#34(L) 10/16/64

Memorandum 64-82

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 6)

Attached are two copies of the revised Comments to Division 6. Mr. Selvin is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

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Executive Secretary

DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

§ 700. General rule as to competency

Comment. Section 700 declares that, except as otherwise provided by statute, "every person is qualified to be a witness" and "no person is disqualified to testify to any matter." Section 700 is similar to, and supersedes, Section 1879 of the Code of Civil Procedure, which provides that "all persons . . . who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses." Section 700 is based on subdivisions (a) and (c) of Rule 7 of the Uniform Rules of Evidence.

Just as Code of Civil Procedure Section 1879 is limited by various statutory restrictions on the competency of witnesses, the broad rule stated in Section 700 is also substantially qualified by statutory restrictions appearing in the Evidence Code and in other California codes. See, e.g., EVIDENCE CODE § 701 (disqualification for mental or physical disability), § 702 (requirement of personal knowledge), § 703 (judge as a witness), § 704 (juror as witness), §§ 900-1072 (privileges); VEHICLE CODE § 40804 (speed trap evidence).

§ 701. Disqualification of witness

Comment. Section 701 states the minimum capabilities that a person must possess to be a witness. Under existing California law, the competency of a witness depends upon his ability to understand the oath and to perceive, recollect, and communicate. "Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to

be resolved by the trier of fact." People v. McCaughan, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957). On the other hand, Section 701 requires merely the ability to communicate and the ability to understand the duty to tell the truth. The two missing qualifications--the ability to perceive and to recollect--are found only to a very limited extent in Section 702, which forbids a witness from testifying about a particular matter if he does not have "personal knowledge" of it (as, for example, where his knowledge of the event is derived solely from the statements of others). Section 701 is based on Rule 17 of the Uniform Rules of Evidence.

Under existing law, as under Section 701, the competency of a person to be a witness is a question for determination by the judge. People v. McCaughan, 49 Cal.2d 409, 421, 317 P.2d 974, 981 (1957). See EVIDENCE CODE § 405 and the Comment thereto.

However, Section 701 changes to a limited extent the nature of the judge's determination regarding the competency to testify of a child or a person suffering from mental impairment. These sections have little significant effect on existing law with respect to determining the competency of other persons as witnesses. In the case of children and persons suffering from mental impairment, however, these sections might permit them to testify in some cases where they are disqualified from testifying under existing law. In such cases, however, if the proposed witness can communicate adequately, can understand the duty to tell the truth, and has personal knowledge, the sensible course of action is to put him on the stand and to let him tell his story for what it may be worth. The trier of fact can consider his immaturity or mental condition in determining the credibility of his testimony. The alternative--to exclude the testimony--may deprive the trier of fact of the only testimony

available.

Children. Code of Civil Procedure Section 1880(2) (superseded by Section 701) provides that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are incompetent as witnesses. This section means that a child under 10 years of age must possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount his impressions; he must also have an understanding of the nature of an oath and an awareness that he should tell the truth and that he is likely to be punished for a falsehood. People v. Burton, 55 Cal.2d 328, 341, 11 Cal. Rptr. 65, 69-70, 359 P.2d 433, 437-438 (1961). If the judge is not persuaded that the child has these abilities, the child is not qualified to be a witness.

Under Section 701, the judge makes no similar determination of a child's ability to perceive and to recollect when deciding whether the child can be a witness. However, he does pass on these questions when deciding whether the witness has the requisite personal knowledge to testify concerning a particular matter under Section 702. But, the Evidence Code requires the judge to permit the child to testify if any trier of fact could reasonably conclude that the child has the ability to perceive and to recollect. See EVIDENCE CODE § 403 and the Comment thereto. It is unlikely, however, that the difference in the nature of the judge's preliminary determination will result in any great change in actual practice. Under existing law, as under Sections 405 and 701, the person objecting to the testimony of the child has the burden of showing incompetency. People v. Craig, 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); People v. Gasser, 34 Cal. App. 541, 543, 168 Pac. 157, 158 (1917); People v. Holloway, 28 Cal. App. 214, 218, 151 Pac. 975, 977 (1915). The

determination of competency is left largely to the trial judge's discretion, and the California cases indicate that children of very tender years are commonly permitted to testify. WITKIN, CALIFORNIA EVIDENCE § 389 (1958). See Bradburn v. Peacock, 135 Cal. App.2d 161, 164-165, 286 P.2d 972, 974 (1955) (held, it was reversible error to refuse to permit a child to testify without conducting a voir dire examination to determine his competency: "We cannot say that no child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5." (Emphasis in original.)).

Persons "of unsound mind." Code of Civil Procedure Section 1880(1) (superseded by Section 701) provides that "those who are of unsound mind at the time of their production for examination" cannot be witnesses. But the test is the same as for other witnesses under California law--an understanding of the oath and the ability to perceive, recollect, and communicate; and if, for example, a proposed witness suffers from "some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event." People v. McCaughan, 49 Cal.2d 409, 421, 317 P.2d 974, 981 (1957).

Section 701 changes the nature of the determination the judge must make to find that a person suffering from mental impairment is competent to testify. Under existing law, the judge must be persuaded that a person of "unsound mind" understands the duty to tell the truth and has the ability to perceive, recollect, and communicate; whereas, under Section 701, the judge must be persuaded only

that such person understands the duty to tell the truth and is capable of communicating. The witness' ability and opportunity to perceive and his ability to recollect--his "personal knowledge"--are matters to be determined under Sections 403 and 702. See EVIDENCE CODE §§ 403 and 702 and the Comments thereto.

§ 702. Personal knowledge

Comment. Section 702 states the general requirement that a witness must have personal knowledge of the facts to which he testifies. Except to the extent that experts may give opinion testimony not based on personal knowledge (see EVIDENCE CODE § 801), the requirement of Section 702 is applicable to all witnesses, whether expert or not. Certain additional qualifications that an expert witness must possess are set forth in Article 1 (commencing with Section 720) of Chapter 3. Section 702 is based on Rule 19 of the Uniform Rules of Evidence.

Subdivision (a). Subdivision (a) restates the substance of and supersedes Code of Civil Procedure Section 1845, which requires a witness to have personal knowledge of the subject about which he testifies. "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness' own senses. 2 WIGMORE, EVIDENCE § 657 at 762 (3d ed. 1940). Cf. EVIDENCE CODE § 170, defining "perceive".

