#34(L) 2/12/65

Fifth Supplement to Memorandum 65-4

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

Attached is an analysis of Section 788 prepared for use in our presentation to the Assembly Judiciary Committee in the hearing to be held on February 15.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Section 788 - Impeachment of a Witness With Evidence of a Conviction

The Law Revision Commission has made several efforts to develop a workable impeachment rule that would correct the anomalies and deficiencies in the existing California law. Each time a solution has been proposed by the Commission, objections have been made to the proposal and the Commission has attempted to meet the objections by modifying its position. Each attempt to meet the objections, however, has proved unsuccessful. The Commission is between the prosecuting agencies who will accept no change in existing law and others, such as a Committee of the Conference of State Bar Delegates, who would permit only perjury convictions to be used for impeachment. In view of the objections that have been made to Section 788 as it appears in the bill, the Commission has decided to reconsider the matter at its meeting on February 18-20, 1965. The matters contained in subdivision (b), however, are not being reconsidered. The Commission is satisfied that subdivision (b) is sound. The following alternative solutions to the problem presented by subdivision (a) might be considered:

1. Permit impeachment with evidence of conviction of any crime involving as an essential element dishonesty or false statement; but prohibit the impeachment of a criminal defendant with evidence of prior convictions unless he introduces evidence of his good character.

This was the original recommendation of the Commission. It was based on the Uniform Rules of Evidence. All crimes, felonies and misdemeanors, are included because the crimes must involve the essential character traits that are in issue on a question of credibility. It eliminates the anomalous existing rule that a conviction resulting in a sentence to one year in jail cannot be used for impeachment (because it is not a felony) while a conviction

resulting in straight probation can be (because it is a felony in the absence of a misdemeanor sentence).

2. Permit impeachment with any crime involving as an essential element either false statement or the intention to deceive or defraud.

This was the position taken by the Commission at the time the Evidence Code was preprinted. The standard for the crimes permitted to be shown was narrowed because of the elimination of the prohibition against impeaching the criminal defendant until he placed his character in issue. The standard was also believed to be more precise and easy to apply. Any crime, felony or misdemeanor, may be used under this standard because the crime must involve the essential qualities relevant to a determination of veracity. The Commission abandoned this position because many crimes involving these essential elements could not be used for impeachment purposes because the record of conviction would not indicate whether they were involved in the particular case. For example, many thefts involve fraud or deceit, but the record of conviction shows merely a theft conviction.

3. Permit impeachment with evidence of conviction of any felony involving as an essential element dishonesty or false statement. This is the position reflected in the present version of the Evidence Code. The "dishonesty or false statement" standard was restored to the section at the recommendation of the State Bar Committee on Evidence; and this version of the section has been approved by that committee and the evidence committees of the Judicial Council and Conference of California Judges. In this version of Section 788, the showable crimes were limited to felonies because of the broadening of the class of crimes permitted to be shown. The "dishonesty" standard has been criticized as too vague. Nevertheless, the standard has been approved by the committees mentioned, by the Commission,

and by the Alameda County District Attorney. The Commission realized that there would be some uncertainty in peripheral areas, but believed that most crimes would be readily subject to classification while the few problem areas would eventually be made certain by the courts. The Commission decided to reconsider the matter, however, in the light of the objections to the vagueness of this standard.

4. Permit impeachment with evidence of conviction of any crime involving false statement or an intention to deceive or defraud and, in addition, certain other specified crimes, including bribery, theft, murder, voluntary manslaughter, arson, kidnapping, extortion, narcotics selling, burglary, assault with a deadly weapon, etc.

This standard would have the virtue of precision. But there is the possibility that some crime that should be included might be omitted. Moreover, the list of crimes that should be included soon begins to look like all of the serious crimes that might be committed; hence, a general reference to all serious crimes (all felonies or all crimes punishable as felonies) would serve as well.

5. Permit impeachment with evidence of conviction of any felony.

This is existing law. The rule has been the subject of substantial criticism and dissatisfaction for several years. The complaint has been that some prosecutors try the defendant for the previous crimes. Representatives of the Commission met with committees of the Judicial Council and Conference of Judges at which the judges indicated that evidence of this sort is "devastating" to a defendant and highly prejudicial. Nevertheless, the standard has virtue from the fact that it is a simple one to apply. Despite its simplicity, however, it is subject to abuse. And even if the abuses could be corrected, there are certain anomalies and absurdities

necessarily contained in it. For example, if two persons were convicted of grand theft and one was sentenced to a year in jail and the other granted straight probation, this standard would permit the person granted probation to be impeached with the prior conviction but would forbid the impeachment of the person who was jailed. Yet, it seems likely that the person jailed was the more serious offender or had the more serious prior record, and by reason thereof received the jail sentence instead of probation.

