

Place of Meeting

State Bar Building
1230 West Third Street
Los Angeles

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

August 22, 23 and 24, 1963

August 22 (meeting starts at 7:00 p.m. and continues to 10:00 p.m.)

1. Minutes of July meeting (enclosed)
2. Administrative matters

Memorandum No. 63-38 (1964 Annual Report) (enclosed)

Memorandum No. 63-39 (Budget for 1964-65 Fiscal Year) (enclosed)

Report on 1963 legislative program (oral)

Report on response to letters requesting comments on tentative recommendations (oral)

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

Bring to meeting: Report of the New Jersey Supreme Court Committee on Evidence (this has a blue cover--you have already received a copy)

Authentication and Content of Writings--Rules 67-72

Materials in loose-leaf binder

Research study (you have this)

Draft of Tentative Recommendation (enclosed)

Memorandum No. 63-40 (enclosed)

August 23 and 24 (meeting starts at 9:00 a.m. each day. Meeting will end at 5:30 p.m. on August 23 and at 5:00 p.m. on August 24)

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

Continuation of consideration of Authentication and Content of Writings
(see item 3 above)

General Provisions (Article 1--Rules 1-8)

Materials in loose-leaf binder (to be sent)

Research study (to be sent)

Memorandum No. 63-41 (to be sent)

Extrinsic Policies Affecting Admissibility (Article VI--Rules 41-55)

Materials in loose-leaf binder (enclosed)

Research study (enclosed)

Memorandum No. 63-42 (enclosed)

Witnesses (Article IV--Rules 17-22)

Materials in loose-leaf binder (to be sent)

Research study (to be sent)

Memorandum No. 63-43 (to be sent)

file

MINUTES OF MEETING

OF

AUGUST 22, 23 and 24, 1963

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on August 22, 23 and 24, 1963.

Present: Herman F. Selvin, Chairman (August 24)
John R. McDonough, Jr., Vice Chairman
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, ex officio

Absent: Joseph A. Ball
Hon. James A. Cobey
Hon. Pearce Young

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

Minutes of July Meeting.

The minutes of the July meeting were revised as follows:

On page 5, in the second item in the schedule, "January 1964" was substituted for "September 1964"; "April 1, 1964" was substituted for "January 1, 1964" and "July 1964" was substituted for "April 1964."

On page 6, in the first item, "July 1, 1964" was substituted for "March 1964."

The minutes of the July meeting were approved as revised.

Future meetings of the Commission.

Future meetings of the Commission have been scheduled as follows:

September 22 (evening), 23 and 24	San Francisco
October 17 (evening), 18 and 19	Los Angeles

ADMINISTRATIVE MATTERS

1964 Annual Report.

It was suggested that "Associate Counsel" be inserted under the name of Mr. Smock on page 2.

On page 4, the first insertion was deleted. (This insertion related to the printing of tentative recommendations.)

On page 5, the word "printed" was deleted from the first line of the insert at the top of the page.

On page 6, a paragraph should be added relating to Senator Bradley becoming a member of the Senate. In addition, the change in dates for expiration of terms was disapproved.

On page 7, the phrase "Although the Commission considered several other topics on its current agenda of studies, the" was deleted and the word "The" was inserted.

On page 8, the introductory paragraph was replaced by the following:

During the year covered by this report, the Commission had on its agenda the topics listed below, each of which it had been authorized and directed by the Legislature to study. The Commission proposes to continue its study of these topics.

On page 11, footnote 2 was deleted.

The detailed statements of the amendments made to the various bills are to be put in an appendix to the report. Reference to the House in which an amendment was made is to be deleted.

The second paragraph of comment (1) on Section 810.2 on page 13 was deleted.

The last sentence of comment (6) on page 14 was deleted.

A sentence is to be added to comment (8) on page 14 to indicate that the amendment did not affect contract liability. (See Section 814.)

The first sentence of comment (25) on page 17 was deleted and the following was inserted in its place: "Section 844.6 was added to the bill." and the first sentence of comment (33) on page 18 was revised to make a similar change.

The first full paragraph on page 22 was deleted.

Comment (8) on page 23 was deleted.

In comment (11) on page 23, after "report" in the fourth line from the bottom of the text, the words "relating to Section 152" were inserted. After the word "infra" in the second to the last line from the bottom, the remainder of the comment was deleted.

