#34 2/12/65

Second Supplement to Memorandum 65-4

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

Attached is a portion of a preliminary draft of the report of the State Bar Committee on Evidence to the Board of Governors on the proposed Evidence Code. We had hoped to be able to send you the entire report in time for the February meeting. However, we have not yet (on February 12) received the remainder of the report.

You will find that the report contains an excellent summary of the proposed Evidence Code. I suggested to Mr. Westbrook that he might consider having the report published in the State Bar Journal.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2d Supp Memo 65-4 EXHIBIT I

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OUR FILE NUMBER

921,499-30

TO: STATE BAR COMMITTEE ON EVIDENCE

Gentlemen:

Enclosed please find pages 1-35 of the proposed report to the Board of Governors on the proposed Evidence Code. This portion embraces discussion of historical background, of the Uniform Rules, of the need for an evidence code and of Divisions 1-7, inclusive, of the proposed code. The remainder of the report, relating to the last four divisions of the proposed code and the conclusion, will be transmitted to you early next week.

Please give your immediate attention to the enclosure with a view to giving me any comments or criticisms as early next week as possible. I hope to have the entire report approved by the committee by the end of next week, so that it may be distributed to the Board of Governors well in advance of their February meeting.

It occurs to me that the matters so far covered in the proposed report most likely to occasion comment are those relating to the elimination of the second crack doctrine with respect to confessions and with respect to dying declarations and spontaneous statements and the elimination of presumptions as evidence. I apologize for the time pressures on this but assure you that they have been occasioned by professional and personal pressure beyond my control.

Sincerely yours,

Philip F. Westbrook, Jr.

PFW:vhr
enclosure
ccs: Messrs. Barnes, Welch,
Hayes, Mathews and
✓De Moully

To: Board of Governors, State Bar of California

From: Committee on Evidence, State Bar of California

Date: _____, 1965

Subject: Proposed California Evidence Code

Among the major proposals before the 1965 Session of the California Legislature is a new Evidence Code, contained in Senate Bill No. 110 and Assembly Bill No. 333 and based upon a Recommendation of the California Law Revision Commission published in its final form under date of January, 1965. If adopted, the Evidence Code will replace the existing provisions of the Code of Civil Procedure insofar as they relate to the law of evidence and codify decisional law on the subject not presently reflected in any statutory provision. In addition, the proposed Evidence Code would clarify existing law and, in a relatively few, but nevertheless important instances, change existing law. It is the purpose of this report to present to the Board the views of the State Bar Committee with respect to this proposal and to recommend the position which the State Bar Committee believes the Board should adopt.

A. HISTORICAL BACKGROUND

Existing statutory provisions relating to the law of evidence are contained primarily in Part IV of the Code of Civil Procedure. These provisions are in essentially

the same form as when that code was adopted in 1872. A revision of Part IV was enacted in 1901 but was declared unconstitutional because the legislation embraced more than one subject and because of deficiencies in the title of the legislation. About 1932, the California Code Commission undertook a thoroughgoing revision of the law of evidence. This work continued until 1939 when the project was abandoned because the American Law Institute undertook the drafting of the Model Code of Evidence and the Commission thought it undesirable to duplicate the Institute's effort.

The American Law Institute effort was responsive to widespread feeling that the law of evidence in most states required revision as well as clarification. Hence, rather than attempting a Restatement of the law of evidence, the American Law Institute departed from its usual practice to prepare the Model Code of Evidence which was promulgated in 1942. The Model Code would have effected rather drastic changes in the law of evidence and the reaction to it was generally adverse. In California, the Model Code was referred to the Committee on the Administration of Justice which recommended that the State Bar oppose its adoption. By 1949, the adoption of the Model Code was a dead issue in California and elsewhere.

Nevertheless, continued need for revision of the law of evidence prompted the National Conference of

Commissioners on Uniform State Laws to undertake the drafting of Uniform Rules of Evidence, which were approved by the Commissioners and the American Bar Association in 1953. The Uniform Rules are simpler than the Model Code and, in addition, eliminate proposals contained in the Model Code which were objectionable. The Uniform Rules have been adopted by statute in Kansas and the Virgin Islands. In New Jersey, a revised form of the privileges article has been adopted by statute and the remainder of the Uniform Rules has been adopted in substantially revised form by court rule.

