

Meeting

Place of Meeting

State Bar Building
1230 W. Third Street
Los Angeles

final

A G E N D A

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

Friday and Saturday
July 21 and 22

Friday, July 21 (Meeting will start at 9:30 a.m.)

1. Minutes of May 1961 meeting (sent May 31, 1961)

2. Administrative matters

Memorandum No. 15(1961) (sent May 31, 1961)

Supplement to Memorandum No. 15(1961) (sent May 31, 1961)

Second Supplement to Memorandum No. 15(1961) (sent July 3, 1961)

Third Supplement to Memorandum No. 15(1961) (sent July 5, 1961)

3. Study No. 36(L) - Condemnation (Pretrial conferences and discovery)

Revised Memorandum No. 16(1961) (sent June 16, 1961)

Consultant's Study on Pretrial Conferences and Discovery (you have this)

4. Study No. 34(L) - Uniform Rules of Evidence

Memorandum No. 19(1961) (Hearsay Evidence) (sent June 13, 1961)

First Supplement to Memorandum No. 19 (1961) (sent June 16, 1961)

Second Supplement to Memorandum No. 19(1961) (sent June 20, 1961)

Third Supplement to Memorandum No. 19(1961) (sent June 20, 1961)

Fourth Supplement to Memorandum No. 19(1961) (sent July 5, 1961)

Fifth Supplement to Memorandum No. 19(1961) (enclosed)

Saturday, July 22 (Meeting will start at 9:00 a.m.)

5. Study No. 34(L) - Uniform Rules of Evidence

Memorandum No. 18(1961) (sent June 7, 1961)

Memorandum No. 20(1961) (sent June 12, 1961)

Memorandum No. 21(1961) (sent June 12, 1961)

6. Study No. 52(L) - Sovereign Immunity (staff recommends that this study
not be considered at July meeting)

Memorandum No. 17(1961) (sent June 12, 1961)

Consultant's Study on Sovereign Immunity (sent May 31, 1961)

MINUTES OF MEETING

of

July 21 and 22, 1961

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on July 21 and 22, 1961.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Joseph A. Ball
Honorable Clark L. Bradley
Honorable James A. Cobey
James R. Edwards
Sho Sato
Vaino H. Spencer
Thomas E. Stanton, Jr.

Absent: Ralph N. Kleps, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Mr. Stanley Tobin was present for a portion of the meeting on July 21, during the discussion of Condemnation (Pretrial Conferences and Discovery).

Professor James A. Chadbourn was present for a portion of the meeting on July 22, during the discussion of the Hearsay Article of the Uniform Rules of Evidence.

The Minutes of the meeting of May 18, 19 and 20, 1961, were corrected as follows:

On page 12, line 10, "the same action of proceeding" was corrected to read: "the same action or proceeding". On page 13, the reason for the deletion of Rule 63(15) was questioned,

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but revision of the reason was deferred until Rule 63(15) in the tentative recommendation on hearsay is considered. (See page 11 of these Minutes.)

The minutes were approved as corrected.

I. ADMINISTRATIVE MATTERS

A. Stanford Lease: The Executive Secretary reported that he had negotiated a five-year lease (beginning July 1, 1961) with Stanford University covering the space in the Law School occupied by the Commission. Both Stanford and the Department of Finance are satisfied with the lease. Upon motion by Senator Cobey, seconded by Mr. McDonough, the Commission unanimously approved the lease and directed the Chairman to approve the lease on behalf of the Commission.

B. Establishment of Priorities for the 1963 Legislative Program: The Commission considered Memorandum No. 15(1961) relating to the priority to be given the various topics on its agenda, and three supplements thereto.

The Commission first determined that no recommendation for legislation will be made to the 1962 budget session.

The Commission then determined that the following topics should be given priority in the order listed below:

(1) Study No. 36(L) - Condemnation (Senate Bill No. 205 - Evidence).

(2) Study No. 52 - (Sovereign Immunity). This study will include the matter of presentation of claims against public officers and employees.

(3) Study No. 36(L) - Condemnation (Pretrial Conferences and Discovery).

