

6/25/64

Memorandum 64-42

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 2--
Words and Phrases Defined)

We have revised the sections in Division 2 in accordance with instructions given us at the June meeting. We attach a copy of Division 2 as revised. We want to send Division 2 to the printer after the July meeting.

Also attached are the Comments to Division 2. We plan to have these set in type after the July meeting. We do not plan to discuss them at the meeting unless a member of the Commission believes that a change should be made before the Comments are set in type. Mark any changes on attached copy so we can make them before we send the Comments to the printer.

We call the following matters to your attention:

Section 115

Section 115 has been revised according to suggestions made at the last meeting. We will want to approve this revision at the July meeting if it is satisfactory.

Section 130

This section has been revised according to instructions given at the June meeting.

Section 240

This section has been revised according to instructions given at the June meeting.

Other sections

We have made a number of revisions in various sections but these revisions were approved at the June meeting.

Comments

The comments have been completely rewritten in view of the suggestions made at the June meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DIVISION 2. WORDS AND PHRASES DEFINED

100. Application of definitions.

100. Unless the provision or context otherwise requires, these definitions govern the construction of this code.

105. Action.

105. "Action" includes a civil action and a criminal action.

110. Burden of producing evidence.

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a peremptory finding against him as to the existence or nonexistence of a fact.

115. Burden of proof.

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he prove the existence or nonexistence of a fact. Burden of proof is synonymous with burden of persuasion.

The burden of proof may require that such party raise a reasonable doubt concerning the existence or nonexistence of a fact or establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or beyond a reasonable doubt.

Unless a rule of law requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

120. Civil Action.

120. "Civil action" means a civil action or proceeding.

125. Conduct.

125. "Conduct" includes all active and passive behavior, both verbal and nonverbal.

130. Criminal action.

130. "Criminal action" means an action brought in a court by the people of the State of California, and initiated by complaint, indictment, or information, to determine whether a person has committed a crime and should be punished therefor, and includes any court proceeding ancillary thereto.

135. Declarant.

135. "Declarant" is a person who makes a statement.

140. Evidence.

140. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact in judicial or factfinding tribunals.

145. Finding of fact, finding, finds.

145. "Finding of fact," "finding," or "finds" means the determination from evidence or judicial notice of the existence or nonexistence of a fact.

150. The hearing.

150. "The hearing" means the hearing at which a question concerning the admissibility of evidence is raised, and not some earlier or later hearing.

155. Hearsay evidence.

155. "Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.

160. Judge.

160. "Judge" includes a court commissioner, referee, or similar officer, who is authorized to conduct and is conducting a court proceeding or court hearing.

165. Cath.

165. "Cath" includes affirmation.

170. Perceive.

170. "Perceive" means to acquire knowledge through one's senses.

175. Person.

175. "Person" includes a natural person, firm, association, organization, partnership, business trust, or corporation.

180. Personal property.

180. "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

185. Property.

185. "Property" includes both real and personal property.

190. Proof.

190. "Proof" is the establishment of a fact by evidence.

195. Public employee.

195. "Public employee" means an officer, agent, or employee of the United States or of a public entity.

200. Public entity.

200. "Public entity" includes a state, county, city and county, city, district, public authority, public agency, and any other political subdivision or public corporation.

205. Real property.

205. "Real property" includes lands, tenements, and hereditaments.

210. Relevant evidence.

210. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action, including the credibility of a witness or hearsay declarant.

215. Rule of law.

215. "Rule of law" includes constitutional, statutory, and decisional law.

220. State.

220. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

225. Statement.

225. "Statement" means not only an oral or written expression but also nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

230. Statute.

230. "Statute" includes a provision of the Constitution.

235. Trier of fact.

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

240. Unavailable as a witness.

240. (a) Except as otherwise provided in subdivisions (b) and (c), "unavailable as a witness" means that the declarant is:

- (1) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant;
- (2) Disqualified from testifying to the matter;
- (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;
- (4) Absent beyond the jurisdiction of the court to compel his attendance by its process;
- (5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process; or
- (6) Absent from the hearing because of imprisonment and the court is unable to compel his attendance at the hearing by its process.

