#34 2/3/65

First Supplement to Memorandum 65-4

Subject: Study No. 34(L) - Evidence Code

The joint committee of the Conference of California Judges and the Judicial Council made numerous suggestions for the revision of the Evidence Code. For the most part, the drafting changes were made for Commission consideration as possible improvements and were not made as indications of vitally needed changes. The principal memorandum identifies by asterisk the four changes the judges thought were of substantial importance. Nonetheless, the remaining suggestions should be considered, and many of them should be approved.

The staff recommends that the following policy be adopted toward revisions suggested by the judges and toward changes suggested by others as well: Drafting changes should be made only if the change would make a significant improvement in the code. At the time of the Commission meeting, the code will have been reviewed in detail by an Assembly subcommittee and as a whole by both the Assembly and Senate Judiciary Committees. Revision of the code, therefore, should be held to the minimum so that it will not become necessary for the committees to go completely over the bill again.

The following memorandum sets forth all of the proposed changes that we believe merit serious consideration under the foregoing standard. The memorandum includes the amendments made by the Commission at the last meeting together with necessary changes in the Comments. If a revised Comment does not appear, it is because we think no revision is necessary. Changes that we think should be made in the light of the suggestions made by the judges and the Trial Practice Committee of the San Francisco Bar

are also included. The memorandum also includes a discussion of matters raised by the Attorney General that were not resolved at the last meeting.

Section 12

We recommend the following amendment:

12. (a) This code shall become operative on January 1, 1967, and it shall govern proceedings in actions brought on or after that date and ~~also~~ , except as provided in subdivision (b), further proceedings in actions pending on that date.

(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this section:

(1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.

(2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.

(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

Comment. The delayed operative date provides time for California judges and attorneys to become familiar with the code before it goes into effect.

Subdivision (a) makes it clear that the Evidence Code governs all trials commenced after December 31, 1966.

Under subdivision (b), a trial that has actually commenced prior to the operative date of the code will continue to be governed by the rules of evidence (except privileges) applicable at the commencement of the trial. Thus, if the trial court makes a ruling on the admission of evidence in a trial commenced prior to January 1, 1967, such ruling is not affected by the enactment of the Evidence Code; if an appeal is taken from the ruling, Section 12 requires the appellate court to apply the law applicable at the commencement of the trial. On the other hand,

any ruling made by the trial court on the admission of evidence in a trial commenced after December 31, 1966, is governed by the Evidence Code, even if a previous trial of the same action was commenced prior to that date.

Under subdivision (c) all claims of privilege made after December 31, 1966, are governed by the Evidence Code in order that there might be no delay in providing protection to the important relationships and interests that are protected by the privileges division.

We have heard this recommendation from the judges, the Department of Public Works, and the State Bar. In view of this weight of opinion, we suggest the above revision.

Section 165

We recommend the following amendment:

165. "Oath" includes affirmation or declaration under penalty of perjury .

Section 230

We recommend the following amendment:

230. "Statute" includes a treaty and a constitutional provision ~~of the Constitution~~ .

Section 311

We recommend the following amendment:

311. (a) Determination of the law of a ~~foreign nation or~~ a public entity ~~in a foreign nation~~ is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(b) If ~~such~~ the law of a foreign nation or a state other than this State, or a public entity in a foreign nation or a state other than this State, is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of the United States and the Constitution of this State; or

(2) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

Comment. Insofar as it relates to the law of foreign nations, Section 311 restates the substance of and supersedes the last paragraph of Section 1875 of the Code of Civil Procedure. The provisions of Section 311 relating to the law of sister states reflect existing, but uncodified, California law. See, e.g., Gagnon Co. v. Nevada Desert Inn, 45 Cal.2d 448, 454, 289 P.2d 466, 471 (1955).