6. Permit impeachment with evidence of conviction of any crime punishable as a felony; but prohibit the impeachment of a criminal defendant with evidence of prior convictions unless he introduces evidence of his good character.

This standard, too, has the virtue of simplicity; and it eliminates the incongruity of existing law whereby the serious offender may not be impeached while the probationer may be. Moreover, prohibiting the impeachment of the criminal defendant until he makes an issue of his character strikes directly at the abuses to which the present law is subject. As the criminal defendant cannot be tried for being a past offender, it seems likely that the convictions that will actually be used for impeachment purposes will be those that are actually relevant to the issue of credibility; for no advantage is derived from trying witnesses for their past crimes. This standard, however, is subject to criticism in that it permits crimes that do not reflect on credibility to be used. And, too, it can be argued that a defendant who chooses to testify should be in no better position than any other witness. But this position reflects the Commission's original view that the criminal defendant may justifiably be treated differently from other witnesses because he is, in fact, in a different position--he is subject to conviction and they are not.

#34 2/18/65

Memorandum 65-9

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

The following matters were identified at the legislative hearings as matters of controversy in the new Evidence Code:

1. Application of the Code to Criminal Actions

The office of the Attorney General suggested that the Code be made not applicable to criminal actions and that the existing law continue to be applicable to criminal actions. The only possible way we see to accomplish this objective would be to defer the operative date of the new code as applied to criminal actions. The following amendment of Section 12 of the bill would accomplish this objective:

> 12. (a) Except as provided in subdivision (d), this code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and, 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 purposes of this subdivision:
>
> (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) Subject to subdivision (d), the provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.
>
> (d) With respect to criminal actions, this code shall become operative to criminal actions brought on or after December 31, 1970.

Section 788

The staff would, if possible, like to eliminate disagreement with the law enforcement representatives. Accordingly, the staff requests Commission approval (subject to approval of the legislative member) to make the

following amendment of Section 788 of the proposed Evidence Code if an agreement can be reached with law enforcement representatives. At the same time, the staff suggests that the Commission also consider what amendment to Section 788 should be made in the event that such agreement with law enforcement officers can not be reached. Various other memoranda prepared for the meeting discuss this problem.

> 788. (a) Subject to subdivision (b), evidence of a witness' conviction of a felony is admissible for the purpose of attacking his credibility. ~~if the court, in proceedings held out of the presence of the jury, finds that:~~
> ~~(1) An essential element of the crime is dishonesty or false statement; and~~
> ~~(2) The witness has admitted his conviction of the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.~~
> [No change in remainder of section.]

In connection with the revision of Section 788 set out above, it should be noted that Mr. Westbrook stated (off the record) that he feared that he would be instructed by the Board of Governors to oppose the revision set out above. He believed that the sentiment of the board is such that Section 788 as drafted is as far as the board will go in allowing evidence of prior convictions for impeachment. If the revision is made, we hope to persuade the representative of the bar to remain silent and we hope that the Assembly committee can be persuaded to accept the revision.

Section 1230

The representatives of law enforcement object to Section 1230, insofar as it codifies the rule of People v. Spriggs, 60 Cal.2d 868, allowing declarations against penal interest to be received in evidence.

Section 1153

The representatives of law enforcement object to Section 1153, insofar as it codifies the rule of People v. Quinn, 61 A.C. 808, holding that a withdrawn plea of guilty may not be received in evidence.

Section 1017

The representatives of law enforcement object to Section 1017, insofar as it clothes with a privilege statements of an accused to a psychiatrist appointed by the court to advise him how to plead. Also, we fear that the representative of the American Civil Liberties Union will urge that this section does not adequately protect the criminal defendant, in that it provides a narrower privilege for the indigent criminal defendant than is provided for the criminal defendant who consults a private psychiatrist. You will recall that Professor Van Alstyne strongly objected to the section on this ground at the last meeting.

Presumptions

The representatives of law enforcement urge that the conclusive presumption of malice contained in C.C.P. Section 1962(1), and the presumptions of intent contained in C.C.P. Section 1963(2), (3), and "other existing presumptions" be included in the Evidence Code. The text of these provisions is set out in our pamphlet (see amendments and repeals).