(b) A declarant is not unavailable as a witness if the exemption, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

(c) A declarant is not unavailable as a witness if unavailability is claimed because he is absent beyond the jurisdiction of the court to compel appearance by its process and his deposition could have been taken by the proponent through the exercise of reasonable diligence and without undue hardship or expense, but this subdivision does not apply where the evidence offered is a deposition.

245. Verbal.

245. "Verbal" includes both oral and written words.

250. Writing.

250. "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100

Comment. Section 100 is a standard provision found in the definitional portion of recently enacted California Codes. The section makes it clear that the definitions in this division are not applicable where the context or language of a particular section requires that a word or phrase used in that section be given a different meaning.

Only definitions of general application are included in this division. Definitions applicable only to a particular division are found in that division. E.g., Section 900 et seq., defining words and phrases used in Division 8 (Privileges). Definitions applicable only to a particular article are found in that article. E.g., Sections 950-953, defining words and phrases used in the article relating to the lawyer-client privilege.

§ 105

Comment. Unless the provision or context of a particular code section otherwise requires, the word "action" includes both a civil action or proceeding and a criminal action or proceeding. Defining "action" eliminates the necessity for repeating "civil action and criminal action" in numerous code sections.

§ 110

Comment. The phrases defined in Sections 110 and 115 are useful because they provide a convenient means for distinguishing between the burden of proving a fact and the burden of going forward with the evidence. They recognize a distinction that is well established in California. WITKIN,

CALIFORNIA EVIDENCE §§ 53-60 (1950). The practical effect of the distinction is discussed in the comments to Division 4 (commencing with Section 500), especially in the Comments to Sections 500 and 510.

Section 115 makes clear that "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law.

Sections 110 and 115 are based on subdivisions (4) and (5) of Rule 1 of the Uniform Rules of Evidence.

§ 115

Comment. See Comment to Section 110.

§ 120

Comment. The phrase "civil action" includes a proceeding of a civil nature. The definition eliminates the necessity of repeating "civil action or proceeding" in every instance in which "civil action" is used.

§ 125

Comment. This broad definition of "conduct" is the same as Rule 1(6) of the Uniform Rules of Evidence.

§ 130

Comment. This definition is based on the definition of "criminal action" in Penal Code Sections 683 and 684. The definition includes ancillary proceedings, such as writ proceedings to test the sufficiency of evidence underlying an indictment or information or to attack a judgment of conviction.

§ 135

Comment. Ordinarily, the word "declarant" is used to distinguish a person who makes a hearsay statement from the witness who testifies as to the content of the statement. The definition is the same as Rule 62(2) of the Uniform Rules of Evidence. See also Comment to Section 1200.

§ 140

Comment. "Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof. The definition includes anything offered whether or not it is technically inadmissible and whether or not it is received. For example, Division 10 (commencing with Section 1200) uses "evidence" to refer to hearsay which may be excluded as inadmissible, but which may be admitted if no proper objection is made. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes clear that it constitutes evidence that may be considered by the trier of fact.

Section 140 is a better statement of existing law than Code of Civil Procedure Section 1823, which is superseded by Section 140. Although Section 1823 by its terms restricts "judicial evidence" to that "sanctioned by law," the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if offered and received without proper objection or motion to strike. E.g., People v. Alexander, 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963) ("illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary evidence violating the best evidence rule, inadmissible

opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parole evidence rule"). See WITKIN, CALIFORNIA EVIDENCE §§ 723-724 (1958).

Under this definition, a presumption is not evidence. See also Section 600 and the Comment thereto.

§ 145

Comment. The terms "finding of fact," "finding," and "finds" are used interchangeably in this code. Although judicial notice is not evidence, this section makes it clear that a finding may be based on judicial notice as well as on evidence. Section 145 is substantially the same as the first sentence of Rule 1(8) of the Uniform Rules of Evidence.

§ 150

Comment. "The hearing" is defined to mean the hearing at which the particular question arises and, unless a particular provision or its context otherwise indicates, not some earlier or later hearing. The definition is substantially the same as Rule 1(7) of the Uniform Rules of Evidence.

§ 155

Comment. See Comment to Section 1200.

§ 160

Comment. "Judge" is broadly defined to include every authorized person conducting a court proceeding.

§ 165

Comment. Similar definitions are found in other codes. E.g., VEHICLE CODE § 16.