The court may be unable to determine the applicable foreign or sister state law because the parties have not provided the court with sufficient information to make such determination. If it appears that the parties may be able to obtain such information, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. But when all sources of information as to the applicable foreign or sister state law are exhausted and the court is unable to determine it, Section 311 provides the rule that governs the disposition of the case.

§ 353. Effect of erroneous admission of evidence

353. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

*Comment.* Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

Section 353 does not specify the form in which an objection must be made; hence, the use of a continuing objection to a line of questioning would be proper under Section 353 just as it is under existing law. See WITKIN, CALIFORNIA EVIDENCE § 708 (1958).

Subdivision (b) reiterates the requirement of Section 4½ of Article VI of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial.

Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d ___, 39 Cal. Rptr. 1, 893 P.2d 161 (1964).

At the January meeting, the Commission directed the revision of the comment indicated above.

Section 451

We recommend the following amendment:

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of this State and of the United States ~~and of every state of the United States~~ and of the provisions of any charter described in Section 7 1/2 or 8 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11383, 11384, or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of practice and procedure for the courts of this State adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

*Comment.* Judicial notice of the matters specified in Section 451 is *mandatory*, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign nations and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions." These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that must be judicially noticed under Section 451.

*California and federal law.* The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code).

*Charter provisions of California cities and counties.* Judicial notice must be taken under subdivision (a) of the provisions of charters adopted pursuant to Section 7½ or 8 of Article XI of the California Constitution. Notice of these provisions is mandatory under the State Constitution. CAL. CONST., Art. XI, § 7½ (county charter), § 8 (charter of city or city and county).

*Regulations of California and federal agencies.* Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules of the State Personnel Board. This, too, is existing law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard*, 133 Cal. App.2d 382, 386 note 4, 285 P.2d 61, 64 note 4 (1955) (referring to 44 U.S.C.A. §§ 301-314). *Compare* Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), *with* Knowlton, *Judicial Notice*, 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Beal*, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g., Pacific Solvents Co. v. Superior Court*, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend*, 50 Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock & Land Co.*, 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

*Rules of court.* Judicial notice of the California Rules of Court is required under subdivision (c). These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes. *Cantillon v. Superior Court*, 150 Cal. App.2d 184, 309 P.2d 890 (1957). See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (c) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States Courts of Appeals or local rules of a particular superior court. See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

*Words, phrases, and legal expressions.* Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory.

*"Universally known" facts.* Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. The facts must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court *must* notice them. See *Varcoe v. Lee,* 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

CROSS-REFERENCES

Definition:
State, see § 220

Section 452

We recommend the following amendment:

§ 452. Matters which may be judicially noticed

452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of ~~any state of the United States~~ this State and the decisional, constitutional, and statutory law of any other state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(f) The law of foreign nations and public entities in foreign nations.

(g) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

*Comment.* Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

*Resolutions and private acts.* Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 968 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman*, 32 Cal. 447 (1867).

*Law of sister states.* [redacted] decisional, constitutional, and [redacted] statutory law in force in sister states ~~must be judicially noticed under subdivision (a)~~. California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section [redacted] notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On

Subdivision (a) also provides for judicial notice of the

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NEW SET

whether judicial notice is mandatory, see *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). ~~Section 451 requires such notice to be taken without a request being made.~~

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Subdivision (a) also provides for judicial notice of the

*Law of territories and possessions of the United States.* The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States ~~must be judicially noticed under subdivision (a)~~. See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

***Regulations, ordinances, and similar legislative enactments.*** **Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.**

**This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles*, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden*, 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays*, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett*, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg*, 193 Cal. App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.**

**Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.**

**Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.**

***Official acts of the legislative, executive, and judicial departments.*** **Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.**

***Court records and rules of court.*** **Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing law. *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra*.**

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo, supra.* To the extent that subdivision (e) overlaps with subdivisions (e) and (d) of Section 451, notice is, of course, mandatory under Section 451.

