

Meeting

Place of Meeting

State Bar Building
1230 W. Third St.
Los Angeles

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

Thursday, Friday and Saturday
May 18-20, 1961

(Meeting will start at 9:30 a.m. on May 18 and at 9:00 a.m. on
May 19 and 20)

1. Minutes of March 1961 meeting (sent 3/28/61)
2. Administrative matters
 - Memorandum No. 12(1961) (sent 4/11/61)
 - Memorandum No. 13(1961) (sent 4/11/61)
 - Memorandum No. 14(1961) (enclosed)
3. Matters in connection with 1961 legislative program
This material, if any, will be presented at the meeting
4. Study No. 34(L) - Uniform Rules of Evidence
 - See: Memorandum No. 10 (1961) (tentative recommendation on hearsay)
(sent 3/2/61)
 - Supplement to Memorandum No. 7 (1961) (sent 2/2/61)
 - Memorandum No. 11 (1961) (sent 3/14/61)
 - Printed Pamphlet containing Uniform Rules of Evidence
(you have this)
 - Chadborn's studies on hearsay portion of the Uniform Rules
of Evidence (you have these)
 - Memorandum No. 1 (1961) (privilege) (sent 12/30/60)
 - Memorandum No. 2 (1961) (privilege) (sent 12/30/60)
5. Study No. 36(L) - Condemnation
 - See: Memorandum No. 9 (1961) (pretrial conferences and discovery)
(sent 2/1/61)
 - Consultant's Study on Pretrial Conferences and Discovery
(you have this)
 - Memorandum No. 78 (1960) (apportionment of award)
(sent 9/22/60)
 - Revised Supplement to Memorandum No. 78 (1960) (sent 10/13/60)
 - Consultant's Study on Apportionment of Award (you have this)
 - Memorandum No. 101 (1960) (date of valuation) (sent 12/9/60)
 - Consultant's Study on Date of Valuation (you have this)
 - Letter from Department of Public Works regarding date of
valuation problems (sent 3/28/61)

MINUTES OF MEETING

of

May 18, 19 and 20, 1961

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on May 18, 19 and 20, 1961.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Joseph A. Ball (May 18 and 20)
James R. Edwards
Sho Sato

Absent: Honorable Clark L. Bradley
Honorable James A. Cobey
Vaino H. Spencer
Thomas E. Stanton, Jr.
Ralph N. Kleps, ex officio

Messrs. John H. DeMouilly and Joseph B. Harvey and Miss Barbara Cunningham of the Commission's staff were also present. Mr. DeMouilly was not present on May 18, 1961, because he was in Sacramento attending a legislative committee hearing upon the Commission's legislative program.

Professor Arvo Van Alstyne was present for a portion of the meeting on May 19, 1961.

The minutes of the meeting of March 17 and 18, 1961, were corrected as follows:

On Page 17, first line, the words "The first sentence" were corrected to read "The second sentence." On Page 19, the third line of the portion entitled "Page 22," the words "The second sentence of the Comment" were corrected to read

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"The second sentence of the second paragraph."

The minutes were approved as corrected.

I. ADMINISTRATIVE MATTERS

A. Appointment of Replacement for Assistant Counsel: The Commission discussed the procedure for the appointment of a replacement for the Assistant Counsel who recently resigned. The Executive Secretary was directed to appoint to the position the person he believed to be best qualified.

B. Stanford Research Contract: The Commission considered a staff recommendation that the Commission enter into a research contract with Stanford University for the 1961-62 fiscal year in the amount of \$5,000 similar to the research contract which expires on June 30, 1961. It was pointed out that the approved budget of the Commission contains an item of \$7,500 for such a research contract with Stanford University. The staff recommended, however, that the Commission defer encumbering \$2,500 of the \$7,500 available for this contract pending a determination of whether the Commission will be able to find the necessary funds to finance the renegotiation of certain research contracts heretofore made by the Commission (See Memorandum No. 12(1961)). If the necessary funds to finance the renegotiation of such contracts become available, a second research contract with Stanford University for the 1961-62 fiscal year in the amount of \$2,500 can be made.