In 1956, the California Legislature directed the Law Revision Commission to make a study to determine whether the law of evidence in California should be revised to conform to the Uniform Rules. The State Bar Committee to Consider the Uniform Rules of Evidence (now the State Bar Committee on Evidence) was created in October 1957 to work with the Law Revision Commission to the end that any proposed legislation would be the product of thorough study and consideration by representatives of the State Bar as well as the Law Revision Commission. The following organizations (through committees or representatives) have also participated in study, comment and criticism of the Commission's work:

Senate Fact Finding Committee on Judiciary

Assembly Interim Committee on Judiciary-Civil

Assembly Interim Committee on Criminal Procedure
Judicial Council
Conference of California Judges
Municipal Court Judges Association of
Los Angeles County
California Commission on Uniform State Laws
Office of the Attorney General
State Department of Public Works
State Office of Administrative Procedure
District Attorney's Association of California
League of California Cities

The San Francisco Bar Association and other local bar associations have also participated.

As the end result of this effort, the Law Revision Commission has drafted the Evidence Code which is under consideration by the 1965 Session of the California Legislature.

B. THE UNIFORM RULES OF EVIDENCE

The Commission has recommended against adoption of the Uniform Rules of Evidence for the following reasons:

1. The need for uniformity in the law of evidence is not as great as in the case of laws which have substantive rather than procedural significance.

2. Many existing statutory provisions have served well and should be continued. While adjustment of the Uniform Rules would permit such continuance, the effort would be self-defeating because the objective of a clear, logically organized and complete statement of the law of evidence could not be achieved in this manner.

3. The draftsmanship of the Uniform Rules departs substantially from the standards of legislative draftsmanship in California. Some of the rules are cumbersome in organization and structure and frequently different language is used to express the same idea. If adopted by court rule with resulting ease of amendment, these problems might not be acute, but legislative enactment requires greater accuracy and precision.

4. The Uniform Rules would change existing California law in important respects which are considered undesirable. Hence, uniformity could not be achieved in any event.

The State Bar Committee concurs in this recommendation for the reasons stated by the Commission.

Nevertheless, it should be noted that the Uniform Rules have performed a most important and useful function. They have provided a framework for a comprehensive and

critical evaluation of the law of evidence not only as it exists in California but as the proponents of the Uniform Rules believe it should be.

C. NEED FOR AN EVIDENCE CODE

1. Arguments for an Evidence Code

The arguments for an evidence code may be related to three principal concepts: (1) The desirability of codifying existing law, (2) the desirability of clarifying existing laws, and (3) the desirability of revising existing law.

The argument for codification of existing law proceeds upon the unquestioned premise that the existing statutory provisions relating to the law of evidence are fragmentary and sometimes inaccurate. The bulk of the law of evidence has found expression only in court decisions. Despite the existence of commendable treatises on the California law of evidence, there is no single authoritative source to which the bench and bar can turn. An evidence code, together with the Law Revision Commission's comment thereon (which will be published as an integral part of the annotated code), would provide an official handbook of the law of evidence. Such a handbook would be of practical value in an area of the law where the speedy and accurate determination of points at issue can play a significant role in the efficient administration of justice.

Perhaps even more important than the desirability of simple codification of existing law is the desirability of clarifying existing law. In the development of the law of evidence, court decisions leave substantial gaps, obscurities, and even inconsistencies. Necessarily, case law in this field depends upon sporadic presentation of particular questions as they arise. The process of clarification is retarded by the fact that many evidentiary questions are subordinate to questions of substantive law in a particular case and by the desirable and necessary concept that evidentiary rulings are not ground for reversal unless clearly erroneous. An evidence code provides the opportunity to fill in gaps and eliminates inconsistencies without violence to the basic concepts involved.