*Law of foreign nations.* Subdivision (f) provides for judicial notice of the law of foreign nations and public entities in foreign nations. See the broad definition of "public entity" in EVIDENCE CODE § 200. Subdivision (f) should be read in connection with Sections 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Subdivision (f) refers to "the law" of foreign nations and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

*Matters of "common knowledge" and verifiable facts.* Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing case law. *Varcoe v. Lee,* 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See EVIDENCE CODE § 453 and the *Comment* thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

Section 703

We recommend the following amendment:

703. (a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, ~~which shall be deemed a motion for mistrial,~~ the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

~~(c)~~ (d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

*Comment.* Under existing law, a judge may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). *But see 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 to important and necessary facts).

Section 703, however, precludes the judge from testifying if a party objects. Before the judge may be called to testify in a civil or criminal action, he must disclose to the parties out of the presence and hearing of the jury the information he has concerning the case. After such disclosure, if no party objects, the judge is permitted—but not required—to testify.

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 questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally. For these and other reasons, Section 703 is preferable to Code of Civil Procedure Section 1883.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the judge to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

Section 704

We recommend the following amendment:

704. (a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, ~~which shall be deemed a motion for mistrial,~~ the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

~~(c)~~ (d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

*Comment.* Under existing law, a juror may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). Section 704, on the other hand, prevents a juror from testifying before the jury if any party objects.

A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight. For these and other reasons, Section 704 forbids jurors to testify over the objection of any party.

Before a juror may be called to testify before the jury in a civil or criminal action, he is required to disclose to the parties out of the presence and hearing of the remaining jurors the information he has concerning the case. After such disclosure, if no party objects, the juror is required to testify. If a party objects, 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.

Section 704 is concerned only with the problem of a juror who is called to testify before the jury. Section 704 does not deal with *voir dire* examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court. *Cf.* EVIDENCE CODE § 1150 and the *Comment* thereto.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the juror to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

ections 768 and 769

We recommend the following amendments:

768. ~~(a)~~ In examining a witness concerning ~~a writing, including~~ a an oral or written statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to ~~show, read, or~~ disclose to him any ~~part of the~~ writing, statement, or other information concerning the statement or other conduct.

Comment. Section 768 deals with a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under the existing sections, a party 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). 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 and permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, even though no disclosure is made to him concerning the prior statement. (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 disclosure of inconsistent written statements that is required under existing law limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement. 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).

~~(b)~~ 769. If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

~~769. In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.~~

Comment. Section 769 restates the substance of and supersedes Section 2054 of the Code of Civil Procedure. However, the right of inspection has been extended to all parties to the action.

Section 771

Section 771 was amended at the January meeting to read:

**§ 771. Refreshing recollection with a writing**

**771. (a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.**

**(b) If the writing is produced at the hearing, the adverse party who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and ~~read it to the jury~~ introduce it in evidence.**

**(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:**

**(1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and**

**(2) Was not reasonably procurable by such party through the use of the court's process or other available means.**

*Comment.* 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 Section 2047 of the Code of Civil Procedure, 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 1009 (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.

Subdivision (c) excuses the nonproduction of the memory-refreshing writing where the writing cannot be produced through no fault of the witness or the party eliciting his testimony concerning the matter. The rule is analogous to the rule announced in People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), which affirmed an order denying defendant's motion to strike certain witnesses' testimony where the witnesses' prior statements were withheld by the Federal Bureau of Investigation.

Section 772

We recommend the following amendment:

772. (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, during interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

*Comment.* Subdivision (a) codifies existing but nonstatutory California law. See WITKIN, CALIFORNIA EVIDENCE § 576 at 631 (1958).

Subdivision (b) is based on and supersedes the second sentence of Section 2045 of the Code of Civil Procedure. The language of the existing section has been expanded, however, to require completion of each phase of examination of the witness, not merely the direct examination.