On page 25, the last sentence of comment (1) was deleted.

In the comment on Senate Bill No. 46 (page 25), the third sentence was deleted and the following inserted: "It passed the Senate in amended form and was further amended and passed by the Assembly, but was not re-passed by the Senate." The comment is to be further revised to indicate that the Commission withdrew its recommendation that the bill be enacted.

On the last page, the respectfully submitted clause, including the names of the Commissioners, was deleted.

Budget for 1963-64 Fiscal Year.

The Commission considered Memorandum No. 63-39, relating to the budget for the 1964-65 fiscal year.

The Executive Secretary pointed out that the revised budget for 1963-64 and the proposed budget for 1964-65 presented two policy questions:

(1) The revised and proposed budgets provide additional funds to finance an increase in rent, and

(2) The revised budget and proposed budget reflect a change in use of funds from research to printing. We are increasing the funds available for printing and decreasing the funds available for research. This change is necessary to finance printing on the URE during the next two years.

The revised budget for 1963-64 and the proposed budget for 1964-65 were approved as submitted.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE
(Article I-General Provisions)

The Commission considered Memorandum No. 63-41. The following actions were taken:

Rule 1.

Subdivision (1) was disapproved and the definition of "judicial evidence" in the Code of Civil Procedure, Section 1823, is to be repealed.

Subdivision (2) was not approved.

The Commission then deferred further consideration of the definitions in Rule 1 until presumptions are considered.

Rule 2.

The "except" clause at the beginning of the rule was modified to read: "Except as otherwise provided by statute"

The staff was directed to revise the words "conducted by or under the supervision of a court" to make clear that the rules apply in the Supreme Court, the District Courts of Appeal, the Superior Courts, Municipal Courts and Justice Courts and in proceedings in those courts conducted by a judge, master, referee or similar officer to whom the court has delegated the duty of hearing evidence.

Rule 2 was then approved.

Rule 3.

A motion to disapprove Rule 3 failed. The opponents of the rule argued that the problem Rule 3 was designed to solve is better solved by other means such as a request for admissions, and that Rule 3 is too susceptible to abuse.

A motion was then approved to refer the matter back to the staff to reconsider in the light of the request for admissions provisions in the discovery statutes. The staff is to consider whether Rule 3 can be framed as an additional remedy in a case where there has been a demand for admissions and an equivocal response.

Rules 4 and 5.

The words "or a motion to strike" were inserted in Rule 4 immediately after the words "objection to" in the third line.

Rules 4 and 5 were then referred to the staff for consideration whether they fully express existing California law concerning when an objection or offer of proof is unnecessary.

Rule 6.

The word "relevant" was deleted from the first line.

The rule was then approved.

Rule 7.

The preliminary clause was modified to read: "Except as otherwise provided by statute"

Subdivision (f) was revised to read: "(f) all evidence having a tendency in reason to prove a fact material to the proceeding is admissible." The revised subdivision substitutes the URE definition of "relevant evidence" for the term "relevant evidence" in the only place in the URE where the defined term is important.

Rule 7 was then approved as modified.

In light of the approval of Rule 7, the Commission approved the repeal of Section 1879 of the Code of Civil Procedure. In addition,

the first clause of Section 2065 of the Code of Civil Procedure is to be deleted.

Rule 8.

The staff was asked to submit a redraft of Rule 8 that makes clear that the judge's function is different when he is ruling on questions of competency and when he is ruling on questions of relevancy. In regard to the competency rulings--hearsay, privilege, competency of witnesses, etc.--the judge's determination is based on evidence pro and con and is final. In regard to relevancy rulings--authentication, personal knowledge of witnesses, etc.--the judge's determination is based on the proponent's evidence only and is not final; the trier of fact ultimately decides whether the document is authentic or the witness actually perceived the event; the judge determines only that there is sufficient evidence to warrant a finding.

Rule 8 and its relation to the Privileges Article.

The Commission considered Exhibits I, II and III to Memorandum No. 63-41.

The clause relating to "evidence apart from the communication itself" was deleted from Rule 26(4)(a), Rule 27 (4)(a), Rule 27.5 (4)(a), and Rule 28 (2)(a).

The proposed sentence set out in Exhibit I was approved after it was limited to Rules 24 to 31, inclusive.