Revision of anachronistic rules of evidence can be an important objective of an evidence code. It should be emphasized that the proposed code is largely a restatement and clarification of existing law. However, it does embody important changes in the law of evidence. Such changes are difficult of accomplishment on a fragmentary basis as shown by the continuing but ineffectual concern of the State Bar with the repeal or modification of the Dead Man Statute. The changes in the law of evidence which are embodied in the proposed Evidence Code will be evaluated herein on a point by point basis. However, it

should be noted that the desirability of and need for an evidence code does not depend upon the desirability of particular changes in the law of evidence which can be added to or deleted from the proposed code with relative ease.

2. Arguments Against An Evidence Code

The arguments against an evidence code are more diffuse but are nevertheless worthy of serious consideration. They may also be related to three principal concepts: (1) concern that a code will proliferate evidence problems in the courts, (2) concern that a code will create an undesirable rigidity in the law of evidence, and (3) concern that a code will introduce impractical and academic concepts into the law of evidence.

Concern with the proliferation of evidence problems in the courts proceeds on the premise that, on the whole, the California law of evidence has worked effectively. The thought is expressed that such procedural reforms as the Federal Rules of Civil Procedure and the California Discovery Act have consumed an inordinate amount of time and attention in the trial and appellate courts and that it has taken years to produce any substantial degree of certainty as to their construction and application. An evidence code may result in similar

intensification of controversy and uncertainty over a period of time.

Rigidity in the law of evidence is certainly undesirable. Except in those areas where the law of evidence is based primarily on considerations of public policy which are best left to the legislature (e.g., assignment of burden of proof, exceptions to the hearsay rule and creation of privileges), the proposed code reserves to the courts room for the further development and clarification of the law of evidence. Nevertheless, the possibility exists that trial courts in particular will be reluctant to develop new areas if the law of evidence is reduced to comprehensive codified form.

Perhaps no area of the law is more concerned with consideration of practicality than the law of evidence. However desirable innovation in this area of the law may be, it should first be tested against the experience and judgment of trial lawyers and judges. Theoretical concepts such as were expressed in the Model Code of Evidence and some writings on the law of evidence may actually produce injustice.

3. Recommendation

On balance, a substantial majority of the Committee favors the enactment of an evidence code. The

codification and clarification of existing law will do much to reduce uncertainty in the law of evidence. Any resulting problems of construction and application will be relatively temporary and will themselves accelerate the development and clarification of the law. The possible reluctance of trial courts to depart from the safe guidelines of a code can be no more frustrating to the ends of justice than the fragmentary development of the law heretofore existing. Finally, such innovations and changes as are included in the proposed Evidence Code can and should be tested on their own merits and can be accepted or rejected independently of the code as a whole.

A subsidiary question exists as to the desirability of a separate evidence code as distinguished from revision of Part IV of the Code of Civil Procedure which now deals with the law of evidence. Three considerations dictate an affirmative answer to this question. First, Part IV of the Code of Civil Procedure contains provisions which do not deal with the law of evidence. While these provisions may require revision, they are beyond the scope of the Law Revision Commission's present study and present authority. Second, the law of evidence is concerned equally with criminal and civil proceedings. Third, the objective of a concise and reasonably comprehensive evidence handbook can best be accomplished through a separate code.

D. THE PROPOSED EVIDENCE CODE

The proposed Evidence Code is divided into eleven divisions which will be discussed seriatim. In each instance, the general format and content of the division and its subdivisions will be presented. Significant clarifications of or changes in existing law will be specifically discussed.

1. Preliminary Provisions (Division 1)

Division 1 contains certain provisions which are usually found at the beginning of modern California codes. They would work no change in the existing law of evidence. The most significant provision specifies a delayed effective date of January 1, 1967, which serves two functions. First, it would permit ample familiarization of the bench and bar with the Code before it becomes effective. Second, it would permit legislative correction of any defects which may be disclosed by further study and comment before the Code becomes effective.

2. Words and Phrases Defined (Division 2)

Division 2 contains definitions which, generally speaking, are used throughout the Code. Definitions which have application only to specific subject matters are contained for the most part in the particular portion of the Code to which they relate. Except in one particular, the

definitions contained in Division 2 would not work any significant change in the existing law except as applied to particular subject matters hereinafter discussed.

