#34(L) 10/22/64

Memorandum 64-77

Subject: Study No. 34(L) Uniform Rules of Evidence (Preprint Senate Bill No. 1 - Division 4)

This memorandum presents staff suggestions and the suggestions of other interested persons concerning Division 4 of the Preprinted Bill.

Use of word "court." You will recall that the Commission previously determined to substitute "court" for "judge" (or pronouns meaning judge) in the Evidence Code unless for some reason such substitution would not be proper. We will make this substitution in Division 4. Where the substitution is not routine, we note below our suggested revision.

General scheme of Division 4. Attached as Exhibit I is a letter from Richard H. Perry, San Francisco. The first point of the letter concerns the statutory scheme on judicial notice. Please read this portion of Exhibit I.

It seems that the proposed code is consistent with Mr. Perry's suggestion that judicial notice "be mandatory rather than discretionary with the particular judge provided, of course, that the proper showing has been made." This is the effect of Section 451 and of Sections 452 and 453. See also Section 459.

It also seems that Section 458 is consistent with his suggestion that the code cover the matter of instructing the jury on matters which have been judicially noticed.

In summary, Mr. Perry's letter seems to be one in support of the general statutory scheme of Division 4 and we do not believe that any revisions are needed to adopt the substance of his suggestions on judicial notice.

Section 459

We suggest that Section 459 be split into two sections to read as follows (changes from Preprinted Bill indicated by strikeout and underscore):

459. Judicial notice by trial court in subsequent proceedings.

459. ~~(a)~~ The failure or refusal of the ~~judge~~ trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the ~~judge~~ trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division ~~in subsequent proceedings in the action~~.

460. Judicial notice by reviewing court.

460. ~~(b)~~ (a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the ~~judge~~ trial court and (2) each matter that the ~~judge~~ trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the ~~judge~~ trial court.

~~(c)~~ (b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the ~~judge~~ trial court under Section 454.

~~(d)~~ (c) When taking judicial notice under this section of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action, the ~~judge or~~ reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

~~(e)~~ (d) NO CHANGE IN THIS SUBDIVISION (See lines 29-38 preprinted bill)

Respectfully submitted

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October 14, 1964

Thomas E. Stanton, Jr.
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Re: Evidence Code

Dear Tom:

I have been noting with interest the efforts to develop a new Evidence Code for California, and the fact that thoughts are invited. I am therefore taking the liberty of mentioning a couple of matters that I am sure have been considered, but as to which I would, nevertheless, like to express my views.

The first point is the subject of judicial notice. It seems to me that much trial time is expended because the Courts exercising their discretion under the present code refuse to take judicial notice of matters which are either set forth in the statute, or have been previously judicially noted by Appellate Courts whose decisions have long since become final.

It seems to me that if the matter is one of which the Court should take judicial notice then it should be mandatory rather than discretionary with the particular judge provided, of course, that the proper showing has been made. It is therefore my thought the statute should be amended to read the Court "shall" take judicial notice of the matter set forth in the Code.

I would also like to suggest that the Code be amended to include an additional subdivision which would provide that the Court shall take judicial notice of all matters of which judicial notice has been taken by Courts of appellate jurisdiction and as to which the decision has become final. This would, of course, be limited to appellate Courts in this State. It seems to me that such a statute would be simply an application of the rule of stare decisis to questions of fact which the Court has accepted as concluded.

There appears to be no reason why the Supreme Court may judicially notice a fact in one case, and in another case presenting the identical fact the party is put on proof frequently in the realm of expert testimony, which is both time-consuming and costly. And lastly, it seems to me that the Code should clarify the duty of the Court with respect to informing the jury as to matters of which the Court takes judicial notice. It seems to me that the appropriate time and fashion for the Court's giving this information to the jury is immediately prior to instructions, or as a part of the instructions, such as with a standard form instruction beginning "you are instructed that the following facts are evidence in this case, although no testimony or other evidence has been produced thereupon" and then enumerating the facts.

The second area upon which I would like to comment is the question of medical reports. Today, it is well accepted by everyone, plaintiff's lawyers, defense lawyers and the Courts that doctors refer their patients for x-rays, laboratory tests and other types of special examinations and consultations. It is also a well-known fact that the laboratory or doctor to whom the reference is made submits a written report to the treating physican who considers the same as part of his patient history and performs his treatments in reliance thereon. Under this practice an individual with a very minor injury may be sent to several different specialists by the treating physican, and may be required to submit to a series of examinations by the defendant if the matter is proceeding toward trial. Both plaintiff's doctor and defendant's doctor in evaluating the patient for purposes of their testimony or diagnostic analysis rely upon the reports received from those to whom they have directed the patient.

As a result of this practice, many hours of trial time, and many hundreds of dollars are spent by producing witnesses who testify directly from their report, their testimony is limited in scope, usually highly technical in nature, and generally, at least in the laboratory instances, almost irrefutable.

Would it not be feasible to include in the Evidence Code a provision that all medical reports submitted by the respective parties to the other prior to pretrial may be admitted in evidence, unless a request for cross-examination is made and becomes a part of the pretrial order. And secondly, that an exception to the hearsay rule be made with respect to reports received by a diagnosing physican in the ordinary course of medical practice, and used by him in formulating his final impressions.

[Page 3, which contained no relevant material, has not been reproduced]

s/ Richard H. Perry