(4) Study No. 34(L) - Uniform Rules of Evidence. The following portions of this study are given priority:

- a. Article VIII (Rules 62-66) - Hearsay Evidence.
- b. Article V (Rules 23-40) - Privileges.
- c. Article IX (Rules 67-72) - Authentication and Content of Writings.

(5) Study No. 57(L) - Bail.

(6) Study No. 53(L) - Whether Personal Injury Damages Should Be Separate Property.

(7) Study No. 46 - Arson.

(8) Study No. 12 - Taking Written Instructions to the Jury Room.

The Commission directed the staff to advise the State Bar that the Commission did not plan to consider the study relating to Additur in time for the 1963 Legislative Session.

C. Third Bound Volume: The Commission considered Memorandum No. 22(1961). The Commission decided to include in the Third Bound Volume a Cumulative Table of Sections Enacted, Amended or Repealed Following Study and Recommendation by the Commission. Since uncodified sections and a section of the Constitution will be included in the table, it was agreed to arrange the table to show Codified, Uncodified and Constitution sections separately. The Commission also determined that the Third Bound Volume should include a list of past and present Commission Members with their periods of service.

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The Commission deferred action on whether a Cumulative Table of Cases and a Cumulative Table of Constitutional and Statutory References should be included in the Third Bound Volume pending a staff report of the estimated cost of including such tables in the Third Bound Volume.

The Commission considered the feasibility of wider distribution of its bound volumes because of the apparent increased interest in the Commission's work. The staff was directed to communicate with the State Printer concerning the possible sale by him of the bound volumes. The staff was also directed to consider printing an overrun of the Legislative History, index and tables so that persons who receive copies of individual pamphlets could bind this material with their individual pamphlets.

Attention was directed to the proposed Preface of the Third Bound Volume. The first complete paragraph on page 2 of the Preface was revised to read:

A wealth of information relating to the matters studied by the Commission is contained in the recommendations and research studies published by the Commission. Only the recommendations of the Commission (as distinguished from the research studies) are expressive of Commission intent, but the research studies are valuable as source material on the problems with which they deal.

The Preface is to be further revised to reflect the ultimate decision concerning the Tables to be published as a part of the Third Bound Volume.

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The Commission considered the Legislative History portion of the material to be included in the Third Bound Volume. It was agreed that the policy of the Commission would be to show its reasons for amendments to bills that were enacted or defeated without attempting to give reasons for actions taken by the Legislature and the Governor. The legislative history of a bill is also to be reported. The staff was directed to revise the Legislative History to reflect the Commission's policy in this regard.

A number of suggestions for revision of the Legislative History were considered. It was agreed that the first sentence of the discussion of each bill should indicate whether the bill was enacted or defeated. After discussion of these suggestions, the Chairman appointed a subcommittee consisting of Commissioners Stanton and McDonough to review, revise and approve the Legislative History to be included in the Third Bound Volume. The draft approved by the Subcommittee is to be submitted to the Chairman for his approval prior to printing.

II. CURRENT STUDIES

Study No. 34(L) - Uniform Rules of Evidence:

Continuation of Study of URE

The Commission considered the Second Supplement to Memorandum No. 15 (1961) which included a letter from Mr. Lawrence C. Baker regarding comments by the Northern Section of the State Bar relating to the Commission's study of the Uniform Rules of Evidence. The Northern Section has expressed concern about the Commission's scope of revision of the Uniform Rules of Evidence. The Commission reaffirmed the desirability of revising the Uniform Rules to make necessary changes in form and substance. The Commission recognized (1) that the URE cannot be adopted in the form proposed and (2) that the Commission is undertaking to draft a California code of evidence using the URE as the springboard. Upon motion of Mr. Stanton, seconded by Mrs. Spencer, the Commission requested its Chairman to make an appearance before the Board of Governors of the State Bar to present the Commission's view when the Board of Governors considers the Uniform Rules of Evidence on its agenda. The Chairman was also requested to advise Mr. Baker of the Commission's views on this matter.

Tentative Hearsay Recommendation

The Commission considered Memorandum No. 19(1961) and the five supplements relating thereto.