Under subdivision (c), as under existing law, a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination if the court permits. See CODE CIV. PROC. §§ 2048 (last clause), 2050; WITKIN, CALIFORNIA EVIDENCE §§ 627, 697 (1958). Under the definition in Section 760, such an extended examination is direct examination. *Cf.* CODE CIV. PROC. § 2048 ("such examination is to be subject to the same rules as a direct examination"). Such direct examination may, however, be subject to the rules applicable to a cross-examination by virtue of the provisions of Section 776, 804, or 1203.

Subdivision (d) states an exception for the defendant-witness in a criminal action that reflects existing law. See WITKIN, CALIFORNIA EVIDENCE § 629 at 676 (1958).

Section 776

We recommend the following amendment:

776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. ~~The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.~~

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

The deleted languate is unnecessary. We have not included such language in Sections 804 and 1203, which are comparable. The judges strongly urge the deletion because parties are frequently confused by the word "bound"; some attorneys apparently think that testimony elicited under this section is somehow not to be considered as evidence against them.

Section 780

The Commission amended Section 780 at the January meeting to read as follows:

780. Except as otherwise provided by ~~law~~ statute , the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

(d) The extent of his opportunity to perceive any matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

Section 804

The Commission amended Section 804 at the January meeting to read as follows:

804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination

concerning the opinion or statement

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

Section 1006

The Commission amended Section 1006 at the January meeting to read:

1006. There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, ~~unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.~~ if such report or record is open to public inspection.

Comment. This exception is not recognized by existing law. However, no valid purpose is served by permitting a person to prevent the disclosure in court, or in some other official proceeding, of information that is required to be open to public inspection.

Section 1026

The Commission amended Section 1026 at the January meeting to read:

1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, ~~unless the statute, charter, ordinance, administrative regulation, or~~

~~other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.~~ if such report or record is open to public inspection.

Section 1042

At the January meeting, the Commission directed the staff to make the following revision in the comment:

*Comment.* Section 1042 provides special rules regarding the consequences of invocation of the privileges provided in this article by the prosecution in a criminal proceeding or a disciplinary proceeding.

*Subdivision (a).* This subdivision recognizes the existing California rule in a criminal case. As was stated by the United States Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the law requires that the court dismiss the case if the public entity does not reveal the information. *People v. McShann*, 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the law requires that the court strike the testimony of a particular witness or make some other order appropriate under the circumstances if the public entity insists upon its privilege. *Priestly v. Superior Court*, 50 Cal.2d 812, 330 P.2d 39 (1958).

In cases where the legality of an arrest is in issue, however, Section 1042 would not require disclosure of the privileged information if there was reasonable cause for the arrest aside from the privileged information. Cf. People v. Hunt, 216 Cal. App.2d 753, 756-757, 31 Cal. Rptr. 221, 223 (1963)("The rule requiring disclosure of an informer's identity has no application in situations where reasonable cause for arrest and search exists aside from the informer's communication.").

Subdivision (a) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (a) does not require the imposition of its sanction if the privilege is invoked in an action prosecuted by the State and the information is withheld by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (a) states existing California law. *People v. Parham*, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

*Subdivision (b).* This subdivision codifies the rule declared in *People v. Keener*, 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

Section 1152

We recommend that the following amendment be considered:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any statements made in negotiation thereof, is inadmissible to prove ~~his liability for the loss or damage or any part of it~~ that anything is due.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

The effect of the foregoing suggestion is merely to substitute the language of Code of Civil Procedure Section 2078 for the language we had approved. This may meet the San Francisco Bar's objection to this section.

Section 1156

Section 1156 was revised by the Commission at the January meeting as follows:

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written reports of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to the Sections 2016 and to 2036, inclusive, of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions ~~(b)~~ and (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) ~~(b)~~ This section does not affect the admissibility in evidence of the original medical records of any patient.

(d) ~~(c)~~ This section does not exclude evidence which is relevant evidence in a criminal action.