A motion was made by Mr. Edwards, seconded by Mr. McDonough, and unanimously adopted that the Chairman be authorized to enter into a research contract with Stanford University for the 1961-62 fiscal year in the amount of \$5,000. The terms of the contract are to be similar to the research contract with Stanford University that expires on June 30, 1961.

C. Stanford Lease: The Executive Secretary reported that the Department of Finance will enter into a lease with Stanford University covering the space occupied by the Law Revision Commission in the Stanford Law School. The terms of the lease will be terms that are agreeable to both Stanford and the Department of Finance. The Executive Secretary plans to work out the details of the lease with both parties thereto.

D. Renegotiation of Certain Research Contracts: The Commission considered Memorandum No. 12(1961), relating to the renegotiation of certain research contracts. These contracts were executed some time ago and the authority to pay the research consultant from the money appropriated for their payment has already expired or will expire on June 30 of this year.

The Budget Division suggested that the Commission re-negotiate some or all of these contracts before the end of the current fiscal year in order to fund them out of the Commission's 1960-61 appropriation. This would give the research consultant not more than two more years within which to complete the study.

A motion was made by Mr. Edwards, seconded by Mr. McDonough, and unanimously adopted that the Chairman be authorized to execute the necessary contracts to accomplish the renegotiation of such contracts as he determines should be renegotiated at this time and that any such contract providing for the making of a study should require that the study be submitted within a specific period (such period is to be determined by the Executive Secretary after conferring with the research consultant but the time for completion is not in any case to be later than June 30, 1963).

E. Index for Third Bound Volume of Reports, Recommendations and Studies: The Commission considered Memorandum No. 13(1961), relating to the index for Bound Volume No. 3 of the Commission's Reports, Recommendations and Studies.

A motion was made by Mr. Selvin, seconded by Mr. Edwards, and unanimously adopted that the third bound volume should contain a cumulative index and a cumulative table of Code

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sections affected by Commission's recommendations. It was suggested that the cumulation be continued in subsequent volumes. If the cumulative index and table become too voluminous, the cumulation could be cut off with a particular volume and started again with the next volume.

A motion was made by Mr. Edwards, seconded by Mr. McDonough, and unanimously adopted that the Chairman be authorized to enter into a contract with Professor Marilyn-June Blawie of Alameda State College (who will be assisted by her husband, Professor James L. Blawie of the University of Santa Clara College of Law) in the amount of One Thousand and Fifty Dollars (\$1,050) for the preparation of a cumulative index and related tables covering the first three bound volumes of the Commission's Reports, Recommendations and Studies. This contract is to cover the indexing, preparation of tables, preparation of copy, proofing, etc., and is to require that the indexers deliver copy in a form ready to go to the printer. It was noted that the indexers will be required to index Volume 3 and to revise the index to Volumes 1 and 2 to the extent necessary to prepare a cumulative index covering the first three volumes.

F. Report on Status of 1961 Legislative Program: The staff gave a report on the status of the Commission's 1961 Legislative Program. It appears that the following Commission bills will become law: A.B. 465, 467 and 832; S.B. 202, 204, 205 and 206. The substance of S.B. 219 and 220 has been incorporated into another bill which it appears will become law. The following bills were referred to interim study: A.B. 464 and 466 and S.B. 203. The following bills were tabled in Committee: A.B. 207 and S.C.A. No. 6. S.B. No. 208 was defeated in the Senate.

G. Publication of Studies Without Commission Recommendation: The Commission considered Memorandum No. 14(1961) in which the staff suggested that the Study on Incidental Business Losses in Eminent Domain Proceedings be published without a Commission recommendation. It was pointed out that there appears to be no possibility of securing legislation providing for the payment of incidental business losses in view of the Legislature's refusal to provide any allowance for moving expenses. It was reported that the Commission has encumbered funds in a previous year to print this study but that the authority to print the study from these funds will expire on June 30, 1962.