Introductory Comments of Tentative Recommendation

The Commission revised the first sentence of the first full paragraph on page 3 of the tentative recommendation (blue pages) to read: "The Law Revision Commission tentatively recommends that URE Rules 62-66, revised as hereinafter indicated, be enacted as the law in California."

It was agreed to delete "considerably" in the last sentence of the first full paragraph on page 3 of the tentative recommendation.

Rule 62(6)(a)

The Commission considered the First Supplement to Memorandum No. 19 (1961). The Commission reaffirmed its decision to approve Rule 62(6)(a) as set out in the tentative recommendation.

In the comment to Rule 62, the word "authorized" was inserted for "compelled" in line 20 on page 8.

Rule 62(8) and (9)

The Commission considered the Fourth Supplement to Memorandum No. 19 (1961). Two new subdivisions -- subdivisions (8) and (9) -- were added to Rule 62 to read in substance as follows:

(8) "Former testimony" means testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

(9) "Another action or proceeding" includes a former hearing or trial of the same action or proceeding.

Rule 63(1)

It was agreed that the text of Rule 22 -- referred to in Rule 63(1) -- should be set out in a footnote in the tentative recommendation.

Rule 63(3)

The Commission considered the Fourth Supplement to Memorandum No. 19 (1961).

The Commission adopted three subdivisions in place of subdivision (3). These subdivisions read in substance as follows:

(3) Subject to the same limitations and objections as though the declarant were testifying in person other than objections to the form of the question which were not made at the time the former testimony was given or objections based on competency or privilege which did not exist at such time, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the former testimony is offered against a party who offered it in evidence on his own behalf in another action or proceeding or against the successor in interest of such party.

(3a) Subject to the same limitations and objections as though the declarant were testifying in person other than objections to the form of the question which were not made at the time the former testimony was given or objections based on competency and privilege which did not exist at such time, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that the party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing except that in a criminal action or proceeding testimony given at a preliminary examination in a criminal action or proceeding other than the action or proceeding in which the testimony is offered and testimony in a deposition taken in another action or proceeding is not admissible under this subdivision unless it was received in evidence at the trial in such other action or proceeding.

(3b) Subject to any objection that could have been taken at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the

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hearing, that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that a party to the action or proceeding in which the former testimony was given had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

The introductory clause of the subdivision as proposed by the National Commissioners was revised so that certain objections to former testimony based on the form of the question or on the competency of the witness or privilege cannot be taken when the former testimony is offered. This revision was made so that otherwise reliable and trustworthy testimony would not be excluded on the technical ground of the form of the question and so that the declarant's competency and the applicability of privilege are determined as of the time the former testimony was given.

Following a discussion of the "similar interest and motive" provision, the staff was directed to revise the comment to these subdivisions to indicate that the judge, in determining whether former testimony is admissible, should consider that a party might decide not to cross-examine when a deposition is being taken for discovery purposes because he would not want to reveal prematurely the weaknesses in the witness' testimony and because he would expect to cross-examine the witness fully at the trial.

Rule 63(10)

The Commission considered the Third Supplement to Memorandum No. 19(1961).

The words "Except as against the defendant in a criminal action or proceeding," were inserted at the beginning of subdivision (10); but a subsequent action limited the application of this limitation to statements

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made while the declarant was in custody. This change was made so that a confession obtained from a person jointly engaged in crime would not be admissible under subdivision (10) against the defendant in a criminal case.

Rule 63(12)

Paragraph (d) of subdivision (12) was revised to read:

(d) The declarant's intent, plan, motive or design at a time prior to the statement to prove such prior intent, plan, motive or design when it is itself an issue in the action or proceeding and the declarant is unavailable as a witness but not to prove any other fact.

The comment to subdivision (12) is to be revised to indicate that paragraph (d) will change the existing California law which apparently permits the statement of the victim in a murder case concerning threats by the defendant to prove the identity of the person who killed the victim.

Rule 63(13)

The words "existing California law" were substituted for "the existing law" in the last sentence of the comment. As so revised, the comment was approved.