Rule 37.5 as set out in Exhibit II was approved after it was limited to privileges claimed under Rules 32, 34 and 36 and is to be revised in view of this limitation.

Minutes - regular meeting
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Rule 37.7 as set out in Exhibit III was approved but "Rule 8 and, if applicable, Rule 37.5" is to be substituted for "Rule 37.5" in the last line of the proposed rule. This rule is also to be revised in light of the action taken on Rules 8 and 37.5.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE
(Article IV. Witnesses)

The Commission considered Memorandum No. 63-43, relating to witnesses.

The following actions were taken:

Rule 17

This rule was approved. It was suggested that subdivision (b) might be redrafted to state more clearly that it pertains to an understanding of the nature and obligation of a witness' oath or affirmation. As presently drafted, there is considerable confusion as to whether this subdivision deals with competency or credibility or both. To more clearly state that Rule 17 is a rule of competency, thereby preserving the scheme of the URE in permitting the trier of fact to determine matters of credibility, it was suggested that this subdivision be revised.

Rule 18

The Commission approved Rule 18 in an amended form to provide either the substance of the oath or affirmation required by law or a specific cross-reference to another section that sets out the required oath or affirmation. In approving this rule as a substitute for present Code of Civil Procedure Section 1846, the Commission agreed to preserve the rule of confrontation also provided in Section 1846 in a provision to be included in the revised evidence code.

Rule 19

The Commission agreed to delete the third sentence in Rule 19 and to restate the substance of the sentence as a separate rule. This change was made because the present law treats the striking of incredible testimony as

a substantive rule of law rather than solely a foundational prerequisite for giving testimony. Though the rule presently is applied only at the appellate level, the Commission approved making the rule applicable as well in trial courts.

A motion to disapprove the last sentence in this rule as being ambiguous and undesirable was defeated. Discussion relating to this and the first sentence highlighted the apparent difference in standards of competency that apply to lay and expert witnesses. On the one hand, except in cases of incredibility as a matter of law, the judge cannot exclude the testimony of a lay witness where the evidence presented by way of foundation is sufficient to sustain a finding of personal knowledge. In this case, the trier of fact is free to believe or disbelieve the fact of such personal knowledge. On the other hand, in the case of an expert witness, the judge must be satisfied as to the witness' qualifications in order to determine that the witness is an expert. Here, the judge's finding as to the qualifications of an expert witness is not reviewable by the trier of fact. Except as to the exclusion of incredible testimony, this states the present California law. Since the Uniform Rule does not make this distinction, the staff was requested to redraft the rule to provide separate standards for determining competency of lay and expert witnesses, thereby preserving in essence the present law.

Rules 20, 21, and 22

These rules were not considered by the Commission.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE
(Article VI. Extrinsic Policies Affecting Admissibility)

The Commission considered Memorandum No. 63-42, relating to extrinsic policies affecting admissibility. The following actions were taken:

Rule 41

The Commission approved the principle of preserving the integrity of jury deliberations; it disapproved the language of Uniform Rule 41 as being insufficient to distinguish clearly between admitting evidence of the existence and excluding evidence of the effect of statements, conduct or other events that may affect the validity of a verdict or indictment, since the language is susceptible to being construed as permitting inquiry into jury deliberations. The New Jersey version of this rule was believed to be more expressive of this distinction, and it was approved in an amended form to read substantially as follows:

Upon an inquiry as to the validity of a verdict or an indictment, evidence otherwise admissible under these rules may be received as to statements made, or conduct, conditions or events occurring, either within or without the jury room, of such a character as is likely to have improperly influenced the verdict or indictment. No evidence is admissible to show the effect of such statement, conduct, condition or event on a juror either in influencing him to assent to or dissent from the verdict or indictment, or concerning the mental processes by which it was determined.

The phrase "otherwise admissible under these rules" was added to the first sentence to make it clear that nothing in this rule supersedes other rules of admissibility, such as privilege and hearsay.

The reference to "testimony" was deleted as being unnecessary.

The last phrase in the first sentence was revised to state more

precisely the standard as to the type of evidence to be admitted.

It was agreed that the Comment to this rule should make it clear that the rule does not preclude the courts from continuing the present law or developing new law in regard to the types of statements, conduct or events that will be considered as improperly influencing verdicts and indictments as a matter of law, such as improper separation of jurors or the presence of unauthorized persons in the jury room.

Rule 42.