The one change of general application contained in Division 2 relates to the definition of "evidence." As presently defined in C.C.P. Section 1823, "judicial evidence" is restricted to that "sanctioned by law." However, it is well established that even otherwise inadmissible "evidence" may be considered in support of a judgment if received without objection. The Code would make it clear that evidence consists of "testimony, writings, material objects, or other things that are offered to prove the existence or nonexistence of a fact." Hence, the definition includes anything offered in evidence whether or not admissible and whether or not received. The Committee concurs in this change.

3. General Provisions (Division 3)

a. Applicability of Code (Chapter 1)

With certain exceptions contained in particular parts of the Code (e.g. Division 8. Privileges), the Code would be applicable only to all proceedings conducted by California courts. Subject to such exceptions, it would not affect administrative or legislative proceedings, unless some other statute so provides (e.g. Government

Code Section 11513 as to hearsay evidence in proceedings under the Administrative Procedure Act) or the agency concerned chooses to apply the provisions of the code. Conversely, it would not affect other statutory provisions relaxing rules of evidence for specified purposes (e.g. C.C.P. Section 117g as to small claims court, C.C.P. Section 1768 as to conciliation proceedings, C.C.P. Section 2016(b) as to discovery proceedings, Pen. C. Section 1203 as to probation reports in criminal proceedings, and Welf. & Inst. C. Section 706 as to probation reports in juvenile court proceedings).

b. Province of Court and Jury (Chapter 2)

Existing law with respect to the province of the court and jury are restated in the Code without significant change. Briefly summarized, all questions of law and all issues of fact preliminary to the admission of evidence would be decided by the court and all other questions of fact would be decided by the jury. Questions of foreign law are specifically declared to be questions of law for determination by the court with provision for the application of the law of California or other appropriate action if the court is unable to determine foreign law.

c. Order of Proof (Chapter 3)

As under existing law, the court's discretion to regulate the order of proof is recognized.

d. Admitting and Excluding Evidence (Chapter 4)

(1) General Provisions (Article 1)

This article restates the familiar rule that only relevant evidence is admissible and the implicit premise of existing law that all relevant evidence is admissible except as otherwise provided by law. It also expresses in much more succinct and cogent form the existing concept that the court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Finally the article restates existing law relating to reversible error in the admission or exclusion of evidence, the requirement that the judge instruct the jury as to limitation of evidence to particular parties or purposes, and the admissibility of the whole subject matter when an adverse party introduces evidence of part of an act, declaration, conversation or writing.

(2) Preliminary Determinations on Admissibility of Evidence (Article 2)

For the most part, this article conforms to existing law relating to the determination of preliminary facts upon which the admissibility of evidence depends. With one exception, as hereinafter noted, it recognizes the existing discretion of the court to hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury.

In conformance with existing law, the code distinguishes between (a) those situations in which the court must be persuaded of the existence of the preliminary fact and the court's determination as to the preliminary fact is final, and (b) those situations in which only prima facie proof of the preliminary fact is necessary to admit the proffered evidence and the court's determination as to the preliminary fact is not final. Under the code, the second or non-final category would include only the following situations: (1) relevance depends upon existence of the preliminary fact (e.g., agency or conspiracy), (2) the preliminary fact is personal knowledge of the witness, (3) the preliminary fact is the authenticity of a writing and (4) the preliminary fact is whether a statement or conduct was by a particular person. In all of the non-final situations except the second, the code would permit

the court (as now) to admit the proffered evidence conditionally subject to evidence of the preliminary fact being supplied later in the course of the trial. In all of the non-final situations, the code would provide (as under existing law) that the court may, and on request shall, instruct the jury to disregard the proffered evidence unless the jury finds that the preliminary fact exists.