The staff noted that the New York Law Revision Commission has sometimes published studies without a recommendation. For

example, the following communication of the New York Law Revision Commission transmitted a study upon which the Commission made no recommendation:

COMMUNICATION FROM THE LAW REVISION
COMMISSION TO THE LEGISLATURE

Relating to Limitation of the Duration of Restrictions
Voluntarily Imposed on the Use of Land

The Law Revision Commission has undertaken a study of restrictions voluntarily imposed on the use of land. The study so far made and herewith transmitted, examines the effect of such restrictions on the marketability of land; the tendency of such restrictions to lose their utility with the passage of time; the operation of doctrines developed by the courts of this state for the purpose of freeing land from such restrictions; the feasibility and constitutionality of a method for automatic limitation of the duration of such restrictions, which might apply both to restrictions limited in their creation to a specified period of time and to restrictions not so limited, and which might limit the duration of existing as well as of future restrictions; the applicability of such a method of limitation to various kinds of restrictions and to various kinds of owners of such restrictions; and statutes of other jurisdictions, either proposed or enacted.

As a part of its continuing study, which may lead to a recommendation to the Legislature in 1952, the Commission intends to hold a public hearing in 1951, which all interested persons will be invited to attend.

Dated: February 23, 1951

BY THE LAW REVISION COMMISSION:

John W. MacDonald,
Executive Secretary
and Director of Research

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The Commission decided not to publish the study on incidental business losses at this time. No decision was made on whether the Commission would at a later time publish a study without a Commission recommendation.

H. Future Meetings: The following dates and places were tentatively set for future meetings of the Commission:

- June 16 and 17 (San Francisco)
- July 21 and 22 (Los Angeles)
- August 18 and 19 (San Francisco)
- September 25, 26 and 27 (Monterey - at the time of the Annual Meeting of the State Bar).

II. CURRENT STUDIES

Study No. 29 - Post-Conviction Sanity Hearings: The Commission considered Memorandum No. 14(1961), which indicated that Professor David Louisell has requested authority to publish in a law review the study he prepared for the Commission on the topic of Post-Conviction Sanity Hearings. The Governor has appointed a special commission to study the problem of insanity in criminal cases and it is unlikely that the Law Revision Commission will make a recommendation on this topic to the 1963 Legislature. A motion was made by Mr. Edwards, seconded by Mr. Sato, and unanimously adopted that Professor Louisell be authorized to publish this study in a law review.

Study No. 34(L) - Uniform Rules of Evidence (Hearsay): The Commission considered the portions of Memorandum No. 10(1961) that had not previously been considered, Memorandum No. 11(1961), the Supplement to Memorandum No. 7(1961) and the portion of the tentative recommendation as previously revised and approved [yellow pages covering up to and including Rule 63(12)]. The following actions were taken:

Rule 62(6)(a)

The meaning of the language of Rule 62(6)(a) of the tentative recommendation as previously approved -- page 6 of yellow sheets -- was discussed. Concern was expressed that Rule 62(6)(a) may defeat a privilege otherwise provided by the URE privilege rules. But it was pointed out that the URE hearsay article does not make evidence admissible; it merely provides that certain evidence is not inadmissible because it is hearsay. Thus, Rule 63 may provide that certain evidence is not inadmissible on the grounds that it is hearsay; but this does not mean that such evidence may not be excluded on the ground of privilege. In other words, under the URE whether evidence is to be excluded on the ground of privilege depends on the scope of the privilege -- not on whether the evidence offered is hearsay. The staff was asked to prepare a memorandum indicating how Rule 62(6)(a) will operate in relation to the various privileges.

It was also agreed that Rule 62(6)(a) should be considered at the time the Commission takes up each URE privilege rule.

Rule 63(1)

On page 11 of the tentative recommendation as previously revised and approved (yellow pages), the word "and" was deleted and a comma was inserted in its place in the fourth line from the bottom of the page. In the second line from the bottom, "(iv) is offered" was inserted before the word "after."

Rule 63(3) - Former Trial of Same Action; Testimony at Preliminary Hearing in Same Action

It was noted that the tentative recommendation and revision of Rule 63 does not specifically cover:

- (1) Testimony at a former trial in the same action of proceeding.
- (2) Testimony at the preliminary hearing in the same action.