Under existing law, as under Section 702, an objection must be made to the testimony of a witness who does not have personal knowledge; but, if there is no reasonable opportunity to object during the direct examination, a motion to strike is appropriate after lack of knowledge has been shown on cross-examination. Fildew v. Shattuck & Nimmo Warehouse Co., 39 Cal. App. 42, 46,

177 Pac. 866, 867 (1918)(objection to question properly sustained when foundational showing of personal knowledge was not made); Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 709, 87 Pac. 376, 378 (1906)(error to overrule motion to strike testimony after lack of knowledge shown on cross-examination); Parker v. Smith, 4 Cal. 105 (1854)(testimony properly stricken by court when lack of knowledge shown on cross-examination). Upon such timely objection being made, however, Section 702 requires the personal knowledge of the witness to be shown as a prerequisite to his testimony on the merits.

If a timely objection is made to a witness' lack of personal knowledge, the judge may not receive the witness'testimony conditionally, subject to the necessary foundation of personal knowledge being supplied later in the trial. Section 701 thus limits the ordinary power of the judge with respect to the order of proof. See EVIDENCE CODE § 403(b). See also EVIDENCE CODE § 320.

Subdivision (a) is made subject to Section 801 because an expert witness in some instances may give opinion testimony not based on personal knowledge. See EVIDENCE CODE § 801 and the Comment thereto.

Subdivision (b). The purpose of subdivision (b) is to make it clear that the requisite showing of a witness' personal knowledge may be provided by his own testimony. Of course, any otherwise admissible evidence may also be used to establish the witness' personal knowledge, but the witness' own testimony is the means ordinarily used. E.g., People v. Avery, 35 Cal.2d 487, 492, 218 P.2d 527, 530 (1950)("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under Section 1845 of the Code of Civil Procedure"); Schneider v. Market Street Ry., 134 Cal. 482, 492, 66 Pac. 734, 738 (1901).

§ 703. Judge as witness

Comment. Section 703 precludes the presiding judge from testifying as a witness at the trial of the action under certain conditions and specifies the procedure to be followed when the judge is offered as a witness. It is based in part on Rule 42 of the Uniform Rules of Evidence and closely follows the provisions of Section 704 relating to the competency of a juror to testify as a witness.

Under existing California law, a judge may be called as a witness, but the judge may in his discretion order the trial postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by Sections 703 and 704).

Section 703 requires the judge in both civil and criminal actions to disclose privately to the parties the information he has concerning the case before he may testify as a witness. Such disclosure out of the presence and hearing of the jury is required in order to inform the parties of the action they should take, if any.

After such disclosure, the judge is permitted to testify as a witness only if no party objects to his testifying. If a party objects to his testifying, however, the objection is deemed a motion for mistrial, and the judge is required to declare a mistrial and order the action assigned for trial before another judge.

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to his testimony must be ruled on by the witness himself. The extent of cross-examination may be limited by the fear of

appearing to attack the judge personally. A party might be embarrassed to introduce impeaching evidence. For these and similar reasons, Section 703 appears to be superior to Code of Civil Procedure Section 1883 which permits the judge to testify even if a party objects. See generally People v. Connors, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (dictum)(abuse of discretion for the presiding judge to testify as to important and necessary facts without proof of which the contention, that his testimony is designed to support, cannot be sustained.

§ 704. Juror as witness

Comment. Section 704 precludes a juror, sworn and impaneled in the trial of an action, from testifying as a witness at the trial of the action under certain conditions and specifies the procedure to be followed when the juror is offered as a witness. It is based in part on Rule 43 of the Uniform Rules of Evidence and closely follows the provisions of Section 703, relating to the competency of the presiding judge to testify as a witness.

Under existing California law, a juror may be called as a witness, but the judge in his discretion may order the trial postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by Sections 703 and 704).

A juror-witness is in an anomalous position. He (as juror) is required to weigh his own testimony (as witness) with complete impartiality. Manifestly, this is impossible. The adverse party, too, is placed in an embarrassing position. He cannot cross-examine in such a manner as to antagonize the juror. He cannot impeach for fear of antagonizing the juror. If he objects to the

juror's appearing as a witness, the juror may regard the objection as a personal reflection upon his character and veracity. For these and similar reasons, Section 704 forbids jurors to testify over the objection of any party.

Subdivisions (a), (b), and (c). Subdivision (a) of Section 704 requires a juror in both civil and criminal actions to disclose privately to the parties the information he has concerning the case before he may testify as a witness. Such disclosure out of the presence and hearing of the remaining jurors is required in order to inform the parties of the action they should take, if any. After such disclosure, a juror sworn and impaneled in the trial of an action is permitted to testify as a witness in that action only if no party objects to his testifying. If a party objects to his testifying, however, the objection is deemed a motion for mistrial, and the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Subdivision (d). Section 704 does not prohibit a juror from testifying as to the occurrence of events likely to have improperly influenced a verdict. The language in subdivision (d) and in the introductory clause in subdivision (b) makes this clear. Therefore, under Section 700 (which provides that all persons are competent to testify), a juror is competent to testify concerning the matters specified in Section 1150.

Together with Section 1150, subdivision (d) will change the existing California law. Under existing law, a juror is incompetent to give evidence as to matters that might impeach his verdict. People v. Gray, 61 Cal. 164, 183 (1882). See also Siemsen v. Oakland, S.L., & H. Elec. Ry., 134 Cal. 494, 66 Pac. 672 (1901). He is competent, however, to give evidence that no misconduct was

committed by the jury after independent evidence has been given that there was misconduct. People v. Deegan, 88 Cal. 602, 26 Pac. 500 (1891). By statute, a juror may give evidence by affidavit that a verdict was determined by chance. CODE CIV. PROC. § 657(2) (recommended for amendment to eliminate inconsistency with the Evidence Code). Moreover, the courts have held that affidavits of jurors may be used to prove that a juror concealed bias or other disqualification by false answers on voir dire (Williams v. Bridges, 140 Cal. App. 537, 35 P.2d 407 (1934)) or was mentally incompetent to serve as a juror (Church v. Capital Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956)).

The rule that jurors' affidavits may be used to show concealed disqualification has been extended by recent cases so that there may be little left of the underlying rule of incompetency. In Noll v. Lee, 221 Cal. App.2d 81, 34 Cal. Rptr. 223 (1963) (hearing denied), the court held that the falsity of a juror's answers on voir dire--i.e., that he would follow the law given in the judge's instructions--could be shown by his affidavit that he read and relied on portions of a Vehicle Code summary that he took with him to the jury room. Despite the evidence in the record that the juror did not believe he was violating the trial court's instructions and did not believe that he was deceiving the court on his voir dire examination, the appellate court held as a matter of law that he did in fact deceive the court by false answers on voir dire and that jurors' affidavits could be used to prove it. Apparently, then, if the questions asked on voir dire are sufficiently comprehensive to cover in general terms the kinds of misconduct that would warrant an attack on the verdict, jurors' affidavits may be used to show that such misconduct occurred and that, consequently, the answers on voir dire were false.