This article would work significant change in the law with respect to confessions and admissions of criminal defendants, spontaneous statements and dying declarations as follows:

1. Under existing law, the court has discretion to hear and determine the admissibility of a confession or admission of a criminal defendant in the presence and hearing of the jury. The code would require such hearing to be held out of the presence and hearing of the jury in order to avoid the possibility of the jury hearing otherwise inadmissible evidence of a prejudicial character. However, the defendant may still attack the credibility of the confession or admission before the jury, utilizing some of the matters presented to the court on the hearing as to admissibility.

2. Under existing law, the court has discretion to submit the question of the admissibility

of a confession or admission of a criminal defendant to the jury. The code would require the court to withhold the confession or admission from the jury unless the court is persuaded that it is admissible. The Commission reasons that this will avoid "passing the buck" to the jury in difficult cases and will afford a greater degree of protection to the criminal defendant than under existing law.

3. Under existing law, the court may pass to the jury the final determination as to the admissibility of dying declarations and spontaneous statements. The code would require final determination of this question by the court.

After considerable difference of opinion in previous discussions, the Committee accepts by a substantial majority the views of the Commission as to the first two of the foregoing changes. A majority of the Committee also concurs with the Commission as to the third of these changes but a substantial minority of the Committee believes that the jury should have a "second crack" at the admissibility of spontaneous statements and dying declarations.

e. Weight of Evidence Generally (Chapter 5)

This chapter restates the substance of certain existing statutory provisions as to the weight of evidence.

4. Judicial Notice (Division 4)

In conformance with existing law, the code provides that judicial notice may not be taken of any matter unless authorized or required by statutory or decisional law. Matters subject to judicial notice are classified by the code into (1) those as to which judicial notice is mandatory whether or not requested by a party, and (2) those as to which judicial notice is discretionary unless requested by a party.

For the most part the recognition and classification by the code of matters subject to judicial notice is a restatement of existing law but some clarification and changes are included in the code as follows:

(a) Matters subject to judicial notice under existing law but newly or clearly placed in the category as to which judicial notice is mandatory include the law of sister states, documents published in the Federal Register, the true signification of English words and phrases and legal expressions, and facts and propositions of generalized knowledge so universally known that they cannot reasonably be the subject of dispute. The decisional law of intermediate courts in other states, which is not clearly subject to judicial notice under existing law, is also placed in the mandatory category.

(b) The non-mandatory category of matters subject to judicial notice under the code includes the following which may or may not be subject to judicial notice under existing law: resolutions and private acts of Congress and other states; ordinances of municipalities in this state, other states and territories and possessions of the United States; regulations of other states and territories and possessions of the United States; and rules of any court of record of the United States or of any state and any territory or possession of the United States.

The Committee concurs in these clarifications and changes.

The principal changes in the existing law as to judicial notice provided by the code are procedural. Judicial notice of matters in the non-mandatory category is required to be taken if a party requests it, giving notice to each adverse party and furnishing the court with sufficient information as a basis for the request. As to all matters in the non-mandatory category and as to "universally known" facts and propositions, the court is required to give each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the tenor of the matter to be noticed. Denial of a request for judicial notice is required to be

noted on the record at the earliest practicable time. The Committee believes that these procedural provisions represent desirable additions to the law of evidence by eliminating surprise and affording reasonable opportunity to be heard.

5. Burden Of Proof, Burden Of Producing Evidence and Presumptions (Division 5)

In general, Division 5 restates existing law dealing with the burden of proof and burden of producing evidence.

a. Burden Of Proof (Chapter 1)

Except as otherwise provided by law, a party is stated to have the burden of proof as to each fact, the existence or nonexistence of which is essential to his case. This would eliminate the inaccurate, anachronistic and confusing statutory provision that the burden of proof is upon the party having the "affirmative of the issue," a change with which the Committee concurs.

b. Burden of Producing Evidence (Chapter 2)

The burden of producing evidence on a particular fact is stated to be initially upon the party with the burden of proof and, thereafter, on the party who would suffer a finding against him in the absence of further evidence.

c. Presumptions and Inferences (Chapter 3)

(1) General (Article 1)

In this article, a presumption is defined as an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. Presumptions are classified as conclusive or rebuttable and rebuttable presumptions are further classified as those affecting the burden of proof (those which implement public policy) and those affecting the burden of producing evidence (those which merely facilitate determination of the action). Except as to criminal cases in which a special rule is provided, presumptions affecting the burden of proof are stated to place that burden on the party against whom they are invoked.