The question whether "another action or proceeding" as used in Rule 63(3) includes a former trial (or preliminary hearing) of the same action was discussed. Testimony at the preliminary hearing in the same action is now covered by Section 686 of the Penal Code which the staff suggested be revised. The staff was asked to prepare a memorandum concerning the two matters listed above which are not specifically covered by revised Rule 63.

Rule 63(13)

On page 38 of the green pages attached to Memorandum No. 10(1961), in the next to the last line of the rule, the words "governmental activity," were inserted. The staff was directed to add language to the Comment to point out that the additional words refer to any government.

Rule 63(15)

This subdivision was deleted for the reason that the evidence admissible under (15) is also admissible under (13).

Rule 63(16)

The staff was directed to revise the original URE subdivision so that it applies only to birth, marriage and death records. The revised provision will cover this State, other states and foreign countries.

Rule 63(20)

In the third line of the Comment, after the word "would," the words "likely be given undue weight and would therefore be" were substituted for the word "be." In the fourth line of the Comment, a period was inserted after "introduced," and the words "and there" were deleted and the word "There" was inserted. In the fifth line of the Comment the period was changed to a semicolon and the two sentences were combined.

Rule 63(21)

The staff was directed to redraft this subdivision so that it provides that all judgments against indemnitees and warrantees are not inadmissible as hearsay in actions to enforce warranty and indemnity agreements. The subdivision is to contain a provision indicating that the effect to be given the judgment -- whether conclusive against the adverse party or not -- is to be determined by other law.

Rule 63(22)

Beginning with the word "if" in the fourth line of the subdivision, the remainder of the subdivision was deleted and the following words were substituted: "if the judgment was entered in an action or proceeding to which the entity whose interest was determined was a party." The last sentence of the Comment was deleted, and the question whether an explanation of the revision should be included in the Comment was left to the staff's discretion. The deleted material was considered unnecessary because it merely reiterates the general principle that evidence must be material to be admissible.

Rule 63(23)

The last sentence of the Comment -- on page 53 -- was deleted.

Rule 63(24)

In the fourth line of subdivision (b) and in the sixth line of subdivision (b) the word "as" was deleted. In the third line of the second paragraph of the Comment, appearing on page 55, "i.e." was deleted and "e.g." was inserted in its place. The last two lines of the Comment were revised to read "made in such circumstances as to cast doubt upon its trustworthiness."

Rule 63(25)

In the fourth line of the Comment, the word "prior" was substituted for the word "first." In the fifth line of the Comment the word "subsequent" was substituted for the word "second." The staff

was directed to add language to the Comment pointing out that if both statements fall within exceptions to Rule 63 they may be admitted under Rule 66.

Rule 63(26)

In the second line of the subdivision the colon was deleted. In the third line of the subdivision "(a)" was deleted. The word "and" at the end of the fifth line of the subdivision and all of subdivision (b) were deleted. The staff was directed to add a separate subdivision to Rule 63 pertaining to the matters contained in subdivision (b)(11) because such matters are not, strictly speaking, evidence of reputation.

Rule 63(28)

The words at the beginning of the subdivision up to and including "material," were deleted as unnecessary. The staff was directed to make any necessary revision in the remainder of the subdivision and to add language to the Comment explaining that the subdivision merely provides that reputation evidence is not inadmissible because it is hearsay. The subdivision has no effect upon the rules as to when character evidence is admissible.

Rule 63(29)

In the third line of subdivision (b) a period was inserted after the word "matter" and the remainder of the subdivision was deleted. The staff was directed to add language to the Comment indicating that there are some cases in California indicating,

without analysis, that recitals in dispositive instruments may be admissible as an exception to the hearsay rule without regard to the 30-year age limitation. The first paragraph of the Comment at the top of page 62 is to be revised to make clear that the statements admissible under subdivision (b) must be generally acted upon as true for 30 years. This clarification is necessary because some cases have not insisted upon this requirement.