Section 665

The representatives of law enforcement object to Section 665 insofar as it lists as a presumption affecting the burden of proof, the presumption of the invalidity of a warrantless arrest.

Section 1042

The representatives of law enforcement are concerned about the comment to this section.

Sections 1250(b) and 1252

The representatives of law enforcement are concerned about the comments to these sections.

Section 120

In order to meet an objection of the Department of Administrative Procedure, we suggest that this section be revised to read:

> 120. "Civil action" includes ~~all actions and proceedings other than a criminal action~~ civil proceedings .

This amendment is consistent with Section 130 and was also suggested by the Committee of the Judicial Council.

Section 405

Mr. Powers indicated concern about using "preliminary fact determinations" instead of "foundational showing" in this section. We would be reluctant to have the legislative committees go into this section because we fear that they will not accept the rule abolishing the second crack doctrine on confessions. Nevertheless, we do not see how we can accept this proposed change. The preliminary fact determinations involved in determining whether to allow or disallow a claim of privilege can hardly be called foundational showings. Moreover, the courts have used the same language we propose in various decisions. See, for example, People v. Graziadio, 231 A.C.A. 581, 588 (1964), where the court said:

> . . . It was proper for the trial judge, outside the presence of the jury, to determine the preliminary questions of fact upon which the admissibility of the evidence depended. [Citations omitted.]
>
> Consequently, the question comes to us, not as a question

> of law, but one of fact, that is, whether the statement of value was just that, an independent statement, or, indeed, a compromise not predicated upon or confined to the market value of the property taken. Since the trial court is no less the arbiter of the credibility of witnesses in a preliminary determination of whether proffered evidence is admissible, than in any other instance of fact determination within its jurisdiction, we are bound by the finding of the trial court.

See also People v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303, 316 (1964):

> . . . the trial court in the instant case, upon defendant's offer to introduce the evidence and plaintiff's objection, heard testimony outside the presence of the jury before ruling on the matter. This was the proper procedure since it was for the trial judge to determine the question of the admissibility of the evidence and any preliminary questions of fact upon which the admissibility of the evidence depended. [Citations omitted.] The determination of any such preliminary questions of fact on conflicting evidence is, like the trial court's determination of any other factual issue, conclusive on appeal.

Accordingly, we urge that no change be made in Section 405. We believe that the risk that the legislative committees will not accept the elimination of the second-crack doctrine on confessions is worth running in order to resist any change in our definitional phrases in Section 405.

Sections 904, 915, 1042, Government Code Section 11513

The Office of Administrative Procedure is concerned about the application of these sections. See Exhibit I (attached).

In light of the objections concerning these sections by the Office of Administrative Procedure, the staff suggests that the following provision be added at the end of subdivision (b) of Section 915:

> For the purposes of this subdivision, a hearing officer of the Division of Administrative Procedure holding a hearing governed by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall be deemed to be a "court" and a "judge."

The reasons that cause us to recommend this change are set out in Exhibit I.

Presumptions

The Office of Administrative Procedure is concerned with the repeal of the rule that a presumption is evidence. See Exhibit I.

The Office of Administrative Procedure suggests that the presumption of identity of person from identity of name be codified in the Evidence Code. See Exhibit I.

We believe that both of these suggestions should be disapproved. They are based on an erroneous analysis of the proposed code.

Sections 1070-1073

The best we can achieve on these sections is to retain them with the deletion of the words "or the disclosure of the source is required in the public interest or otherwise required to prevent injustice". Senator Cobey has suggested that I attempt to persuade the representative of the newsmen to accept this amendment rather than substituting the existing code provision.

Section 1011

There will be a representative of California's certified psychologists present at the meeting to suggest that the definition of "patient" be revised to include someone interviewed for purposes of scientific research. Under existing law, psychologists engaged in research on mental and emotional problems may solicit interviews and obtain information because they can assure the persons interviewed of the confidentiality of the information received. The definition of "patient" would remove this protection. They desire to have the protection restored. The representative will raise some other matters, too, but the above mentioned matter they believe is extremely important.

Section 451

Mr. Elmore of the State Bar suggests the following revision of Section 451, subdivision (c):

> (c) Rules of professional conduct for all members of the bar in this State adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this State adopted by the Judicial Council.

