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Place of Meeting

State Bar Building
601 McAllister Street
San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

November 20, 21 and 22, 1963

NOVEMBER 20 (MEETING STARTS AT 7:00 P.M. AND CONTINUES TO 10:00 P.M.)

1. Minutes of October meeting (sent 10/24/63)
2. Administrative matters (if any)
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 already have received a copy)

Loose-leaf binder containing Uniform Rules of Evidence as Revised to Date (handed out at October meeting, copies sent to persons who were unable to attend October meeting)

Approval for printing

Tentative Recommendation on Authentication and Content of Writings

Memorandum 63-51 (enclosed)

Approval for distribution to State Bar Committee

Tentative Recommendation on Judicial Notice

Memorandum 63-52 (enclosed)

NOVEMBER 21 AND 22 (MEETING STARTS AT 9:00 A.M. EACH DAY)

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

Presumptions (Article III--Rules 13-16)

Materials in binder (you have some of these)

Memorandum 63-53 (sent 11/12/63)

Memorandum 63-47 (in your binder)

Research Study (in your binder)

Continuation of item 3 (if not completed on November 20).

Expert and Other Opinion Testimony (Article VII--Rules 56-61)

Materials in binder (you have most of these)

Memorandum 63-50 (you have this in binder)

First Supplement to Memorandum 63-50 (sent 10/24/63)

Research Study (you have this in binder)

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

Materials in binder (you have these)

Memorandum 63-46 (in your binder)

Research Study (in your binder)

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MINUTES OF MEETING

OF

NOVEMBER 20, 21 and 22, 1963

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on November 20, 21 and 22, 1963.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman (November 21 and 22)
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
Angus C. Morrison, ex officio

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

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

Minutes of October Meeting.

The minutes of the October 1963 meeting were approved as submitted.

Future meetings of the Commission.

Future meetings of the Commission are scheduled as follows:

| | |
|---------------------|---|
| December 20 and 21 | San Bernardino (Commissioner Edwards' office) |
| January 1964 | not yet scheduled |
| February 1964 | not yet scheduled |
| March 22, 23 and 24 | Lake Tahoe (California Alumni Center) |

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

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

The Commission approved the addition of the substance of the following provision to be added to the new evidence statute:

Whenever any reference is made in this part to any portion of this part or of any other law, the reference applies to all amendments and additions now or hereafter made.

The quoted provision is based on Section 10 of the Vehicle Code and Section 4 of the Education Code.

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

(Article II. Judicial Notice--Rules 9-12)

The Commission considered Memorandum 63-62 and the attached tentative recommendation on Judicial Notice. The following actions were taken:

Letter of Transmittal.

The letter of transmittal was approved.

Rule 9.

The use of the word "jurisdiction" in this rule should be reviewed. The Commission wishes the word to have a broad meaning. Consideration might be given to using the word "possession" in Rule 9(1). What about the law applicable in territory under the jurisdiction of the United States (as a Naval base)? Note that subdivision (1)(a) and subdivision (3)(e) are inconsistent in use of the word "jurisdiction."

Rule 9(1)(b).

This subdivision was revised to read:

(b) Any matter made the subject of judicial notice by Section 11383 or 11384 of the Government Code or by Section 307 of Title 33 of the United States Code.

Rule 9(1)(c).

This subdivision was revised to read: "(c) Rules of court of this State and of the United States."

Rule 9(3)(introductory clause).

The introductory clause to subdivision (3) of Rule 9 was revised to read:

(3) Judicial notice may be taken without request by a party of the following matters to the extent that they are not embraced within subdivision (1) or (2):

Rule 9(3)(b).

Under this subdivision, "jurisdiction" should be given a broad meaning. The words "legislative enactments" were substituted for "ordinances."

Rule 9(3)(d).

Delete "any federal court" and insert "the United States."

Rule 9(3)(h),(i).

These subdivisions were deleted; the tentative recommendation on authentication is to be revised to cover seals and official signatures.

Rule 9(3)(new paragraph).

The following new paragraph was added to subdivision (3):

Specific facts and propositions that are matters of common knowledge within the territorial jurisdiction of the court and not reasonably subject to dispute.

Subdivision (3)(j); Subdivision (5).

Subdivision (3)(j) was deleted and subdivision (5) was approved. The Commission directed the staff to advise the State Bar Committee that the matter of what revisions should be made in our existing judicial notice statutes (those dealing with judicial notice in particular cases) is under study. The staff is to prepare a memorandum showing various methods that might be used to deal with provisions such as Corporations Code Section 6602.

Section 6602 might be revised to cover only those matters not listed in Rule 9. It could provide that notice might be taken of those matters (not listed in Rule 9) in the same manner as matters listed in Rule 9(3).