Rule 63(30)

This subdivision was revised to read as follows:

(30) [~~Evidence-of~~] Statements [~~of-matters-of-interest to-persons-engaged-in-an-occupation~~] , other than opinions, contained in a tabulation, list, directory, register, [~~periodical,~~] or other published compilation [~~to-prove-the truth-of-any-relevant-matter-so-stated~~] if the judge finds that the compilation is [~~published-for-use-by-persons-engaged in-that-occupation-and-is~~] generally used and relied upon by [~~them,~~] persons engaged in an occupation for the same purpose or purposes for which the information is offered in evidence.

In the fourth line of the second paragraph of the Comment the words "generally used and relied on" were substituted for "prepared for the use of."

Rule 63(31)

After considerable discussion during which the view was expressed that the treatise problem may be solved by a broader

cross examination rule, consideration of the subdivision was deferred for 30 days.

Rule 63(32)

The subdivision was approved as it appears on page 65 after the words "other than Rule 7" were deleted. In the fourth line of the Comment, after the word "statute" the following words were inserted: "which is not repealed in connection with the enactment of these rules."

Rule 63A

This rule was revised to read: "Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence." This rule will not be made a part of the codified Rules of Evidence but it will be enacted as an uncodified section of the act which codifies the hearsay article of the Uniform Rules of Evidence.

Rule 64

This rule was deleted.

Rule 65

The words "not inadmissible" were substituted for the word "admissible" in the fourth line of the rule. In the fifth line, the words "is given and has" were inserted after the word "he." The staff was directed to revise the Comment to point out that, unlike evidence of inconsistent statements introduced to impeach a witness, inconsistent statements introduced under this rule to impeach a hearsay declarant may not be considered as evidence of the truth of the matters stated.

Rule 66

This rule was revised to read as follows:

A statement within the scope of an exception to Rule 63
[shall] is not [be] inadmissible on the ground that [~~it includes~~
~~a statement made by another declarant and is offered to prove~~
~~the truth of the included statement if such included statement~~
~~itself~~] the evidence of such statement is hearsay evidence if
the evidence of such statement consists of one or more
statements each of which meets the requirements of an exception
to Rule 63.

In the fourth line of the Comment "multiple" was substituted
for "double." In the seventh line of the Comment the word "modest"
was deleted.

Adjustments and Repeals

These were not considered in detail except as noted below.
The staff was asked to include the text of the repealed sections in
the tentative recommendation.

Section 2047 of the Code of Civil Procedure

The staff was directed to revise this section by deleting the
last sentence. The remainder of the section is to be revised to
remove the limitation on what may be used to refresh recollection.
The adverse party is to be given the right to see any writing that
is used to refresh recollection, whether it is used while testifying
or previously.

C.C.P. § 2016; Penal Code §§ 686, 1345 and 1362 (Depositions in
Civil and Criminal Actions)

The staff revision of Code of Civil Procedure Section 2016 -- Supplement to Memorandum No. 7(1961) -- was considered but no action was taken. The staff was requested to prepare a memorandum indicating the manner in which Rule 62(6) and (7) will operate in connection with the proposed changes in Section 2016.

The staff revisions of Penal Code Sections 686, 1345 and 1362 -- Supplement to Memorandum No. 7(1961) -- were considered but no action was taken. The staff was requested to prepare a memorandum indicating the manner in which Rule 62(6) and (7) will operate in connection with the proposed changes to these sections of the Penal Code.

Revision of Tentative Hearsay Recommendation

The staff was directed to make any necessary further revisions of the Comments to explain the actions taken by the Commission.

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Study No. 34(L) - U.R.E. (Privileges Article): The Commission considered Memoranda Nos. 1(1961) and 2(1961). The following actions were taken:

In regard to the rules attached to Memorandum No. 1(1961), which are the rules previously revised and approved by the Commission, the Commission decided to reconsider them on the merits, but if no agreement is reached on alternative language the previously approved language will remain the recommendation of the Commission.

Rule 23

The staff was directed to revise Rule 23 so that "defendant" as used in Rule 23 includes a person accused of crime or who is the subject of an investigation, such as a grand jury investigation.

The staff was also directed to consider whether subdivision (3) of Rule 23 and subdivision (10) of Rule 25, in whatever form these subdivisions may be approved, should be placed in Rule 39.