The reason for this amendment is stated in Exhibit II attached.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

STATE OF CALIFORNIA
EDMUND G. BROWN, Governor
DEPARTMENT OF GENERAL SERVICES
OFFICE OF ADMINISTRATIVE PROCEDURE
EIGHTH STREET
SACRAMENTO 95814
455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102
314 WEST FIRST STREET
LOS ANGELES 90012

Sacramento, California
February 16, 1965

To

Re: Proposed Evidence Code
S.B. 110 and A.B. 333

Dear Sir:

This bill purports to revise, consolidate and codify the statutory and case evidence law into a California Evidence Code. It is the product of several years of study by California Law Revision Commission and interested legal minds and organizations. It is appropriate that it is oriented by judicial considerations. However, the proposed Code is expressly made applicable in certain areas to administrative hearings, including license hearings under the Administrative Procedure Act.

Those provisions of this bill which affect and apply to administrative hearings under the Administrative Procedure Act give us considerable concern. The critical analysis of this bill is based upon anticipated difficulty in administration of its provisions, and is not directed toward the advisability of the policy that it reflects.

The following provisions of the bill cause concern:

1. Division 8, Privileges, sections 900 through 1073

2. Section 135 of the bill (Amendment to Government Code section 11513), p. 90

3. Division 5, Chapter 3, Presumptions and Inferences, sections 600 through 667

4. Division 2, Section 120

Comments as to Paragraph 1, Privileges:

Division 8 of the bill codifies, and apparently clarifies through reflection of some case law, the law of privileges. It prescribes in addition to the particular privileges, the procedures to be followed in determining the existence and assertability of claims of privilege.

Existing law prescribes that privileges pertaining in civil actions shall apply in license hearings under the Administrative Procedure Act (Government Code section 11513). This bill proposes a major change in the law. It treats license suspension and revocation proceedings under the Administrative Procedure Act as if they were criminal proceedings, contrary to the repeated holdings of our appellate courts that such proceedings are not criminal in nature. The bill does this by defining "disciplinary proceedings" in section 904 as a suspension or revocation proceeding. The term "disciplinary" in and of itself connotes punishment, and is not appropriate as descriptive of a proceeding designed to determine entitlement or qualification to exercise a license privilege. The bill next, in section 1042, provides that if a claim of "official information" of "identity of informer" privilege is asserted, "by the state or a public entity in this state /and/ is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material." (Underlining for emphasis.) The bill does not distinguish between the licensing agency itself asserting the privilege and a local agency, not within the control of the state licensing agency, asserting the privilege, or as to the results which must follow therefrom. The inclusion of licensing hearings within the rule of the criminal law is a major change in existing law. There are more than 50 licensing agencies administering that number of vocations, professions, and businesses in the State of California. The cases indicate that the State controls these various vocational and professional activities because it is necessary for the protection and welfare of the public. Whatever the reason for applying the criminal rule in administrative adjudication, it might be well to ask if that rule should apply to all licensing proceedings.

If the bill is adopted in its present form, any state agency or governmental entity in the State would continue to have available to it the existing privilege of non-disclosure of information which would be against the public interest to disclose (C.C.P. 1881(5)). In proceedings under the Administrative Procedure Act, presided over by a Hearing Officer having the same qualifications as a Superior Court judge, the claim of privilege of official information (against public interest to disclose) would be disposed of by the Hearing Officer under current law, and he would have the power to require disclosure of information which is necessary to a proper determination of whether or not the privilege exists. Under the bill as proposed, the Hearing Officer is prohibited from requiring disclosure of the information claimed to be privileged, though disclosure is necessary for a proper determination of the existence of the privilege. (See section 915). Under sections 914, 915 of the bill, if a claim of official information privilege is asserted in administrative proceedings, and it is necessary that the information claimed to be privileged be disclosed in order for the proper determination of existence of privilege to be made, the administrative proceedings must cease. Only a Judge of the Superior Court can determine the existence of the privilege in this situation.

The administrative proceedings cease, and through some unprescribed procedure, resort must be had to the court to determine the existence of the privilege. Should the privilege be found to exist, then section 1042 of the bill requires the Hearing Officer to find against the licensing agency "upon any issue in the proceeding to which the privileged information is material". This is an impossibility. The bill prohibits the Hearing Officer from learning the content of the information claimed to be privileged, and yet it requires him to hold against the agency upon any issue to which that privileged information is material.