Comment. Section 1156 supersedes Code of Civil Procedure Section 1936.1 (added by Cal. Stats. 1963, Ch. 1558, § 1, p. 3142). Except as

noted below, Section 1156 restates the substance of the superseded section.

The phrase "Sections 2016 to 2036, inclusive," has been inserted in Section 1156 in place of the phrase "Sections 2016 and 2036," which appears in Section 1936.1, to correct an apparent inadvertence. This substitution permits use of all kinds of discovery procedures, instead of depositions only, to discover material of the type described in Section 1156. E.g., CODE CIV. PROC. §§ 2030 (written interrogatories); 2031 (motion for order for production of documents).

Section 1156 also makes it clear that the names of patients may not be disclosed without the consent of the patient. This limitation is necessary to preserve the physician-patient and psychotherapist-patient privileges.

Section 1203

The Commission approved this amendment at the January meeting:

1203. (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

*Comment.* Hearsay evidence is generally excluded because the declarant was not in court and not subject to cross-examination before the trier of fact when he made the statement. *People v. Bob*, 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946).

In some situations, hearsay evidence is admitted because there is either some exceptional need for the evidence or some circumstantial probability of its trustworthiness, or both. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957); *Turney v. Sousa*, 146 Cal. App.2d 787, 791, 304 P.2d 1025, 1027-1028 (1956). Even though it may be necessary or desirable to permit certain hearsay evidence to be admitted despite the fact that the adverse party had no opportunity to cross-examine the declarant when the hearsay statement was made, there seems to be no reason to prohibit the adverse party from cross-examining the declarant concerning the statement. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement received in evidence and to cross-examine him concerning his statement.

Section 1203, therefore, reverses (insofar as a hearsay declarant is concerned) the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. Because a hearsay declarant is in practical effect a witness against the party against whom his hearsay statement is admitted, Section 1203 gives that party the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

Subdivisions (b) and (c) make Section 1203 inapplicable in certain situations where it would be inappropriate to permit a party to examine a hearsay declarant as if under cross-examination. Thus, for example, subdivision (b) does not permit counsel for a party to examine his own client as if under cross-examination merely because a hearsay statement of his client has been admitted; and, because a party should not have the right to cross-examine his own witness merely because the adverse party has introduced a hearsay statement of the witness, witnesses who have testified in the action concerning the statement are not subject to examination under Section 1203.

subject matter of the

Subdivision (d) makes it clear that the unavailability of a hearsay declarant for examination under Section 1203 has no effect on the admissibility of his hearsay statements. The subdivision forestalls any argument that availability of the declarant for examination under Section 1203 is an additional condition of admissibility for hearsay evidence.

Section 1237

We recommend the following amendment:

§ 1237. Past recollection recorded

1237. (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(1) (a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) (b) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(3) (d) Is offered after the writing is authenticated as an accurate record of the statement.

(4)

*Comment.* Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." Although the provisions of Section 1237 are taken largely from the provisions of Section 2047 of the Code of Civil Procedure, there are some substantive differences between Section 1237 and existing law.

Existing *First*, existing law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at the time when the fact recorded in the writing actually occurred or at another time when the fact was fresh in the witness' memory, and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement.

*Second*, under Section 1237 the writing embodying the statement is itself admissible in evidence. Under present law, the declarant reads the writing on the witness stand; the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

Under subdivision (b), as under existing law, the statement must be read into evidence. See Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497 (1952). The adverse party, however, may introduce the writing as evidence. Cf. Horowitz v. Fitch, 216 Cal. App.2d 303, 30 Cal. Rptr. 882 (1963)(dictum).

Section 1241

We recommend the following amendment:

1241. Evidence of a statement is not made inadmissible by the hearsay rule if ~~the-declarant-is-unavailable-as-a-witness~~ and the statement:

(a) Purports to ~~narrate,-describe,~~ qualify or explain ~~an-act,-condition,-or-event-perceived-by~~ conduct of the declarant; and

(b) Was made while the declarant was ~~perceiving-the-act,-condition,-or-event~~ engaged in such conduct.