This article works a change in existing law by expressly providing (as is implicit in the code's definition of evidence) that a presumption is not evidence. However, the article expressly recognizes inferences as deductions of fact that may logically and reasonably be drawn from another fact or group of facts. Thus, even though presumptions themselves are not evidence under the code, inferences are permissible in most situations where presumptions presently apply. A substantial minority of the Committee opposes this change in existing law, believing that treating presumptions as evidence avoids injustice

in some cases. However, the majority of the Committee concurs in the proposed change, subscribing to the Commission's view that treating presumptions as evidence is illogical and that sufficient protection is afforded to litigants by the rules pertaining to the burden of proof and burden of producing evidence.

(2) Conclusive Presumptions (Article 2)

Conclusive presumptions are more rules of substantive law than evidentiary rules. Hence the code sets forth, without substantive change, the conclusive presumptions presently contained in the Code of Civil Procedure and also recognizes the existence of other conclusive presumptions in decisional and statutory law.

(3) Presumptions Affecting the Burden of Producing Evidence (Article 3)

This article lists a number of existing rebuttable presumptions as being presumptions affecting the burden of producing evidence, not all of which have been clearly classified under existing law. It also recognizes the existence of other such presumptions, some of which will require classification by the courts in accordance with the criteria set out in Article 1. A slight change in existing law is made by restating the recently eroded requirement that the presumed genuiness of ancient

documents depends, in part, upon their being acted upon as genuine and limiting the ancient documents rule to dispositive instruments. The Committee concurs in the clarification of and minor changes in existing law proposed by this article.

(4) Presumptions Affecting Burden Of Proof (Article 4)

This article lists several existing rebuttable presumptions as being presumptions affecting the burden of proof and recognizes the existence of other statutory and common law presumptions which must await classification by the courts. In this category, it is proposed to extend the presumption of lawful exercise of jurisdiction to any court of this state or the United States (as distinguished from courts of general jurisdiction). The restriction to courts of general jurisdiction would still obtain so far as courts of other states are concerned. Again, the Committee concurs in the minor change in existing law proposed by this article.

6. Witnesses (Division 6)

While the bulk of this division is a recodification of existing law, it would work several significant changes in California law on the subject.

a. Competency (Chapter 1)

In conformance with existing law, the code declares that every person is qualified to be a witness and no person is disqualified to testify to any matter except as otherwise provided by statute. The code states a general rule of disqualification as a witness if a person is incapable of expressing himself understandably either directly or through an interpreter or incapable of understanding his duty to tell the truth. Personal knowledge is also stated to be a prerequisite to testimony concerning a particular matter (except in the case of expert witnesses). Specific rules are provided as to judges and jurors as witnesses.

This chapter would produce the following changes or clarifications of existing law.

(1) Existing law requires a prior determination by the court, not only of capacity to communicate and to understand the duty to tell the truth, but also of capacity to perceive and to recollect. While the capacity to perceive and recollect are embraced within the requirement of personal knowledge, the

court may exclude testimony as to a particular matter for lack of personal knowledge only if no jury could reasonably find such knowledge. Hence, the code would relax the requisite findings as to capacity to perceive and to recollect and leave to the trier of the fact the question whether the witness in fact perceived and does recollect.

(2) Existing law declares that children under ten years of age who appear incapable of receiving just impressions of the facts or of relating them truly and persons of unsound mind are disqualified as witnesses. These special provisions do not appear in the code but the omission is not likely to have much practical significance in view of the fact that the existing special provisions have been equated to the general requirements for qualification of witnesses.

(3) Existing law may permit testimony to be admitted conditionally upon showing personal knowledge later. The code would require a prima facie showing of personal knowledge to be made upon objection of a party before the testimony may be admitted.