The relation of section 1042 to "disciplinary proceedings" should be eliminated from the bill. The problems created by the general, over-all, application of forfeiture provisions to all administrative licensing adjudication would not satisfy any demonstrated need. If particular agencies would benefit by such forfeiture provisions, that might best be accomplished by amendment of the particular licensing act or acts. Secondly, existing authority should be continued in the Hearing Officer on the staff of the Office of Administrative Procedure permitting him to require disclosure of information claimed to be privileged where it is necessary to rule on the existence of the privilege. Certainly he is qualified to do so.

Comments as to Paragraph 2, Section 135 of the bill:

Commenting on the amendment to section 11513 of the Government Code, section 135 of the bill, the proposed amendment to section 11513 contained in the bill correlates to sections 904 and 1042 of the bill in applying the criminal rules to administrative proceedings.

Comments as to Paragraph 3, Presumptions and Inferences:

Chapter 3 of Division 5, "Presumptions and Inferences", proposes a major change in existing law. Under existing California law, presumptions are evidence. Section 600 of the bill expressly provides: "A presumption is not evidence." (Underlining for emphasis.)

Section 1963 of the California Code of Civil Procedure contains a list of some 39 rebuttable presumptions that have been for some years treated as evidence in the State of California. The proposed bill recodifies many of the section 1963 presumptions, but does not contain, among others, subsection 1 ("that a person is innocent of crime or wrong") or subsection 25 ("identity of person from identity of name") thereof.

It would appear that the drafters of the proposed Code of Evidence have reason for eliminating the treating of presumptions as evidence. Whatever may be the benefits to be attained by such a change in courts of law, the results of the change will be detrimental in proceedings under the Administrative Procedure Act. The two presumptions mentioned above have been relied upon as evidence in a great number of license hearings. Failure to retain the "identity of name means identity of person" presumption would require proof of identity through involved evidence (e.g., fingerprints, expert testimony, etc.) when a conviction is material. Ordinarily the record of conviction and the presumption suffice to support a finding that the licensee (of same name) was convicted. It would not under this bill even though not denied.

In many Alcoholic Beverage Control Department cases, the question of whether an alcoholic beverage was sold or furnished, in response to an order being placed for an alcoholic beverage, arises. It is a crime to serve a non-alcoholic beverage when an alcoholic beverage is ordered and paid for. The presumption that a person is innocent of crime has been used in administrative proceedings as evidence that the licensee furnished an alcoholic beverage in response to an order therefor. Elimination of this presumption as evidence will create considerable problem in the area of proof of the furnishing of an alcoholic beverage. Unnecessary consumption of time is the vice predicted.

Comments as to Paragraph 4:

Section 120 of the bill defines "civil action" as including "all actions and proceedings other than a criminal action." In view of section 901 of the bill, which defines "proceeding" as including administrative proceedings, there is a possibility that administrative proceedings would be defined as a result of this bill as "civil actions."

We would recommend the amendment of section 120 to add the word "court" as an adjective to "all actions and proceedings."

For the foregoing reasons, we believe that appropriate changes should be made in the Proposed Evidence Code.

Respectfully submitted,

George R. Coan

GEORGE R. COAN
Presiding Officer

GRC:CHB:bh

Exhibit II

Mr. Mack
Rules of professional conduct for
all members of the bar in the
State

THE STATE BAR OF CALIFORNIA

San Francisco

INTER-OFFICE COMMUNICATION

TO: Mr. Barnes, Chairman, Committee Disciplinary Procedures, and Mr. Hayes

Date: January 22, 1965

FROM: Mr. Elmore

SUBJECT: Evidence Code -Judicial Notice - Status of State Bar Rules of Procedure and Rules of Professional Conduct

3 + Pvt 6076

Gentlemen:

The Evidence Code sections on Judicial Notice (S.B. 110, p. 8, Sec. 450-459) raise a question whether Rules of Procedure of the State Bar may be judicially noticed, without request in each instance. See Sec. 452 (b) (c) and Sec. 453.

On the other hand, no request is needed for judicial notice of state agency regulations published in the Cal. Adm. Code or of state civil service regulations. This results from reference to Gov't. C. 11383, 11384 and 18576, in Sec. 451 of the proposed code.

It would appear the same question exists as to Rules of Professional Conduct of the State Bar.

These matters are sui generis and seemingly have not been specifically considered.

It is suggested this subject be promptly explored with a view to offering amendments before the Evidence Code is too far along.

Yours very truly,

Garrett H. Elmore
Special Counsel

GHE:ew
cc: Messrs. Mack, Matthews, Forshee