The Commission approved the substance of the New Jersey revision of Rule 42, adding thereto the words "in that trial" following "testify" for clarity. It was noted that this would change the present law in regard to judges' testifying.

Rule 43.

The Commission approved the substance of the New Jersey revision of Rule 43, adding thereto the words "in that trial" following "testify" for purposes of clarity and also adding an introductory clause to read: "Except as to matters covered by Rule 41, ". The qualifying language was added to make it clear that the exclusion operates only as to matters with which the trial itself is concerned and not as to such extraneous matters as are covered by Rule 41.

A motion to provide only conditional disqualification as in the case of judges' testimony failed for lack of a second.

It was noted that this rule would substantially change the present law in regard to jurors' testifying. The Commission believed that an adequately

conducted voir dire examination would exclude as jurors any persons having information of such importance that it should be made the subject of testimony at the trial and that a rule of certainty of disqualification is desirable. In light of Penal Code Section 1120, making jurors' testimony in criminal cases mandatory under certain circumstances, the staff was requested to recommend a procedure whereby that section would conform to Rule 43 as revised by the Commission.

Rule 44.

This rule was disapproved by the Commission. Since Rule 44(a) would continue the present California law making jurors' testimony inadmissible except in the case of a chance verdict or misrepresentation on voir dire, it was disapproved because it excludes the best evidence available as to matters admissible under Rule 41. This is in accord with the New Jersey recommendation.

Rule 44(b) was disapproved as being unnecessary in light of Rule 7. However, in light of the penal sanctions for unauthorized disclosures as provided in Penal Code Sections 911, 924 and 924.1, the staff was requested to study these sections and recommend such adjustments as may be necessary to effectuate the policy of permitting grand jurors to testify.

Rule 45.

The Commission approved the principle expressed in Rule 45 but disapproved subdivision (c) of this rule. If the probative value of evidence is sufficient to "unfairly and harmfully surprise" an opponent, the proper remedy should be continuance for the purpose of preparation rather than exclusion of such probative evidence. The availability of pretrial discovery

procedures militates against any rule that would exclude probative evidence merely on the basis of surprise.

Rule 46.

The Commission discussed this rule at length but was unable to agree upon the modes of proof that should be available to prove character. The Commission did agree that the words "in issue" were not sufficient to define the scope of inquiry and approved the following substitute language for the introductory clause: "When a person's character or a trait of his character is itself an issue in the action or proceeding, but not to prove any fact other than such character or trait of character, . . ." Further action on this rule was deferred for later consideration.

Rule 47.

The Commission discussed this rule at length but was unable to agree upon any policy. A motion to adopt the principle that character evidence was relative and probative to determine conduct was defeated by an evenly divided vote. Some Commissioners expressed the view that the principle cannot be isolated from the methods of proving character. One Commissioner favored the principle only where coupled with specific exceptions defining the areas where the principle should be inoperative. Another Commissioner expressed the view that character evidence is weak at best and of little probative value, hence, it should be excluded entirely. Further action on this rule was deferred until the entire matter of character evidence could be considered by more Commissioners than those present. The staff was requested to prepare a memorandum dealing with this matter.

Rule 48.

In light of deferring action on Rules 46 and 47, this rule was not discussed; it was deferred until later consideration of the entire matter of character evidence.

Rule 49.

The Commission approved the New Jersey revision of this rule as more accurately stating the purpose of this rule, but deleted the phrase "whether corroborated or not" as being unnecessary since this is not a problem in California. In approving this rule, the Commission also approved the elimination of the present eyewitness limitation on habit evidence.

Rule 50.

This rule was disapproved as being unnecessary in light of Rule 7, which declares a general rule of admissibility of relevant evidence.

Rule 51.

This rule was approved. It was noted that this is but a specific example of prejudicial matter that may be excluded under Rule 45 and, also, that a contrary rule would have a tendency to discourage the making of beneficial improvements.

Rule 52.

The Commission approved the principle expressed in this rule but referred the rule to the staff for redrafting to make it clear that offers of compromise and the like would be inadmissible to prove culpability unless accompanied by an express admission of some material element necessary to establish culpability. The second sentence of the rule is to be redrafted

to avoid any ambiguity created by changing the theory of the rule from a reservation of liability to an express admission of liability. The Commission also approved adding a provision to this rule in substantially the same form as recommended in New Jersey so as to exclude in criminal cases an offer to plead guilty to a lesser offense than the crime charged.