Rule 63(15)

The staff was directed to redraft the comment to this subdivision. The proposed comment did not accurately express the reason the Commission deleted the URE subdivision. The comment should indicate that insofar as subdivision (15) permits evidence to come in that is not admissible under subdivision (13), subdivision (15) permits untrustworthy evidence to come in.

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Rule 63(16)

This subdivision was revised to eliminate the tabulated paragraphs. The second paragraph of the subdivision was revised to read: "The Commission believes that the URE subdivision states too broad an exception to the hearsay rule in view of the great number and variety of reports that must be filed with various administrative agencies."

The subdivision and the comment as so revised were approved.

Rule 63(17)

The addition of the footnotes to this rule was approved. The words "highly likely to be" were deleted in the third paragraph as unnecessary.

The staff was directed to phrase the language in the various comments relating to the deletion of cross-references to Rule 64 so that it is uniform.

Rule 63(18), (19) and (20)

The comments to these subdivisions were approved.

Rule 63(21)

Paragraph (c) was revised to read:

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

The last sentence of the revised subdivision was deleted. The subdivision is intended to declare a rule of admissibility rather than to determine the effect to be given to admissible evidence.

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The last word, "For," at the bottom of page 50 and all of page 51 were deleted from the comment. "See for example Civil Code Section 2778(5) and (6) and Code of Civil Procedure Sections 1908 and 1963(17)." was added to the end of the comment.

As so revised, the subdivision and comment were approved.

Rule 63(22)

This subdivision was revised to insert "United States or a state or territory of the United States or any" in place of "public or of a state or nation or".

The fourth sentence of the comment was deleted.

As so revised, the subdivision and comment were approved.

Rule 63(25)

The comment to this subdivision was approved.

Rule 63(26a)

The words ", and the like" were added at the end of the subdivision. The subdivision as revised and the comment thereto were approved.

Rule 63(28)

The comment was revised to add, following the word "unnecessary" in the third line of the comment, the following: ", for it merely reiterates the general principle that evidence must be material to be admissible." The words "character or" were inserted between "a" and "trait" in the last sentence of the comment.

The subdivision and the comment as so revised were approved.

Rule 63(29)

In the third sentence of the last paragraph of the comment, the words "as true." were deleted and the following inserted "as if it were true for at least a generation." The next sentence was deleted.

The staff was directed to revise the last paragraph of the comment to indicate that the subdivision may go beyond California law, for the Supreme Court has stated that C.C.P. § 1963 (34) states a rule of authentication only whereas certain D.C.A. cases have held that it states an exception to the hearsay rule.

As so revised, the comment was approved.

Rule 63(30)

After the word "occupation" the words "as accurate" were added and the remainder of the subdivision was deleted.

The word "great" was deleted in the second sentence of the second paragraph of the comment.

As so revised, the subdivision and comment were approved.

Rule 63(31)

The second sentence of the second paragraph of the comment was deleted. In the second sentence from the end of the comment, the word "rule" was deleted and "California statute" was substituted.

As so revised, the comment was approved.

Rule 64

The comment to this rule was revised to read:

The Commission does not recommend the adoption of Rule 64. No such requirement of pretrial disclosure now exists as to this kind of evidence or, for that matter, to other documentary evidence. The Commission believes that modern discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise.

As so revised, the comment was approved.

Rule 65

The second sentence of the comment was revised to read: "It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that [no change in remainder of sentence]."

As so revised, the comment was approved.

Rule 66

The last sentence was revised to insert "each of them" in place of "each statement."

As so revised, the comment was approved.

Rule 66A

The renumbering of Rule 66A was approved. The comment to Rule 66A was also approved.

C.C.P. Section 1849

The Commission considered the comments and suggestions by the Northern and Southern Sections of the State Bar to retain Code of Civil Procedure

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Section 1849. Evidence may be admissible in some circumstances under Section 1849 which would not be admissible under the proposed Revised Rules. Although favoring repeal of this section, the Commission favors retaining its principle. It was suggested that this might be accomplished by amending the exception regarding admissions so as to include declarations of predecessors in interest. The reason for retaining the substance of Section 1849 is that this is the present California law. The staff was directed to draft appropriate language to accomplish this purpose.

