#34(L) 10/26/64

Memorandum 64-73

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 2. Words and Phrases Defined)

We have received no comments on Division 2. There are a few details, however, that need attention:

§ 120. The words "special proceedings of a civil nature and" seem unnecessary, and their inclusion in the section tends to imply that the word "all" does not really mean all. We suggest that the words be deleted.

§ 175. We suggest that the term "public entity" be added to the list of things included in the word "person". The term "person" seems intended to include a "public entity" when the term is used in the Evidence Code (except, of course, where the term is so used that it can refer only to a natural person). See, for example, Section 911.

§ 190. The definition of "proof" appears defective. The definition is "the effect of evidence"; but that definition does not indicate sufficiently what the nature of the effect of the evidence must be. What we actually mean by the defined term is the establishment of a degree of belief concerning a fact in the mind of the person or persons who are required by law to determine the fact. Although we use the term "proof" in this sense in several places in the Evidence Code, we also use the word "proof" in an undefined sense in some places. For example, the term "order of proof" is used in many places to refer to the order of presenting evidence. In most places, we do not think there can be any confusion over the meaning of the term "proof" in its context. Hence, we think that the definition might be eliminated without harm. It

should either be eliminated or be revised to express more accurately what is meant. If the definition is eliminated, we suggest that Section 1224(d) be modified to read:

> (d) The evidence is offered either after [proof] the court is persuaded of the existence of the relationship between the declarant and the party or, in the court's discretion as to the order of proof, subject to such proof.

If Section 190 is retained, we suggest that it be revised to read:

> 190. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court, whichever is required to determine the fact.

§§ 195, 200. The definition of "public entity" is not specifically limited to public entities in the United States. The defining words seem to indicate, however, that the definition does not include a foreign nation or foreign public entities. At times, in the Evidence Code, we seem to have used the term with the understanding that it is limited to public entities in the United States. This, we think, was the intent in Section 452(b). At other times, such a restrictive use of the term "public entity" seems not to have been intended. For example, Section 951 is probably intended to extend the attorney-client privilege to foreign public entities as well as domestic. We are uncertain whether Sections 1040 et seq. were intended to confer an official information privilege on foreign governments. We think that the right to cross-examine an adverse party and his employees under Section 776 was probably intended to permit cross-examination of the employees of a foreign public entity if such an entity became a party to California litigation.

To eliminate these uncertainties, we suggest that the definition of "public entity" be revised to include the United States and foreign nations as well as the other political entities listed. In the text of the Evidence

Code, if a more confined meaning is desired it should be expressly stated. We think the Evidence Code will be more easily understood if there is not an artificial limitation on the meaning of the word in the definitions and if any limitations on the meaning of the word are expressed in the section where the term is used. If this change is made the Commission should consider what conforming revisions are needed in the remainder of the Evidence Code. The pertinent sections together with the staff recommendations appear below:

§ 195. Delete "of the United States or".

§ 200. Amend to read:

> 200. "Public entity" means a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

§ 311. Delete "governmental subdivision of" and insert "public entity in.

§ 452(b). Leave unchanged. [We recommend no change because Section 452(b) merely indicates that the matters listed are determined by the judge alone as matters of law. The broad use of "public entity" is thus consistent with Section 311.]

§ 452(f). Delete "governmental subdivisions of" and insert "public entities in".

§ 776. On page 35, lines 21 and 22, we recommend no change.

§ 904. We recommend no change.

§ 951. Delete "the United States and" from line 51.

§ 953(d). On line 26, we recommend no change.

§ 1006. On line 6, we recommend no change.

§ 1026. On line 19, we recommend no change.

§ 1040-42. The terms "public employee" and "public entity" appear as follows: page 51, line 51; page 52, lines 1, 5, 15, 20, 23, 24-25, 30, 42; page 53, lines 1, 4, 9, 12, and 16. We recommend no change except on lines 1 and 25 of page 52, where "(including the United States)" should be deleted.

§ 1280. Delete "of the United States or a public entity" on line 38.

§ 1284. We recommend no change.

§ 1290(b). Add "in the United States" at end of subdivision. [We think this was the Commission's intent.]

§ 1452. We recommend no change in lines 38-39, 40, and 41. In line 44, we suggest that "governmental subdivision of" be deleted and that "public entity in" be inserted.

§ 1453. We recommend no change in line 52 of page 68 and line 1 of page 69.

§ 1454. On line 8, we suggest that "governmental subdivision of" be deleted and that "public entity in" be inserted.

§ 1506. We recommend no change.

§ 1530. We recommend no change in lines 39, 42, 48 and 49 of page 70. [See § 1600.]

§ 1532. We recommend no change in line 26. [See § 1600.]

§ 1600. We recommend no change in line 46. [On line 42 of page 70, line 26 of page 71, and line 46 of page 73, the words "governmental subdivision" are used. These might be changed to "public entity". The sections involved all create presumptions relating to the authenticity and the efficacy of copies of certain writings in official custody. On the pertinent lines, the office involved is an office of a foreign

government of some sort. The words "governmental subdivision" indicate that the office derives its authority from the nation or state and not from some locally organized district or municipal corporation. The substitution of "public entity" would broaden the number of offices to which the sections relate. Although we do not feel strongly about the matter, we recommend no changes in these lines.]

§ 210. We think that the matter in parentheses is inaccurate because we do not think that the credibility of a witness is a fact of consequence to the determination of the action. Evidence bearing on the credibility of a witness who has testified to a fact of consequence to the determination of the action, however, is evidence having a tendency in reason to prove or disprove such a fact and is therefore "relevant evidence" within the meaning of the section. Under the section as it is now drafted all evidence bearing on the credibility of a witness seems to be "relevant evidence" even though the witness, because of loss of memory or any other reason, has given no testimony concerning any matter that is of consequence to the action. We recommend that Section 210 be revised to read:

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

§ 225. We have removed the comma following the word "expression" in line 40.

§ 235. We recommend the substitution of "includes" for "means" in line 44 because a referee, court commissioner, or similar officer may sometimes be the trier of fact. We are changing the word "it" in line 45 to "the court" because the antecedent of the pronoun "it" is somewhat uncertain.

§ 250. The New Jersey revision of this definition is as follows:

Rule 1. (13). Writing.

"Writing" means handwriting, typewriting, printing, photostating, photography 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, provided that such recording is (a) reasonably permanent and (b) readable by sight. When information or data is recorded by means of a generally accepted method or system, which is operated with suitable controls to safeguard the reliability and accuracy of the information or data, and which is equipped with means for providing a reproduction that is a "writing", such reproduction shall be treated as the equivalent of the information or data, notwithstanding that the form of recording does not itself constitute a "writing" as defined by this rule.

This is the definition recently adopted by New Jersey as part of its rules of evidence. You will note that the New Jersey definition apparently excludes sound recordings. It also includes IBM punch cards and other forms of electronic data processing by specific description. The practical effect of the definition on our code would be to preclude sound recordings from being introduced under the business or official records exceptions to the hearsay rule and to take such recordings out of the operation of the authentication and best evidence requirements of Division 11. We do not recommend adoption of the definition.

Respectfully submitted,

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