(4) Under existing law, a judge or juror may be called as a witness in a trial pending before them even over the objection of a party but the judge has

discretion to order the trial to be postponed or suspended or to take place before another judge or jury. The code would require prior disclosure of the information the judge or juror has and would permit testimony by the judge or juror in the absence of objection. However, upon the objection of a party, the court would be required to declare a mistrial and order the action to be assigned for trial before another judge or jury.

(5) Under existing law, parties, assignors of parties, and real parties in interest are disqualified from testifying in an action upon a claim or demand against a decedent's estate as to any matter or fact occurring before the decedent's death. This California version of the "dead man statute" would be omitted from the code but a new, limited hearsay exception would be introduced to aid the decedent's personal representative in defending against the claim or demand. The existing "dead man statute" is shot through with exceptions and restrictions. It is believed that the solution advanced by the Commission is sound and in the interests of justice.

The Committee concurs in all of the foregoing changes and clarifications.

b. Oath and Confrontation (Chapter 2)

This chapter continues existing law requiring testimony to be on oath or affirmation and in the presence of and subject to the examination of all parties to the action.

c. Expert Witnesses (Chapter 3)

The code spells out familiar rules as to expert witnesses in such manner as to clarify and organize the existing law. Experts may be qualified by reason of special knowledge, skill, experience, training or education which, against the objection of a party, must be shown to the satisfaction of the court before a witness may testify as an expert. Cross-examination of experts would be extended (as now) to a much broader basis than ordinary witnesses and includes qualifications, the subject matter of the expert testimony, the matter upon which the expert's opinion is based and the reasons therefore, and publications referred to, considered, relied upon or admitted in evidence. Credibility would be tested by examination into employment (including court appointment) and compensation and expenses. The court (as now) could limit the number of expert witnesses.

Two significant clarifications in existing law would result from the foregoing provisions:

(1) The California law is confused with respect to the extent of cross-examination on

publications in the field of expertise. Some cases suggest a broad range of inquiry into this subject matter but the trend of recent decisions seems to restrict such examination to publications relied upon by the expert. The code would permit cross-examination to any publication referred to, considered or relied upon, thus broadening the scope of cross-examination within reasonable limits. Cross-examination to other publications would be limited to those admitted in evidence.

(2) Under existing law, some doubt exists whether an expert can be asked the amount of his compensation except in condemnation. Such inquiry would be permitted under the code.

The Committee concurs with both clarifications.

This chapter also contains a restatement of existing provisions relating to the appointment of expert witnesses (other than blood test experts) by the court.

d. Interpreters and Translators (Chapter 4)

This chapter codifies and restates existing law with respect to interpreters and translators, clarifying the law only to the extent of recognizing their appointment and compensation as experts.

e. Method and Scope of Examination (Chapter 5)

(1) Definitions (Article 1)

This article carries forward existing definitions of "direct examination," "cross-examination" and "leading question" without substantive change. It adds definitions of "redirect examination" and "recross-examination" which are recognized in existing practice.

(2) Examination of Witnesses (Article 2)

Under this article, the existing power of the court to control the interrogation of a witness so as to make it as rapid, as distinct, and as effective for ascertainment of the truth as possible would be continued. So too would be the power of the court to protect a witness from undue harassment or embarrassment. Existing rules relating to nonresponsive answers and leading questions are also restated in the code as are familiar principles relating to the order and scope of the examination, the calling of witnesses by the court, the examination of adverse parties and their representatives, the exclusion of witnesses and the recalling of witnesses once excused.

This article would make a number of changes in and clarifications of existing law, as follows:

i. Under existing law, prior inconsistent statements of a witness which were written or have

been reduced to writing must be shown to a witness before he is interrogated with respect to them. This requirement, based upon an English common law rule abandoned in England for 100 years, would be eliminated and such statements would be placed on the same footing as oral statements not reduced to writing. The thought underlying the change is that the existing rule limits the effectiveness of cross-examination in this important area.

ii. Under existing law, extrinsic evidence of a witness' inconsistent statement can be introduced only if the witness were given an opportunity to explain or deny it while testifying. Under the code, such evidence could be introduced if the witness were still subject to recall in the action and even this requirement could be waived if the interests of justice require it. This change is based on the premise that, while permitting explanation or denial is desirable, there is no compelling reason to do so before the inconsistent statement is introduced in evidence.