Thus, under existing law, a juror is permitted to give evidence of a chance verdict or evidence of misconduct when an intention to engage in misconduct is denied on voir dire, but he is prohibited from giving evidence of misconduct under any other circumstances. No reason is apparent for this distinction. The danger to the stability of verdicts appears to be as great in the one case as it is in the other. Jurors are the persons most apt to know whether misconduct has occurred. Not to hear evidence of misconduct from the jurors themselves (except when it can be linked to an answer on voir dire) may at times conceal the only evidence of misconduct that exists. The existing rule is a temptation to eavesdropping and similar undesirable practices, for the only admissible evidence of misconduct in the jury room must come from those not authorized to be there.

The existing rule is based on an ancient common law precedent. Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). The reason given for the rule in that case--that the jurors should not be permitted to give evidence of their own crime or misconduct--is no longer apposite. The rule is now based on a fear that juries will be tampered with and their verdicts imperiled. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 505, 58 Pac. 169, 170 (1899). However, the peril to the verdict flows from the substantive rule permitting verdicts to be set aside for misconduct, not from the source of the evidence. If verdicts may be set aside for jury misconduct, it is absurd to deny access to the most reliable evidence of such misconduct. See the criticism of the existing rule in 8 WIGMORE, EVIDENCE § 2353 (McNaughton rev. 1961). Experience with the exception to the existing rule permitting jurors to impeach verdicts made by chance or by jurors who answer falsely on voir dire indicates that fears

of jury tampering are unrealistic. Therefore, the Evidence Code repudiates the rule forbidding a juror to give evidence of misconduct of the jury.

Penal Code Section 1120 requires a juror who discovers that he has personal knowledge of the case being tried before him to declare that fact. The section requires the juror to be sworn as a witness and examined in the presence of the parties. Section 704 retains this method for determining whether a juror is qualified to continue to sit as a juror in the case.

CHAPTER 2. OATH AND CONFRONTATION

§ 710. Oath required

Comment. Section 710 restates the substance of Section 1846 of the Code of Civil Procedure. Section 710 is based in part on Rule 18 of the Uniform Rules of Evidence.

§ 711. Confrontation

Comment. Section 711 restates the substance of the rule of confrontation provided in Section 1846 of the Code of Civil Procedure.

CHAPTER 3. EXPERT WITNESSES

Article 1. Expert Witnesses Generally

§ 720. Qualification as an expert witness

Comment. Section 720 states the special requisites necessary to qualify a witness as an expert. It is based on similar language contained in Rule 19 of the Uniform Rules of Evidence.

Subdivision (a). Subdivision (a) requires that a person offered as an

expert witness have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the particular matter. This subdivision states existing law. CODE CIV. PROC. § 1870(9) (last clause) (superseded by Section 720).

The judge must be satisfied that the proposed witness is an expert. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Bossert v. Southern Pac. Co., 172 Cal. 405, 157 Pac. 597 (1916); People v. Pacific Gas § Elec. Co., 27 Cal. App.2d 725, 81 P.2d 584 (1938). Against the objection of a party, the special qualifications of the proposed witness must be shown as a prerequisite to his testimony as an expert. In the absence of such objection, the judge may receive the witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial. See EVIDENCE CODE § 320. Unless the foundation is subsequently supplied, however, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Howland v. Oakland Consol. St. Ry., 110 Cal. 513, 42 Pac. 983 (1895); Estate of Johnson, 100 Cal. App.2d 73, 223 P.2d 105 (1950). See EVIDENCE CODE § 405 and the Comment thereto.

Subdivision (b). This subdivision states that the requisite special qualifications required of an expert witness may be shown by any otherwise admissible evidence, including the witness' own testimony. The witness' own

testimony is the usual method used to qualify a person as an expert. See, e.g., Moore v. Belt, 34 Cal.2d 525, 532, 212 P.2d 509, 513 (1949).

§ 721. Cross-examination of expert witness

Comment. Section 721 governs the cross-examination permitted of a witness who testifies as an expert. Such a witness may, of course, be cross-examined to the same extent as any other witness. See Chapter 5 (commencing with Section 760). Section 721 states the existing California law that permits a somewhat broader cross-examination of expert witnesses: "Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based (Code Civ. Proc., § 1872), and which he took into consideration; and he may be 'subjected to the most rigid cross examination' concerning his qualifications, and his opinion and its sources [citation omitted]." Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 230, 344 P.2d 428, 433 (1959). The cross-examination rule stated in subdivision (a) is based in part on the last clause of Code of Civil Procedure Section 1872.

Subdivision (b) of Section 721 clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear under existing law that an expert witness may be cross-examined in regard to the same books on which he relied in forming or arriving at his opinion. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). Dicta in some decisions indicate that the cross-examiner is strictly limited to those books relied on by the expert witness.

See, e.g., Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that the cross-examiner is not thus limited and that an expert witness may be cross-examined in regard to any books of the same character as the books on which he relied in forming his opinion. Griffith v. Los Angeles Pac. Co., 14 Cal. App. 145, 111 Pac. 107 (1910). See Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949) (reviewing California authorities). Possibly, the cross-examiner is restricted in his examination to the use of such books as "are not in harmony with the testimony of the witness." Griffith v. Los Angeles Pac. Co., supra. Language in several earlier cases indicated that the cross-examiner could use books to test the competency of an expert witness, whether or not the expert relied on those books in forming his opinion. Fisher v. Southern Pac. R.R., 89 Cal. 399, 26 Pac. 894 (1891); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). More recent decisions indicate, however, that the opinion of an expert witness must be based either generally or specifically on books before the expert can be cross-examined concerning them. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949). The conflicting California cases are gathered in Annot., 60 A.L.R.2d 77 (1958).

Subdivision (b) of Section 721 prohibits the cross-examiner from using certain types of publications unless they have been either admitted in evidence or referred to, considered, or relied on by the expert witness in forming his opinion. These publications are described in subdivision (b) as "any scientific, technical, or professional text, treatise, journal, or

similar publication . . . . "

If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit corss-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a broader rule--one that would permit cross-examination on scientific, technical, or professional works not referred to, considered, or relied on by the expert--would permit the cross-examiner to place the opinions of absentee authors before the trier of fact without the safeguard of cross-examination. Although the court would be required upon request to caution the jury that the statements read are not to be considered evidence of the truth of the propositions stated, there is a danger that at least some jurors might rely on the author's statements for this purpose. Yet, the statements in the text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to the case before the court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination. Therefore, such statements should not be permitted to be brought before the jury under the guise of testing the competency of another expert.

If a particular publication has been admitted in evidence, if the publication may be judicially noticed, or if, for some other reason, the publication is other than one described in subdivision (b), the dangers with which subdivision (b) is concerned are not present; hence, the subdivision permits an expert witness to be examined concerning such a publication without regard to whether he referred to, considered, or relied on it in forming his opinion. See generally Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 331 P.2d 617 (1958). The rule stated in subdivision (b) thus provides a fair and workable solution to this conflict of competing interests with respect to the permissible use of scientific, technical, or professional publications by the cross-examiner.

