact, the judge shall not inform the jury of his determination of the preliminary fact. The jury shall make its determination of the fact without regard to the determination made by the judge. The determination of the fact by the jury does not affect the admissibility of the proffered evidence nor the right of the jury to consider such evidence; and, if the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the judge's determination of the preliminary fact.

(4) (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the judge finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when:

[~~(a)~~] (i) The relevance of the proffered evidence depends on the existence of the preliminary fact; or

[~~(b)~~] (ii) The preliminary fact is the personal knowledge of the witness concerning the subject matter of his testimony; or

[~~(c)~~] (iii) The preliminary fact is the authenticity of a writing; or

[~~(d)~~] (iv) The proffered evidence is of a statement or other conduct by a particular person and the disputed preliminary fact is whether that person made the statement or did the act.

(b) The judge may admit conditionally the proffered evidence under paragraph (a), subject to the evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the judge admits the proffered evidence under paragraph (a):

(i) He may on his own motion, and on request shall, instruct the jury to determine the existence of the preliminary fact and to disregard the evidence if they find that the preliminary fact does not exist.

(ii) He shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.