Comment. Under existing law, where a person's conduct or act is relevant but is equivocal or ambiguous, the statements accompanying it may be admitted to explain and make the act or conduct understandable. CODE CIV. PROC. § 1850 (superseded by EVIDENCE CODE § 1241); WITKIN, CALIFORNIA EVIDENCE § 216 (1958). Some writers do not regard evidence of this sort as hearsay evidence, although the definition in Section 1200 seems applicable to many of the statements received under this exception. Cf. 6 WIGMORE, EVIDENCE §§ 1772 et seq. Section 1241 removes any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.

Section 1250

At the January meeting, the Commission directed the staff to revise the Comment to Section 1250 to include some discussion such as that appearing in the revision below:

> *Comment.* Section 1250 provides an exception to the hearsay rule for statements of the declarant's *then* existing mental or physical state. Under Section 1250, as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when the then existing state of mind is itself an issue in the case. *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior or subsequent to the statement. *Watenpaugh v. State Teachers' Retirement System*, 51 Cal.2d 675, 336 P.2d 165 (1959); *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530 (1942); *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921); *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. *People v. Alcalde*, 24 Cal.2d 177, 148 P.2d 627 (1944); *Benjamin v. District Grand Lodge No. 4*, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition also are admissible to prove the existence of such condition. *Bloomberg v. Laventhal*, 179 Cal. 616, 178 Pac. 496 (1919); *People v. Wright*, 167 Cal. 1, 138 Pac. 349 (1914).
>
> A statement is not admissible under Section 1250 if the statement was made under circumstances indicating that the statement is not trustworthy. See EVIDENCE CODE § 1252 and the *Comment* thereto.
>
> In light of the definition of "hearsay evidence" in Section 1200, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state. Under the Evidence Code, no hearsay problem is involved if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state. See the *Comment* to Section 1200.
>
> Section 1250(b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind —his memory or belief—concerning the past event. If the evidence of that state of mind—the statement of memory—were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.
>
> The limitation in Section 1250(b) is generally in accord with the law developed in the California cases. Thus, in *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921), a testatrix, after the execution of a will, declared, in effect, that the will had been made at an aunt's request; this statement was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in *People v. Merkouris*, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that certain murder victims' statements relating threats by the defendant were admissible to show the victims' mental state—their fear of the defendant. Their fear was not itself an issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct engendering the fear, *i.e.*, that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In *People v. Purvis*, 56 Cal.2d 93, 18 Cal. Rptr. 801, 362 P.2d 713 (1961), the doctrine of the Merkouris case was apparently limited to cases where identity is an issue; however, at least one subsequent decision has applied the doctrine where identity was not in issue. See People v. Cooley, 211 Cal. App.2d 173, 27 Cal. Rptr. 543 (1962).

The doctrine of the *Merkouris* case is repudiated in Section 1250(b) because that doctrine undermines the hearsay rule itself. Other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957). The exception created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule.

To be distinguished from the Merkouris decision, however, are certain other cases in which the statements of a murder victim have been used to prove or explain subsequent acts of the decedent, and are not used as a basis for inferring that the defendant did the acts charged in the statements. See, e.g., People v. Atchley, 53 Cal.2d 160, 172, 346 P.2d 764, 770 (1959); People v. Finch, 213 Cal. App.2d 752, 765, 29 Cal. Rptr. 420, 427 (1963). Statements of a decedent's then state of mind--i.e., his fear--may be offered under Section 1250, as under existing law, either to prove that fear when it is itself in issue or to prove or explain the decedent's subsequent conduct. Statements of a decedent narrating threats or brutal conduct by some other person may also be used as circumstantial evidence of the decedent's state of mind--his fear--when that fear is itself in issue or when it is relevant to prove or explain

the decedent's subsequent conduct; and for that purpose, the evidence is not subject to a hearsay objection for it is not offered to prove the truth of the matters stated. See the Comment to Section 1200. See also the Comment to Section 1252. But when such evidence is used as a basis for inferring that the alleged threatener must have made threats, the evidence falls within the language of Section 1250(b) and is inadmissible hearsay evidence.