§ 722. Credibility of expert witness

Comment. Subdivision (a) of Section 722 codifies a rule recognized in the California decisions. People v. Cornell, 203 Cal. 144, 263 Pac. 216 (1928); People v. Strong, 114 Cal. App. 522, 300 Pac. 84 (1931).

Subdivision (b) of Section 722 is a restatement of the existing California law applicable in condemnation cases as provided by Code of Civil Procedure Section 1256.2 (superseded by Section 722). It is uncertain whether the California law in other fields of litigation is as stated in Section 722. At least one California case has held that an expert could be asked whether he was being compensated but that he could not be asked the amount of the compensation. People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513 (1910). However, the decision may have been based on the discretionary right of the trial judge to curtail collateral inquiry.

In any event, the rule enunciated in Section 1256.2 and in Section 722 is a desirable rule. The tendency of some experts to become advocates for the

party employing them has been recognized. 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 STAN. L. REV. 455, 485-486 (1962). The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed of the amount of his fee--and, hence, the extent of his possible feeling of obligation to the party calling him.

§ 723. Limit on number of expert witnesses

Comment. Section 723 restates existing California law as expressed in the last sentence of Code of Civil Procedure Section 1871.

Article 2. Appointment of Expert Witness by Court

§ 730. Appointment of expert by court

Comment. Section 730 restates the substance of the first paragraph of Code of Civil Procedure Section 1871, which has been revised to incorporate terms defined in the Evidence Code and shortened by the elimination of unnecessary language.

§ 731. Payment of court-appointed expert

Comment. Section 731 restates the substance of and supersedes the second paragraph of Code of Civil Procedure Section 1871, which has been revised to incorporate terms defined in the Evidence Code.

§ 732. Calling and examining court-appointed expert

Comment. Section 732 restates the substance of the fourth paragraph of Code of Civil Procedure Section 1871. This section is subject to the first

article in this chapter, which deals with the competency and qualification of a person to testify as an expert. The section also refers to Section 775, which is based on language originally contained in Section 1871. Section 775 permits each party to the action to object to questions asked and evidence adduced and, also, to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party. A reference to Section 775 is included in Section 732 in lieu of repeating the language of that section.

§ 733. Right to produce other expert evidence

Comment. Section 733 restates the substance of and supersedes the third paragraph of Code of Civil Procedure Section 1871.

CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750. Rules relating to witnesses apply to interpreters and translators

Comment. Section 750 makes all of the rules of law relating to witnesses applicable to persons who serve as interpreters or translators in any action. This is existing law. E.g., People v. Lem Deo, 132 Cal. 199, 201, 64 Pac. 265, 266 (1901) (interpreter); People v. Bardin, 148 Cal. App.2d 776, 307 P.2d 384 (1957) (translator).

§ 751. Oath required of interpreters and translators

Comment. All of the rules of law relating to witnesses apply to interpreters and translators. See EVIDENCE CODE § 750 and the Comment thereto. A person who serves as an interpreter or translator, however, is in a different position than other witnesses. He does not "testify" from his personal

knowledge to any facts in the case, but uses his knowledge and skill as a conduit through which the testimony of others or other evidence is made intelligible to the judge, the jury, and counsel. Hence, Section 751 provides a different form of oath for an interpreter or translator than is required of other witnesses. Under Section 751, an interpreter is required to commit himself to use his best skill in truthfully relating questions to and answers from witnesses. Similarly, a translator is required to commit himself to use his best skill in truthfully performing his task. The substance of this section is based on language presently contained in subdivision (c) of Section 1885 of the Code of Civil Procedure, restated in Section 751 as a separate section applicable to all interpreters and translators.

§ 752. Interpreters for witnesses

Comment. Section 752 restates the substance of and supersedes Section 1884 of the Code of Civil Procedure. The language of this section, however, is new; it is cast in terms similar to Section 701(a), dealing with the disqualification of a person to be a witness if he is incapable of expressing himself so as to be understood. Section 752 thus indicates that an interpreter may be appointed for a person whose inability to be understood directly stems from physical disability as well as from lack of understanding of the English language. See discussion in People v. Walker, 69 Cal. App. 475, 231 Pac. 572 (1924). Under Section 752, as under existing law, whether an interpreter should be appointed is largely within the discretion of the trial judge. People v. Holtzclaw, 76 Cal. App. 168, 243 Pac. 894 (1926).

Subdivision (b) of Section 752 substitutes for the detailed language in Code of Civil Procedure Section 1884 a reference to the general authority

of a court to appoint expert witnesses, since interpreters are treated as expert witnesses and subject to the same rules of competency and examination as are experts generally.

§ 753. Translators of writings

Comment. Section 753 restates the substance of and supersedes Code of Civil Procedure Section 1863, but the language of this section is new. The same principles that require the appointment of an interpreter for a witness who is incapable of expressing himself so as to be understood directly apply with equal force to documentary evidence. See EVIDENCE CODE § 752 and the Comment thereto.

§ 754. Interpreters for deaf in criminal and commitment cases

Comment. Section 754 restates the substance of and supersedes Code of Civil Procedure Section 1885, which has been revised to incorporate terms defined in the Evidence Code and to clarify the meaning of this section. Subdivision (c) of Section 1885 is not continued in Section 754, but the substance of subdivision (c) is restated in Section 751.

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

§ 760. "Direct examination"

Comment. Section 760 restates the substance of and supersedes the definition of "direct examination" found in Code of Civil Procedure Section 2045.

sentence of Code of Civil Procedure Section 2046. The last clause of Section 767, permitting a party to ask leading questions of a witness on cross-examination, restates a phrase that appears in Code of Civil Procedure Section 2048.

§ 768. Writings

Comment. Section 768 deals with the method of examining a witness in regard to a writing, a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under these Code of Civil Procedure sections, a cross-examiner need not disclose to a witness any information concerning a prior inconsistent oral statement of the witness before asking him questions about the statement. People v. Kidd, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); People v. Campos, 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). Nor does a party examining his own witness need to make such a disclosure in cases where he is permitted to attack the credibility of his own witness. People v. Kidd, 56 Cal.2d 759, 16 Cal. Rptr. 793, 366 P.2d 49 (1961). However, if a witness' prior inconsistent statements are in writing or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." CODE CIV. PROC. § 2052 (superseded by EVIDENCE CODE § 768); Umemoto v. McDonald, 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Section 768 eliminates the distinction made in existing law between oral and written statements. Under this section, a witness may be asked questions concerning prior inconsistent statements, whether written or oral, even though no disclosure is made to him concerning the prior statement. In this respect, Section 768 is based on Rule 22(a) of the Uniform Rules of Evidence. Whether

a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 770.