Study No. 36(L) - Condemnation (Pretrial Conferences and Discovery): The Commission considered Revised Memorandum No. 16(1961). The following actions were taken:

Section 1 (Section 1246.8)

The Commission approved this section as drafted.

Section 2 (Section 1246.1)

The Commission considered revising this section to read: 20 and 10 days before pretrial rather than 40 and 20 days before trial in light of the current practice in some counties to set the trial date at the time of the pretrial conference. After considerable discussion, the Commission reaffirmed its previous decision to fix the dates at specified times prior to trial. This will permit the Judicial Council to establish rules setting the time for the pretrial conference at a time after the exchange has taken place. But even if the Judicial Council does not establish such rules, the statute will still serve a very useful purpose -- it will permit a pretrial investigation of the other party's valuation data and may encourage settlement.

The section was approved as drafted.

Section 3 (Section 1246.2)

Subdivision (a) was revised as follows:

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(1) The words "person intended to be called as a witness" were substituted for "witness who will be called." This change was made to avoid the implication that listed persons are required to be called as witnesses.

(2) The words "as to the amount" were inserted between the words "or" and "of" for clarification. The staff was directed to insert similar language, i.e., "as to the amount of" in such other places in the statute as is necessary to carry out the intent of the Commission in this regard.

In the introductory clause of subdivision (b), the words "the following data to the extent that the opinion is based thereon" were substituted for the words "data upon which the opinion is based which may include but is not limited to." This change was intended to make the list an exclusive enumeration.

In subdivision (b)(3) ", transactions" was deleted and "transactions" was substituted for "facts and data."

Subdivision (b)(6) was revised by the addition of the words "and will be made" between the words "is" and "available" to require that the demanding party make evidence available for inspection in addition to merely giving its location. A similar change was made for the same reason in subdivision (d)(5) between the words "is" and "available".

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Subdivision (c) was deleted and corresponding adjustments in other parts of the bill are to be made to conform the bill to this deletion.

The section was approved as revised.

Section 4 (Section 1246.3)

Subdivision (a) was amended to insert "as to the amount" before "of the damage or benefit" for clarification.

Subdivision (b) is to be limited to direct examination and the other provisions of the bill are to be adjusted to conform to this change. It was also agreed that subdivision (b) should have a provision to permit testimony that is merely an explanation or elaboration of the evidence listed.

Subdivision (c) was deleted.

Section 5 (Section 1246.4)

The following revisions were made in this section:

(1) The word "or" was inserted in place of "and" in both the third and fourth lines for the purpose of clarification.

(2) The phrase "or permit a witness to testify to data supporting his opinion" was inserted between the words "file" and "if" in the sixth line of the proposed section.

(3) The word "by" was substituted for "prior to" in the sixth line of the proposed section for the purpose of clarification.

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(4) The words "or listed" were inserted after the word "discovered" in subdivision (a) and the words "or list" were inserted after the word "discover" in subdivision (b) to provide for the case where evidence may have been discovered but not listed through inadvertence, mistake, etc.

As so revised, the section was approved.

Section 6 (Section 1247b)

In this section "60" was inserted in place of "40" and "50" was inserted for "20" so that the map would be provided prior to the time the appraisers prepare their appraisal reports.

As so revised, the section was approved.

Section 7 (Section 1248.5)

This section was deleted from the bill. The section is to be added to Senate Bill No. 205.

Contacting the Judicial Council

The Commission decided that the tentative recommendation should not be distributed to persons on our list of persons interested in the eminent domain study until after the Chief Justice has been contacted. The Chairman was instructed to contact the Chief Justice during the month of August to discuss this recommendation. After the meeting with the Chief Justice and after the August meeting of the Commission, the Commission

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will consider whether the tentative recommendation should be distributed to the State Bar Committee and other interested persons. The staff was directed to revise the tentative recommendation in accordance with the decisions made by the Commission so that it will be available when the Chairman discusses this matter with the Chief Justice.