

#34(L)

10/2/64

Memorandum 64-74

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

Attached are two copies of the revised Comments to Division 2.  
Mr. Keatinge is responsible for checking these Comments. Please  
mark any revisions you believe should be made on one copy of the  
Comments.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100. Application of definitions

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., EVIDENCE CODE §§ 900-905, defining words and phrases used in Division 8 (Privileges). Definitions applicable only to a particular article are found in that article. E.g., EVIDENCE CODE §§ 950-953, defining words and phrases used in the article relating to the lawyer-client privilege.

§ 105. "Action"

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. "Burden of producing evidence"

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,

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CALIFORNIA EVIDENCE §§ 53-60 (1958). 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.

The second paragraph of Section 115 makes it 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. "Burden of proof"

Comment. See Comment to Section 110.

§ 120. "Civil action"

Comment. The phrase "civil action" includes special proceedings of a civil nature (see Part 3 (commencing with Section 1063) of the Code of Civil Procedure) and all actions and proceedings other than criminal actions and proceedings. The definition eliminates the necessity of repeating "civil action or proceeding" in every instance in which "civil action" is used, and, together with the definition of "criminal action" in Section 130, it assures the applicability of the Evidence Code to all actions and proceedings.

EVIDENCE CODE § 300.

§ 125. "Conduct"

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

§ 130. "Criminal action"

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

the Comment to Section 120.

§ 135. "Declarant"

Comment. Ordinarily, the word "declarant" is used in the Evidence Code 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 the definition in Rule 62(2) of the Uniform Rules of Evidence. See also the Comment to EVIDENCE CODE § 1200.

§ 140. "Evidence"

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 it 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 (1953).

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

§ 145. "The hearing"

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

§ 150. "Hearsay evidence"

Comment. See Comment to Section 1200.

§ 160. "Law"

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

§ 165. "Oath"

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

§ 170. "Perceive"

Comment. This definition is substantially the same as the definition in Rule 62(3) of the Uniform Rules of Evidence.

§ 175. "Person"

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. PRCC. § 17.

§ 180. "Personal property"

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

§ 185. "Property"

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

§ 190. "Proof"

Comment. This definition is the same in substance as the definition of "proof" in Code of Civil Procedure Section 1824, which is superseded by Section 190.

§ 195. "Public employee"

Comment. "Public employee" is broadly defined in this section. The definition specifically includes public officers and agents, thereby eliminating any distinction between employees and officers and making it unnecessary to repeat the phrase "officer, agent, or employee" in numerous code sections.

§ 200. "Public entity"

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. "Public entity" is used in the Evidence Code to refer to entities within the United States. The phrase "governmental subdivision" is used to refer to political subdivisions of foreign countries. E.g., EVIDENCE CODE §§ 452(f), 1454.

§ 205. "Real property"

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

§ 210. "Relevant evidence"

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), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 339-340, 569-575 (1964) (credibility of hearsay declarants).

§ 220. "State"

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. "Statement"

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

§ 230. "Statute"

Comment. In the Evidence Code, "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. "Trier of fact"

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 the definition in Rule 1(11) of the Uniform Rules of Evidence.

§ 240. "Unavailable as a witness"

Comment. Usually, the phrase "unavailable as a witness" is used in the Evidence 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 a similar definition in Rule 62(7) of the Uniform Rules of Evidence.

"Unavailable as a witness" includes, in addition to cases where the declarant is physically unavailable (i.e., dead, insane, or beyond the reach of the court's process), situations in which the declarant is legally unavailable (i.e., prevented from testifying by a claim of privilege or disqualified from testifying). Of course, if the declaration made out of court 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) of the Evidence Code 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 the superseded Code of Civil Procedure sections providing hearsay exceptions. U.C.P., CODE CIV. PROC., § 1870 (4), (8). 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 may, to a considerable extent, restate existing law. Compare People v. Spriggs, 60 Cal.2d 868, 875, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964) (generally consistent with Section 240), with the older cases, some but not all of which 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), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 411 n.7' (1964).

§ 245. "Verbal"

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 the definition in Rule 1(12) of the Uniform Rules of Evidence.

§ 250. "Writing"

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 the definition in Rule 1(13) of the Uniform Rules of Evidence.