The rule requiring that prior inconsistent written statements be shown to the witness has been eliminated for much the same reason that there is no such requirement in regard to inconsistent oral statements. The requirement of disclosure limits the effectiveness of cross-examination by removing the element of surprise. The forewarning required under the present law gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement and thus avoid being exposed. The existing rule is based on an English common law rule that has been abandoned in England for 100 years. See McCORMICK, EVIDENCE § 28 at 53 (1954). The California rule applicable to prior oral statements is the more desirable rule and should be applicable to all prior inconsistent statements.

With respect to other types of writings (such as those that are not made by the witness himself or, even though made by him, are not inconsistent statements used for impeachment purposes), the existing law is uncertain. Except where a writing is shown to a witness for purposes of identification or refreshing recollection, it is not clear under the existing law whether other types of writings like those suggested need be shown to the witness before he can be examined concerning them. For example, it is not clear whether a witness necessarily must be shown a written contract executed by him before he can be examined concerning its terms. Section 2054 of the Code of Civil Procedure requires only that the adverse party must be given an opportunity to inspect any writing that is actually shown to a witness

before the witness can be examined concerning the writing; it does not in terms require that any writing need be shown to the witness before he can be examined concerning it--unless, of course, it is an inconsistent statement within the terms of Section 2052 or it is used to refresh recollection as provided in Section 2047 (superseded by Evidence Code Section 771). See People v. Briggs, 56 Cal.2d 385, 413, 24 Cal. Rptr. 417, 435, 374 P.2d 257, 275 (1962); People v. Keyes, 103 Cal. App. 624, 284 Pac. 487 (1930) (hearing denied); People v. De Angelli, 34 Cal. App. 716, 168 Pac. 669 (1917). Section 768 clarifies whatever doubt may exist in this regard by declaring that such writing need not be shown to the witness before he can be examined concerning it. Of course, the best evidence rule may in some cases preclude the elicitation of testimony concerning the content of a writing. See EVIDENCE CODE § 1500 and the Comment thereto.

Subdivision (b) of Section 768 preserves the right of the adverse party to inspect a writing that is actually shown to a witness before the witness can be examined concerning it. As indicated above, this preserves the existing requirement declared in Code of Civil Procedure Section 2054. However, the right of inspection has been extended to all parties to the action.

§ 769. Inconsistent statement or conduct

Comment. Section 769 is consistent with the existing California law regarding the examination of a witness concerning prior inconsistent oral statements. People v. Kidd, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961). Section 769 is based on Rule 22(a) of the Uniform Rules of Evidence. Insofar as this section also relates to inconsistent

statements of a witness that are in writing (see the definitions of "statement" and "conduct" in EVIDENCE CODE §§ 225 and 125, respectively), see the Comment to Section 768.

§ 770. Evidence of inconsistent statement of witness

Comment. Under Section 2052 of the Code of Civil Procedure, evidence of a witness' inconsistent statement may be admitted only if the witness was given the opportunity, while testifying, to explain or deny the contradictory statement. The principle of permitting a witness to explain the circumstances surrounding the making of an inconsistent statement is sound, but his does not compel the conclusion that the opportunity for explanation must be given before the inconsistent statement is introduced. Accordingly, unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness was not examined so as to give him an opportunity to explain or deny the statement and if he has been unconditionally excused and is not subject to being recalled.

Section 770 will permit effective cross-examination and impeachment of several collusive witnesses, for under this section there need be no disclosure of prior inconsistency before all such witnesses have been examined.

Where the interests of justice require it, the court in its discretion may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement. An absolute rule forbidding introduction of such evidence unless the specified conditions are met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer

available. Hence, Section 770 permits the trial court to admit evidence of the statement where justice so requires. Section 770 is based on Rule 22(b) of the Uniform Rules of Evidence. For the foundational requirements for the admission of a hearsay declarant's inconsistent statement, see EVIDENCE CODE § 1202 and the Comment thereto.

§ 771. Refreshing recollection with a writing

Comment. Section 771 deals with the use of a writing by a witness to refresh his recollection concerning the matter about which he testifies. It is based on and supersedes Code of Civil Procedure Section 2047.

Code of Civil Procedure Section 2047 permits a witness to refresh his recollection with a writing only if it was "written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing." The requirements stated in Section 2047 parallel the conditions normally imposed to insure the trustworthiness of a writing that is admissible as past recollection recorded under an exception to the hearsay rule. See EVIDENCE CODE §§ 1200 and 1237. There is no need, however, to require a writing used to refresh recollection to meet the necessarily strict standards that a writing purporting to contain recorded memory must meet. If a writing in fact has the effect of refreshing a witness' recollection, it is the reliability of the witness' present recollection--not the reliability of the writing--that is of concern to the trier of fact. In such a case, the witness testifies to his present recollection--not to the contents of the writing. Accordingly, Section 771 permits a witness to refresh

his recollection by any writing, regardless of when or by whom it was prepared.

Section 771 grants to an adverse party the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness while testifying or prior thereto. The right of inspection granted by Section 771 may be broader than the similar right of inspection granted by Code of Civil Procedure Section 2047, for Section 2047, has been interpreted by the courts to grant a right of inspection of only those writings used by the witness while he is testifying. People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29 (1953); People v. Grayson, 172 Cal. App.2d 372, 341 P.2d 820 (1959); Smith v. Smith, 135 Cal. App.2d 100, 286 P.2d 820 (1955). In a criminal case, however, the defendant can compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in the witness' testimony. People v. Estrada, 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960). The extent to which the public policy reflected in criminal discovery practice overrides the restrictive interpretation of Code of Civil Procedure Section 2047 is not clear. See WITKIN, CALIFORNIA EVIDENCE § 602 (Supp. 1963). In any event, Section 771 follows the lead of the criminal cases, such as People v. Silberstein, 159 Cal. App.2d Supp. 848, 323 P.2d 591 (1958) (defendant entitled to inspect police report used by police officer to refresh his recollection before testifying), and grants a right of inspection without regard to when the writing is used to refresh recollection. If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used.

§ 772. Cross-examination

Comment. Section 772 restates the substance of Sections 2045 (part) and 2048 of the Code of Civil Procedure and Section 1323 of the Penal Code. In accordance with existing law, it limits cross-examination of a witness to the scope of the witness' direct examination. See generally WITKIN, CALIFORNIA EVIDENCE §§ 622-638 (1958). Section 772 retains the cross-examination rule now applicable to a defendant in a criminal action who testifies as a witness in that action. See People v. McCarthy, 88 Cal. App.2d 883, 200 P.2d 69 (1948). See also People v. Arrighini, 122 Cal. 121, 54 Pac. 591 (1898); People v. O'Brien, 66 Cal. 602, 6 Pac. 695 (1885); WITKIN, CALIFORNIA EVIDENCE § 629 (1958).