The staff was directed to revise Rule 23(3) to restrict the provision to evidence produced at the trial.

Rule 24

In the third line the word "disclosed" was deleted. The other matter may not be "disclosed" but may be known to the person who claims the privilege. In the fourth line the words

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"violation of" were deleted and the words "crime or public offense under" were substituted. The words "crime or offense" were substituted for the word "violation" at the end of the rule.

The staff was directed to research the question whether the Fifth Amendment can be invoked in a state court to avoid testifying to facts that might be incriminatory under federal law.

Rule 25

A motion to delete subdivision (1) did not pass.

In the first line of subdivision (2) the words "his body" were inserted after the word "submit".

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Study No. 36(L) - Condemnation (Pretrial Conferences and Discovery): The Commission considered Memorandum No. 9(1961). The following actions were taken:

Section 1246.1

In the fourth line of the section, at the bottom of page 1, the words "and the estate or interest therein" were deleted to avoid the implication that the condemner must separately value divided interests in the same parcel of property. The third line from the top of page 2 was deleted. The staff was directed to add language to subdivision (a) requiring the demand for evaluation evidence to state the actions that must be taken to comply with the demand.

Section 1246.2

Subdivision (a) was deleted. Subdivision (b) was renumbered subdivision (c). Subdivision (c) was renumbered subdivision (a). Subdivision (d) was renumbered subdivision (b). In subdivision (e)(5) on page 3 the words "and circumstances" were added after the word "terms". The staff was instructed to add language to subdivision (e) permitting a party to make the sales contract available for inspection in lieu of declaring the details of the transaction.

Section 1246.3

In the first line on page 4 the words "demand to exchange" were deleted and the words "statement of" were substituted and in the second line after "filed" the words "pursuant to Section 1246.1" were inserted.

In the second line of subdivision (c) the words "any party required to serve and file such a statement" were substituted for "such parties".

Section 1246.5

The staff was directed to revise this section to limit its provisions to the situation where a witness has testified that his opinion is based on the statements of others.

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Study No. 43 - Separate Trial on Issue of Insanity in Criminal

Cases: The Commission considered Memorandum No. 14(1961), which indicated that Professor David Louisell has requested authority to publish in a law review the study he prepared for the Commission on the topic of Separate Trial on the Issue of Insanity in Criminal Cases. The Governor has appointed a special commission to study the problem of insanity in criminal cases and it is unlikely that the Law Revision Commission will make a recommendation on this topic to the 1963 Legislature. A motion was made by Mr. Edwards, seconded by Mr. Sato, and unanimously adopted that Professor Louisell be authorized to publish this study in a law review.

Study No. 52(L) - Tort Liability of Governmental

Entities: Professor Arvo Van Alstyne appeared before the Commission on May 19 and outlined the scope of his study on the doctrine of sovereign immunity. The Commission concluded that the scope of the subject is so great that the Commission will be unable to report in time for the 1962 Session of the Legislature to consider the report. Hopefully, the Commission may be able to report in time for the 1963 Session. The Vice-Chairman was directed to communicate this information to the Governor's Legislative Secretary.

Professor Van Alstyne suggested that he would need information concerning insurance costs and other statistical information concerning the experience of claims and liability under existing California statutes and under the statutes of other states. After a discussion of the matter, the Commission suggested to Professor Van Alstyne that he determine precisely the type of information he needed. He is also to attempt to find a person who could collect this information. The possibility of employing such person as an additional consultant on the study was discussed but action on that matter was deferred pending a report from Professor Van Alstyne.

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Study No. 57(L) - Bail: The Commission considered Memorandum No. 12(1961) in which the staff recommended that Mr. Cohen, our consultant on Study No. 57(L) - Bail, be paid the balance of \$500 due him for this study. A motion was made by Mr. McDonough, seconded by Mr. Sato, and unanimously adopted that Mr. Cohen be paid the \$500 balance now. This payment is made with the understanding that he will do any additional work on the study that the Commission considers necessary.

Respectfully submitted,

John H. DeMouilly
Executive Secretary