Rule 53.

This rule was approved as being the necessary corollary to Rule 52.

Rule 54.

This rule was approved. It was noted that this rule also deals with specific matter that may be excluded under Rule 45.

Rule 55.

In light of the Commission's deferring action on Rule 47, this rule was not discussed; it was deferred until later consideration of the entire matter of character evidence.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE
(Article IX. Authentication and Content of Writings)

The Commission considered Memorandum No. 63-40 and the tentative recommendation relating to authentication and content of writings. The following actions were taken:

Page 1.

The word "copy" was deleted from the fourth line from the bottom of the page.

Rule 67.

The words "the original or a copy of" were inserted after "Authentication of" in the first line in order to make clear that the "writing" referred to in the first line need not be an original.

The staff was instructed to make a separate rule out of the last sentence, the "ancient documents rule".

The staff was directed to add a provision relating to authentication similar to that in Rule 70(4) relating to best evidence.

Rule 68.

The words "as a copy of such record or entry" were inserted in the second line following the word "authentication" in order to make clear that Rule 68 merely provides a method for authenticating a copy of an official record as a genuine copy and does not concern itself with the question of authenticating the original record. The copy may, however, be the authenticating evidence of the original under the exception to the hearsay rule in Rule 63(17).

In subdivision (4), the fourth line, the words "statement declaring" were substituted for "certificate stating" in order to avoid confusion between the word "certificate" and the requirement that the writing be "certified". Conforming changes were made throughout the remainder of the rule.

Rule 68 was then approved as revised.

Page 11.

The staff was directed to revise the last sentence of the paragraph ending at the top of page 11 so that removal of long and complicated sections from the code does not appear as an objective in and of itself.

Rule 70.

Subdivision (1)(c) was modified by substituting "was" for "has been" in the second line. Subdivision (1)(h) was eliminated and, in lieu thereof, the staff was directed to modify subdivision (1)(c) to provide that in a criminal case the at-trial request to the defendant cannot be made in the presence of the jury.

Subdivision (1)(d) was approved, and the staff was directed to revise the last sentence of the comment relating to the subdivision on page 18 so that its description of the effect of the subdivision follows the language of the subdivision more closely.

Subdivisions (1)(e) and (1)(f) were then approved.

Subdivision (1)(g). The staff was directed to add a provision to subdivision (1)(g) granting the judge the discretionary authority to require production of the accounts and documents upon which a summary introduced under subdivision (1)(g) is based. Subdivision (1)(g) was then approved.

Admissions exception. The Commission rejected a proposal to add an admissions exception to the best evidence rule.

Subdivision (2). The staff was directed to revise subdivision (2) so that it clearly requires the production of a copy, if available, of a document listed in subdivision (1)(e) or (1)(f) even though the original writing falls within one of the other exceptions to the best evidence rule listed in subdivision (1).

Subdivision (3). The staff was directed to revise subdivision (3) to provide that oral testimony as to the content of a writing, other than an official document, is admissible if the proponent does not have a copy in his custody or control. If the proponent has a copy of the writing in his custody or control, he is to be required to use such copy to prove the content of the original.

Subdivision (4). The language of Rule 70(3) as recommended by the New Jersey Supreme Court Committee on Evidence was substituted for the language appearing in subdivision (4).

Rule 71.

Rule 71 was disapproved. The staff was directed to incorporate the substance of provisions of Code of Civil Procedure Section 1940 in lieu thereof.

Rule 72.

The staff was directed to revise Rule 72 so that it states more clearly that only photographic reproductions actually made in the course of business may be admitted under Rule 72.

Amendments and repeals.

The portion of the tentative recommendation on amendment and repeal of existing statutes was approved. The staff was directed to review C.C.P. § 1918

and analyze it in the light of the authentication rules and also in the light of the hearsay rules. If there is doubt that a portion of § 1918 is covered specifically in Rule 68, but it appears that the matter is covered by the provision relating to "evidence . . . sufficient to warrant a finding", the comments are to be modified, and if it appears that a provision of § 1918 is not covered by the URE, the matter should be brought to the Commission's attention when authentication is again considered.

Tentative recommendation.

The tentative recommendation was then approved and the staff was authorized to send it to the State Bar Committee and distribute it for comments.