§ 773. Order of examination

Comment. Section 773 restates the substance of and supersedes the second sentence in Section 2045 of the Code of Civil Procedure. Where circumstances require it, the court may vary the procedure specified in this section. Cf., EVIDENCE CODE § 320 and the Comment thereto.

§ 774. Re-examination

Comment. Section 774 is based on and supersedes the first and third sentences of Section 2050 of the Code of Civil Procedure.

§ 775. Court may call witnesses

Comment. The power of the judge to call expert witnesses is well-recognized by statutory and case law in California. CODE CIV. PROC. § 1871 (recodified as Section 723 and Article 2 (commencing with Section 730) of

Chapter 3); PENAL CODE § 1027; Citizens State Bank v. Castro, 105 Cal. App. 284, 287 Pac. 559 (1930). See also CODE CIV. PROC. § 1863 (translators of writings), §§ 1884, 1885 (interpreters), continued in substance by Chapter 4 (commencing with Section 750).

The power of the judge to call other witnesses is also recognized by case law. Travis v. Southern Pac. Co., 210 Cal. App.2d 410, 425, 26 Cal. Rptr. 700, 707-708 (1962) ("[W]e have been cited to no case, nor has our independent research disclosed any case, dealing with a civil action in which a witness has been called to the stand by the court, over objection of a party. However, we can see no difference in this respect between a civil and a criminal case. In both, the endeavor of the court and the parties should be to get at the truth of the matter in contest. Fundamentally, there is no reason why the court in the interests of justice should not call to the stand anyone who appears to have relevant, competent and material information.").

Section 775 expressly authorizes the judge to call witnesses and assures to the parties the same rights to which they would be entitled if the witnesses were called by a party to the action. The language used to express these rights is taken from the fourth paragraph of Section 1871 of the Code of Civil Procedure (superseded by Section 732), dealing with the rights of the parties when an expert witness is called and examined by the court.

§ 776. Examination of adverse party or witness

Comment. Section 776 restates the substance of Code of Civil Procedure Section 2055 as it has been interpreted by the courts. See WITKIN, CALIFORNIA EVIDENCE §§ 607-613 (1958), and pertinent cases cited and discussed therein.

Subdivision (a). Subdivision (a) restates the provisions of Section 2055 that permit a party to call and examine as if under cross-examination an adverse party and certain adverse witnesses. However, Section 776 substitutes the phrase "or a person identified with a party" for the confusing enumeration of persons listed in the first sentence of Section 2055. This phrase is defined in subdivision (d) of Section 776 to include all of the persons presently named in Section 2055. See the Comment to subdivision (d), infra.

Subdivision (b). Subdivision (b) concerns the scope and nature of the cross-examination permitted of a witness who is examined under this section. It is based in part on similar provisions contained in Code of Civil Procedure Section 2055. Unlike Section 2055, however, this subdivision is drafted in recognition of the problems involved in multiple party litigation. Thus, the introductory portion of subdivision (b) states the general rule that a witness examined under this section may be cross-examined by all other parties

to the action in such order as the court directs. For example, a party whose interest in the action is identical with that of the party who called the witness for examination under this section has a right to cross-examine the witness fully because he, too, has the right to call the witness for examination under this section. Similarly, a party whose interest in the action is adverse to the party who calls the witness for examination under this section has the right to cross-examine the witness fully unless he is identified with the witness as described in paragraphs (1) and (2) of this subdivision. Paragraphs (1) and (2) restrict the nature of the cross-examination permitted of a witness by a party with whom the witness is identified and by parties whose interest in the action is not adverse to the party with whom the witness is identified. These parties are limited to examination of the witness as if under redirect examination. In essence, this simply means that leading questions cannot be asked of the witness by these parties. See EVIDENCE CODE § 767. Cf. EVIDENCE CODE § 785.

Subdivision (c). Subdivision (c) codifies a principle that has been recognized in the California cases even though not explicitly stated in Code of Civil Procedure Section 2055. See Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925); Goehring v. Rogers, 67 Cal. App. 260, 227 Pac. 689 (1924).

Subdivision (d). Subdivision (d) lists the classes of persons who are "identified with a party" as that phrase and variations of it are used in subdivisions (a) and (b) of Section 776. The persons named in paragraphs (1) and (2) are those described in the first sentence of Code of Civil Procedure Section 2055 as being subject to examination pursuant to the section because of a particular relationship to a party. See the definitions of "person,"

"public employee," and "public entity" in EVIDENCE CODE §§ 175, 195, and 200, respectively. In addition, paragraph (3) of this subdivision describes persons who were in any of the requisite relationships at the time of the act or omission giving rise to the cause of action. This states existing case law. Scott v. Del Monte Properties, Inc., 140 Cal. App.2d 756, 295 P.2d 947 (1956); Wells v. Lloyd, 35 Cal. App.2d 6, 94 P.2d 373 (1939). Similarly, paragraph (4) extends this principle to include any person who obtained relevant knowledge as a result of such a relationship but who does not fit the precise descriptions contained in paragraphs (1) through (3). For example, a person whose employment by a party began after the cause of action arose and terminated prior to the time of his examination at the trial would be included in the description contained in paragraph (4) if he obtained relevant knowledge of the incident as a result of his employment. It is not clear whether this states existing law, for no California decision has been found that decides this question. The paragraph is necessary, however, to preclude a party from preventing examination of his employee pursuant to this section by the simple expedient of discharging the employee prior to trial and reinstating him afterwards. Cf., Wells v. Lloyd, 35 Cal. App.2d 6, 12, 94 P.2d 373, 376-377 (1939).

§ 777. Exclusion of witness

Comment. Section 777 is based on and supersedes Section 2043 of the Code of Civil Procedure. Under the existing law, the judge exercises broad discretion in regard to the exclusion of witnesses. People v. Larisey, 14 Cal.2d 30, 92 P.2d 638 (1939); People v. Garbutt, 197 Cal. 200, 239 Pac. 1080 (1925). Cf. PENAL CODE § 867 (power of magistrate to exclude witnesses

during preliminary examination). See also CODE CIV. PROC. § 125 (general discretionary power of the court to exclude witnesses).

Under the existing law, the judge may not exclude a party to an action. If the party is a corporation, an officer designated by its attorney is entitled to be present. Section 777 permits the right of presence to be exercised by an employee as well as an officer, and because there is little practical distinction between corporations and other artificial entities and organizations, Section 777 extends the right of presence to all artificial parties.

§ 778. Recall of witness

Comment. Section 778 restates the substance of and supersedes the second and third sentences of Section 2050 of the Code of Civil Procedure.