§ 170

Comment. This definition is substantially the same as Rule 62(3) of the Uniform Rules of Evidence. It includes perception by sight, smell, touch, hearing, and the like.

§ 175

Comment. This broad definition includes not only natural persons and legal entities but also unincorporated associations, societies, and organizations. It is similar to definitions found in other codes. E.g., GOVT. CODE § 17; VEHICLE CODE § 470. See also CODE CIV. PROC. § 17.

§ 180

Comment. This definition is the same as the definition in Code of Civil Procedure Section 17(3).

§ 185

Comment. This definition is the same as the definition in Code of Civil Procedure Section 17(1).

§ 190

Comment. This definition is the same in substance as the definition of "proof" in Code of Civil Procedure Section 1824 and supersedes that section.

§ 195

Comment. "Public employee" is broadly defined in this section.

§ 200

Comment. The broad definition of "public entity" includes every form of public authority and is not limited to public entities in this State unless otherwise indicated by the context or specific language.

§ 205

Comment. This definition is substantially the same as the definition of "real property" in Code of Civil Procedure Section 17(2).

§ 210

Comment. This definition restates existing California law. E.g., Larson v. Solbakken, 221 Cal. App.2d ___, ___, 34 Cal. Rptr. 450, 455 (1963); People v. Lint, 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, 102-103 (1960). Thus, under Section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute, but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of Code of Civil Procedure Section 1870, which are superseded by the Evidence Code. In addition, Section 210 makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is "relevant evidence." This retains existing law. See CODE CIV. PROC. §§ 1868, 1870(16)(credibility of witnesses), which are superseded by the Evidence Code, and Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 339-340, 569-575 (1963)(credibility of hearsay declarants).

§ 215

Comment. This definition provides a convenient short reference for "constitutional, statutory, and decisional law."

§ 220

Comment. This definition is more precise than the comparable definition found in Code of Civil Procedure Section 17(7). For example, Section 220

makes it clear that "state" includes Puerto Rico, even though Puerto Rico is now a "commonwealth" rather than a territory.

§ 225

Comment. The significance of this definition is indicated in the Comment to Section 1200.

§ 230

Comment. This definition makes it clear that a reference to "statute" includes a constitutional provision. Thus, for example, when a particular section is subject to any exceptions "otherwise provided by statute," exceptions provided by the Constitution also are applicable.

§ 235

Comment. "Trier of fact" is defined to distinguish between jury trials and trials conducted by the court sitting without a jury. The definition is substantially the same as Rule 1(11) of the Uniform Rules of Evidence.

§ 240

Comment. Usually, the phrase "unavailable as a witness" is used in this code to state the condition that must be met whenever the admissibility of hearsay evidence is dependent upon the declarant's present unavailability to testify. The definition is based on Rule 62(7) of the Uniform Rules of Evidence.

"Unavailable as a witness" includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable, i.e., where he is prevented from testifying by a claim of privilege or is disqualified from testifying. Of course, if the out-of-court declaration is

itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege does not make the declaration admissible. The exceptions to the hearsay rule that are set forth in Division 10 (commencing with Section 1200) do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law--such as privilege--which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Accordingly, the hearsay exceptions permit the introduction of evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

Section 240 substitutes a uniform standard for the varying standards of unavailability provided by superseded Code of Civil Procedure sections providing hearsay exceptions. The conditions constituting unavailability under these superseded sections vary from exception to exception without apparent reason. Under some of these sections, the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under still others, the evidence is admissible if the declarant is absent from the jurisdiction. Despite the express language of these superseded sections, Section 240 probably is a restatement of existing law. People v. Spriggs, 60 Cal.2d ___, ___, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964). However, some (but not all) of the older cases are inconsistent with the Spriggs case and with Section 240. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 411 n. 7 (1963).

§ 245

Comment. The word "verbal" is defined to avoid the necessity of repeating "oral or written" in various sections of the code. The definition is the same as Rule 1(12) of the Uniform Rules of Evidence.

§ 250

Comment. "Writing" is defined very broadly and, unless the particular section or its context otherwise requires, includes pictures and sound recordings. The definition is the same as Rule 1(13) of the Uniform Rules of Evidence.