Section 1261

The Commission approved the following amendment at the January meeting:

1261. (a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was ~~(a)~~ made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear ~~, and~~.

(b) Evidence of a statement is inadmissible under this Section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Section 1291

The Commission approved the amendment to subdivision (a) at the January meeting. In addition, we recommend the amendment indicated to subdivision (b).

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing~~, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.~~

~~(b)--Except-for-objections-to-the-form-of-the-question which-were-not-made-at-the-time-the-former-testimony-was-given, and-objections-based-on-competency-or-privilege-which-did-not exist-at-that-time,-the~~ (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time.

**Comment.** Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arises involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. Since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine the declarant.

Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence—lack of opportunity to cross-examine the declarant—is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar interest and motive to cross-examine the declarant. The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action—at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that these matters are to be determined as of the time the former testimony is offered in evidence. 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 581-585 (1964).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered phrased the question himself; and where the former testimony is admitted under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the party is not permitted to raise this technical objection when the former testimony is offered against him.

Section 1292

We recommend the following amendment:

§ 1292. Former testimony offered against person not a party to former proceeding

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the prosecution in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

~~(b)--Except-for-objections-based-on-competency-or-privilege which-did-not-exist-at-the-time-the-former-testimony-was-given,~~ the (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

Section 1410

We recommend the following amendment:

1410. ~~A writing is sufficiently authenticated to be received in evidence if there is any evidence sufficient to sustain a finding of the authenticity of the writing; and~~ Nothing in this article shall be construed to limit the means by which ~~the authenticity of~~ a writing may be ~~shown~~ authenticated or proved.

Section 1414

We recommend the following amendment:

1414. A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing ~~is produced from the custody of the party against whom it is offered and~~ has been acted upon by him as authentic.

Section 1415

We recommend the following amendment:

1415. A writing may be authenticated by evidence of the ~~authenticity~~ genuineness of the handwriting of the maker.

Section 1417

We recommend the following amendment:

1417. The ~~authenticity~~ genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted

or treated as ~~authentic~~ genuine by the party against whom the evidence is offered or (b) otherwise proved to be ~~authentic~~ genuine to the satisfaction of the court.

Section 1418

We recommend the following amendment:

1418. The ~~authenticity~~ genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as ~~authentic~~ genuine by the party against whom the evidence is offered or (b) otherwise proved to be ~~authentic~~ genuine to the satisfaction of the court.

Section 1419

We recommend the following amendment:

1419. Where a writing whose genuineness is sought to be ~~introduced in evidence~~ proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be ~~authentic~~ genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is ~~authentic~~ genuine .

Title of Article 3, Chapter 1, Division 11 (commencing with Section 1450

We recommend the following amendment:

Article 3. Presumptions Affecting Acknowledged Writings and Official Writings

Section 1562

We recommend the following amendment:

1562. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible in evidence and the matters stated therein pursuant to Section 1561 are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of ~~proof~~ producing evidence.

Comment. Section 1562 supersedes the provisions of Code of Civil Procedure Section 1998.2. Under Section 1998.2, the presumption provided in this section could be overcome only by a preponderance of the evidence. Section 1562, however, classifies the presumption as affecting the burden of producing evidence only. See EVIDENCE CODE §§ 603 and 604 and the Comments thereto. Section 1562 makes it clear, too, that the presumption relates only to the truthfulness of the matters required to be stated in the affidavit by Section 1561. Other matters that may be stated in the affidavit derive no presumption of truthfulness from the fact that they have been included in it.