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. General rule as to credibility

Comment. Section 780 is a restatement of the existing California law as declared in several sections of the Code of Civil Procedure, all of which are superseded by this section and other sections in Article 2 (commencing with Section 785) of this chapter. See, e.g., CODE CIV. PROC. §§ 1847, 2049, 2051, 2052, 2053.

Section 780 is a general catalogue of those matters that have any tendency in reason to affect the credibility of a witness. So far as the admissibility of evidence relating to credibility is concerned, Section 780

is technically unnecessary because Section 351 declares that "all relevant evidence is admissible." However, this section makes it clear that matters that may not be "evidence" in a technical sense can affect the credibility of a witness, and it provides a convenient list of the most common factors that bear on the question of credibility. See Davis v. Judson, 159 Cal. 121, 128, 113 Pac. 147, 150 (1910). La Jolla Casa de Manana v. Hopkins, 98 Cal. App.2d 339, 346, 219 P.2d 871, 876 (1950). See generally WITKIN, CALIFORNIA EVIDENCE §§ 480-485 (1958).

Limitations on the admissibility of evidence offered to attack or support the credibility of a witness are stated in Article 2 (commencing with Section 785).

Yet, there is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral".

The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. Accordingly, evidence that is relevant merely to collateral disputes between the parties should be excluded from consideration. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

The effect of Section 780 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be

admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

Nor is there a limitation in Article 2 on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such evidence is admissible. This represents a change in the present law. See People v. Methvin, 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

Article 2. Attacking or Supporting Credibility

§ 785. Parties may attack or support credibility

Comment. Section 785, which is based on the principle expressed in Rule 20 of the Uniform Rules of Evidence, eliminates the present restriction on attacking the credibility of one's own witness. Under the existing California law, a party is precluded from attacking the credibility of his own witness unless he has been surprised and damaged by the witness' testimony. CODE CIV. PROC. §§ 2049, 2052 (superseded by EVIDENCE CODE §§ 768, 769, 770, 785); People v. LeBeau, 39 Cal.2d 146, 148, 245 P.2d 302, 303 (1952). In large part, the present law rests upon the theory that a party producing a witness is bound by his testimony. See discussion in Smellie v. Southern Pac. Co., 212 Cal. 540, 555-556, 299 Pac. 529, 535 (1931). This theory has long been abandoned in several jurisdictions where the practical exigencies of

litigation have been recognized. See McMORMICK, EVIDENCE § 38 (1954). A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be "bound" by the testimony of a witness produced by him and should be permitted to attack the credibility of the witness without anachronistic limitations. Denial of the right to attack credibility may often work a hardship on a party where by necessity he must call a hostile witness. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure. In regard to attacking the credibility of a "necessary" witness, see generally People v. McFarlane, 134 Cal. 618, 66 Pac. 865 (1901); Anthony v. Hobbie, 85 Cal. App.2d 798, 803-804, 193 P.2d 748, 751 (1948); First Nat'l Bank v. De Moulin, 56 Cal. App. 313, 321, 205 Pac. 92, 96 (1922).

§ 786. Character evidence--generally

Comment. Section 786 limits evidence relating to the character of a witness to the character traits necessarily involved in a proper determination of credibility. Other character traits are not sufficiently probative of a witness' truthfulness or accuracy to warrant their consideration on the issue of credibility.

Section 786 is based on subdivision (c) of Rule 22 of the Uniform Rules of Evidence. It is substantially in accord with the present California law. CODE CIV. PROC. § 2051 (superseded by EVIDENCE CODE §§ 780, 785-788); People v. Yslas, 27 Cal. 630, 633 (1865).

§ 787. Specific instances of conduct

Comment. Section 787, which is based on subdivision (d) of Rule 22 of the Uniform Rules of Evidence, makes evidence of specific instances of conduct inadmissible to prove a trait of character for the purpose of attacking or supporting the credibility of a witness. This is in accord with the present California law. Sharon v. Sharon, 79 Cal. 633, 673-674, 22 Pac. 26, 38 (1889); CODE CIV. PROC. § 2051 (superseded by Section 787 and several other sections in Chapter 6). This section is subject, however, to Section 788, which permits certain kinds of criminal convictions to be used for the purpose of attacking a witness' credibility.

§ 788. Conviction of witness for a crime

Comment. Section 788 prescribes the extent to which evidence of conviction for a crime can be used for the purpose of attacking the credibility of a witness. Section 788 is based on Rule 21 of the Uniform Rules of Evidence.

Subdivision (a). Subdivision (a) limits the types of crimes that may be used for impeachment purposes to crimes involving false statement or the intention to deceive. Crimes of this nature have a considerable bearing on credibility, whereas others do not. Other crimes are excluded because the probative value of such crimes on the issue of credibility is low and the prejudice that may result from their introduction may be great.

Under Section 788, the minimum elements essential to conviction for the crime must necessarily involve false statement or the intent to deceive, or the conviction cannot be used for impeachment. Cf. In re Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954). Examples of the types of crimes that may be used for impeachment purposes under this section include: arson with intent to defraud an insurer (PENAL CODE §§ 450a, 548); forgery and counterfeiting (PENAL CODE

§§ 470, 471, 472, 474, 475, 475a, 476, 476a, 477, 479, 480, 481); perjury and subornation of perjury (PENAL CODE §§ 118, 118a, 127); touting (PENAL CODE § 337.1); credit card fraud (PENAL CODE §§ 484a(b) and 484a(c)); defrauding liverymen or chattel mortgagees (PENAL CODE §§ 537b, 538); falsification of documents for evidence (PENAL CODE § 134); producing spurious heir (PENAL CODE § 156); false personation and false pretenses (PENAL CODE §§ 146a, 528, 532, 538d, 538e).

Subdivision (a) will substantially change the existing California law. Under existing law, a conviction for any felony may be used for impeachment purposes--even though the crime does not involve the trait of honesty--but a conviction for a misdemeanor may not be used to attack credibility even though the crime involves lying. CODE CIV. PROC. § 2051; People v. Carolan, 71 Cal. 195, 12 Pac. 52 (1886)(misdemeanor conviction inadmissible; gratuitous remark suggesting possible admissibility of misdemeanor conviction for purpose of discrediting a witness if "it should be made to appear that the offense involved moral turpitude or infamy" effectively quashed in People v. White, 142 Cal. 292, 294, 75 Pac. 828, 829 (1904), with the statement, "But the language of the code in question [CODE CIV. PROC. § 2051] clearly limits it to cases where there has been a conviction of felony."). Under existing California law, an offense that is punishable either as a felony or a misdemeanor is deemed a misdemeanor for all purposes if the punishment actually imposed is that applicable to misdemeanors. PENAL CODE § 17. Hence, if a person is charged with a felony and is punished with imprisonment in a county jail, the conviction may not be shown to attack his credibility. People v. Hamilton, 33 Cal.2d 45, 198 P.2d 873 (1948). However, if probation is granted instead of imprisonment, the conviction may be shown to attack the credibility of the defendant in a subsequent criminal

case, even after the conviction is expunged under the provisions of Penal Code Section 1203.4 (People v. Burch, 196 Cal. App.2d 754, 17 Cal. Rptr. 102 (1961)), unless the court at the time of granting probation declares the offense to be a misdemeanor (PENAL CODE § 17--provision added by Cal. Stats. 1963, Ch. 919, § 1, p. 918, after the decision in the Burch case, supra). Apparently, however, the conviction may not be used to attack the credibility of a person who is not a defendant in a subsequent criminal case once the conviction is expunged under the provisions of Penal Code Section 1203.4. People v. Mackey, 58 Cal. App. 123, 128-131, 208 Pac. 135, 137-138 (1922).