iii. Under existing law (at least in civil cases), a writing used by the witness to refresh his memory need be made available to the adverse party only if so used by testifying. The code adopts the salutary approach of requiring such writing to

be made available if used by the witness prior to testifying.

iv. Existing law may restrict the use of writings to refresh recollection to those prepared by the witness or under his direction when the facts were fresh in his memory; the existing statutory provisions being the same as for the use of a writing as past recollection recorded. Other writings may indeed refresh a witness' memory and the code eliminates any such restriction.

v. In restating the existing statutory provisions relating to the calling and examination of an adverse party or a witness identified with an adverse party, the code clarifies problems relating to cross-examination of such witnesses in multi-party litigation by restricting cross-examination by parties whose interest is not adverse to the party with whom the witness is identified. In addition, the code clearly includes persons whose knowledge was obtained when they were identified with a party as well as those so identified at the time of trial or at the time the cause of action arose.

The Committee concurs with these changes and clarifications.

f. Credibility of Witnesses (Chapter 6)

The code catalogues recognized considerations going to the credibility and restates a number of existing restrictions and limitations on evidence going to credibility. However, it would work the following significant changes in existing law.

(1) Under existing law, impeaching evidence on collateral matters is required to be excluded. Under the code, there would be no inflexible rule of exclusion but the use of such impeaching evidence would be left within the court's discretion.

(2) Under existing law, the only evidence admissible to prove the character of a witness for honesty and veracity or the lack thereof is evidence of reputation. The code would permit opinion on these traits by persons familiar with the witness on the theory that such evidence is likely to be of more probative value than that of reputation.

(3) Under existing law, the party calling a witness is precluded from attacking his credibility unless surprised and damaged by his testimony. In recognition of the need sometimes to call hostile witnesses and in keeping with the

modern interest in full and free disclosure, the code would permit any party to attack the credibility of any witness.

(4) Any felony conviction may be used to attack credibility under existing law. The code would confine such attacks to felony convictions where an essential element of the crime was dishonesty or false statement. Moreover, contrary to existing law, the code would preclude use of such felony convictions when there is formal evidence of pardon or rehabilitation or where more than ten years has expired since release from confinement or expiration of parole, probation or sentence. It may be noted that these changes are consistent with a committee report approved at the 1964 Conference of State Bar Delegates.

(5) Older California cases restrict evidence of prior consistent statements to support the credibility of a witness to those instances where there is a change of bias, interest, recent fabrication or other improper motive. Consistently with more recent decisions tending

to treat evidence of prior inconsistent statements as impliedly charging recent fabrication, the code would permit evidence of a prior inconsistent statement to be met with evidence of a consistent statement made before the alleged inconsistent statement.

The Committee concurs with these changes.

7. Opinion Testimony and Scientific Evidence (Division 7)

As noted, the subject of expert witnesses is dealt with in the preceding division so far as special rules as to the qualification cross-examination and credibility of expert witnesses is concerned. This division deals with opinion testimony whether by lay witnesses or expert witnesses.

a. Expert and Other Opinion Testimony (Chapter 1)

Under the code, as under existing law, opinion testimony by lay witnesses would be confined (1) to certain well-recognized categories (such as an owner's opinion of the value of his property or an intimate acquaintance's opinion of sanity) and (2) to such opinions

as are rationally based on the perception of the witness and helpful to a clear understanding of his testimony. The code provisions as to expert opinion are also declarative of existing law with only one procedural innovation. Where an expert bases his opinion in whole or in part on the opinion or statement of another person (as sometimes is permissible), the code provides that such other person may be called and examined by any adverse party as if under cross-examination. This change minimizes any unfairness which may result from permitting expert opinion to be based upon the opinion of or statement of others.

b. Blood Tests to Determine Paternity

(Chapter 2)

This chapter carries forward the Uniform Act on Blood Tests to Determine Paternity without significant change.