Thus, under existing law, evidence of considerable significance on the issue of credibility is frequently excluded while much evidence of little probative value on the issue is admitted. Section 788 removes these anomalies from the California law.

Subdivision (a) also requires a party, before attacking the credibility of a witness on the basis of prior convictions, to satisfy the judge in proceedings out of the presence and hearing of the jury that the conviction in question is admissible under Section 788 and that the witness was actually convicted. The purpose of the provision is to avoid unfair imputations of crimes that either do not fit within the rule or are nonexistent. This provision is based in part on a proposal made by the Committee on Administration of Justice of the State Bar of California. See 29 CAL. S. B. J. 224, 238 (1954). Moreover, it is substantially in accord with existing California law as declared in People v. Perez, 58 Cal.2d 229, 23 Cal. Rptr. 569, 373 P.2d 617 (1962).

Subdivision (a) makes any evidence of the conviction of a witness for a crime inadmissible unless the appropriate showing has been made to the judge. This includes evidence in the form of testimony from the witness himself. Hence, a party may not ask a witness if he has been convicted of a crime unless the party has made the requisite showing to the judge. As indicated in paragraph (2) of

subdivision (a), a prior admission by the witness may be used to establish the conviction as well as any other competent evidence.

Subdivision (b). Subdivision (b) is a logical extension of the policy expressed in Section 2051 of the Code of Civil Procedure that prohibits the use of a conviction to attack credibility if a pardon has been granted upon the basis of a certificate of rehabilitation. See also CODE CIV. PROC. § 2065. Section 2051 is too limited, however, because it does not exclude convictions in analogous situations.

Insofar as other convictions and pardons are concerned, the conviction is admissible to attack credibility, and the pardon--even though it may be based on the innocence of the defendant and his wrongful conviction for the crime--is admissible merely to mitigate the effect of the conviction. People v. Hardwick, 204 Cal. 582, 269 Pac. 427 (1928). Moreover, the certificate of rehabilitation referred to in Section 2051 is available only to felons who have been confined in a state prison or penal institution; it is not available to persons given misdemeanor sentences or to persons granted probation. PENAL CODE § 4852.01. Sections 1203.4, 1203.4a, and 1203.45 of the Penal Code provide procedures for setting aside the convictions of rehabilitated probationers and misdemeanants. Yet, under Section 2051 of the Code of Civil Procedure, a conviction that has been set aside under Penal Code Section 1203.4, for example, may be shown to attack the credibility of the defendant in a subsequent criminal prosecution. People v. James, 40 Cal. App.2d 740, 105 P.2d 947 (1940). As to the use of such prior convictions generally, see the discussion under subdivision (a), supra.

Subdivision (b) eliminates these anachronisms by prohibiting the use of a conviction to attack credibility if the person convicted has been determined to be either innocent or rehabilitated and a pardon has been granted or the conviction has been set aside by court order pursuant to the cited provisions of the Penal Code or he has been relieved of the penalties

and disabilities of the conviction pursuant to a similar procedure provided by the laws of another jurisdiction.

§ 789. Religious belief

Comment. Section 789 restates the present California law as expressed in People v. Copsey, 71 Cal 548, 12 Pac. 721 (1887), where the Supreme Court held that evidence relating to a witness' religious belief or lack thereof is incompetent on the issue of his credibility as a witness. See CAL. CONST., Art. I, § 4.

§ 790. Good character of witness

Comment. Section 790 precludes the introduction of character evidence to support the credibility of a witness unless and until evidence of the witness' bad character has been admitted for the purpose of attacking his credibility as a witness. This section restates without substantive change a rule that is well recognized by statutory and case law in California. CODE CIV. PROC. § 2053 (superseded by EVIDENCE CODE §§ 790, 1101); People v. Bush, 65 Cal. 129, 131, 3 Pac. 590, 591 (1884). Unless the credibility of a witness is put in issue by an attack impugning his character for honesty or veracity (see Section 786), evidence of the witness' good character admitted merely to support his credibility introduces collateral material that is unnecessary to a proper determination of any legitimate issue in the action. See People v. Sweeney, 55 Cal.2d 27, 38-39, 9 Cal. Rptr. 793, 799, 357 P.2d 1049, 1055 (1960).

§ 788
§ 789
§ 790

§ 791. Prior consistent statement of witness

Comment. Section 791 sets forth the conditions for admitting a witness' prior consistent statements for the purpose of supporting his credibility as a witness. For a discussion of the effect to be given to the evidence admitted under this section, see EVIDENCE CODE § 1236 and the Comment thereto.

Subdivision (a). Subdivision (a) permits the introduction of a witness' prior consistent statement if evidence of a prior inconsistent statement of the witness has been admitted for the purpose of attacking his credibility and if the prior consistent statement was made before the alleged inconsistent statement.

Under existing California law, evidence of a prior consistent statement is admissible to rebut a charge of bias, interest, recent fabrication, or other improper motive. See the Comment to subdivision (b). Existing law may preclude admission of a prior consistent statement to rehabilitate a witness where only a prior inconsistent statement has been admitted for the purpose of attacking his credibility. See People v. Doyell, 48 Cal. 85, 90-91 (1874). However, recent cases indicate that the offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony at the hearing since the time the inconsistent statement was made and justifies the admission of a consistent statement made prior to the alleged inconsistent statement. People v. Bias, 170 Cal. App.2d 502, 511-512, 339 P.2d 204, 210-211 (1959). Subdivision (a) makes it clear that evidence of a previous consistent statement is admissible under these circumstances to show that no such fabrication took place. Subdivision (a), thus, is no more than a logical extension of the general rule that evidence

of a prior consistent statement is admissible to rehabilitate a witness following an express or implied charge of recent fabrication.

Subdivision (b). This subdivision codifies existing California law. See People v. Kynette, 15 Cal.2d 731, 104 P.2d 794 (1940). Of course, if the consistent statement is made after the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible. See People v. Doetschman, 69 Cal. App.2d 486, 159 P.2d 418 (1945).