Subdivision (4)(b).

A staff suggestion that the word "reasonable" be inserted was not adopted.

Comment to Rule 9.

The relationship of subdivisions (1) and (2) and subdivision (3)--
i.e., the overlap between the mandatory and the discretionary judicial
notice provision--should be discussed in the comment to Rule 9.

Rule 10(2)(a).

The words ", including the advice of persons learned in the subject
matter," were inserted after the word "information."

Rule 10(3).

A revised version of URE subdivision (3) was suggested for addition
by the staff, but it was not approved by the Commission.

Rule 10.5.

It was suggested that this rule might be placed in some part of the
code other than the new evidence statute when the new evidence statute is
prepared.

Rule 11(2).

The words "may and upon request shall instruct" were inserted in lieu
of "shall instruct." This revision will eliminate unnecessary instructions.

Rule 12(2).

This subdivision was revised to read:

(2) The reviewing court shall judicially notice, in the
manner provided by subdivision (2) of Rule 10, any matter
specified in Rule 9 which the judge was obliged to notice. In
other cases, the reviewing court may notice matters specified
in Rule 9 in its discretion and has the same powers as the judge
under Rule 10.5.

Where a matter is properly noticed by the trial judge, the matter becomes
a matter of record and the reviewing court does not notice the matter;

instead, the reviewing court considers the matter as evidence in the case and there is no occasion for the reviewing court to take judicial notice of the matter.

Repeals and Amendments.

The proposed amendments and repeals are to be revised in view of the above changes in the tentative recommendation.

Distribution to State Bar Committee.

After revising the tentative recommendation as indicated above and considering the suggested revisions in the Comments (supplied by various Commissioners), the staff is to send the revised tentative recommendation to the State Bar Committee for comment.

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

(Article III. Presumptions)

The Commission considered Memorandum No. 63-53 and several statutory presumptions. The Commission instructed the staff to prepare a memorandum recommending that particular presumptions be classified as Morgan presumptions, Traynor presumption, Thayer presumptions or inferences. Particular attention should be given to the Code of Civil Procedure presumptions and some of the more important common law presumptions. The suggestion was also made that the staff give consideration to limiting the categories to three, because of the slight difference between the Traynor and Morgan presumption theories.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE
(Article VII. Expert and Other Opinion Testimony)

The Commission considered Memorandum No. 53-50 and URE Rules 56-61. The following actions were taken:

Generally

Consideration should be given to deleting all references to "inferences" in this article.

Rule 56.

Subdivision (1) was approved.

Subdivision (2). The Commission discussed whether to modify the subdivision to require an expert to base his opinion "primarily" on facts or data known or made known to the witness. Some Commissioners objected to permitting an expert to rely on matters not personally known to him or in evidence at the hearing. Other Commissioners believed that the word "primarily" was unnecessary, for when a physician, for example, relies on a case history recited by a patient, that recitation of the case history constitutes the "data" "personally known" to the physician upon which his opinion is based-- even though he does not know whether the case history recital is true. After considerable discussion, the subdivision was approved without change.

Subdivision (3) was deleted because it duplicates a provision of Rule 1.

Subdivision (4) was approved without change. A suggestion was made that the word "merely" or "solely" should be

inserted after "objectionable", but the suggestion was not approved because it would imply that the fact that an opinion relates to an ultimate issue can be used as a make-weight reason for excluding a particular opinion.

Rule 57.

The rule was approved after being revised to read:

(1) A witness testifying in terms of opinion or inference may state on direct examination the reasons for his opinion or inference and the facts and data upon which it is founded.

(2) The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the facts and data upon which the opinion or inference is founded.

C.C.P. § 1845.5.

The possible inconsistency of Section 1845.5 of the Code of Civil Procedure with Rule 57 as revised was then discussed. A motion to repeal Section 1845.5 failed for lack of sufficient affirmative votes. A motion was then approved to reconsider the evidence in eminent domain bill and to consider the matter of the repeal of Section 1845.5 in connection with that bill.

Rule 57.5.

The staff was directed to add a sentence providing that the unavailability of a person upon whose statement or opinion an expert has based his opinion does not affect the admissibility of the expert's opinion. Subject to this revision, the rule was approved.

Proposed new rule.

The Commission considered the following rule:

The opinion of a witness may be held inadmissible or may be stricken if the judge finds that it is based in whole or in part on incompetent facts or data. In such case the witness may then give his opinion after excluding from consideration the facts and data determined to be incompetent.

The rule was not acted upon. The staff was asked to report on whether, in fields other than eminent domain, expert opinions are stricken only because of reliance on evidentially incompetent matter or whether they are stricken because of reliance on factors that may not properly be considered.

Rule 58.

Rule 58 was approved after being revised to read:

Unless the judge in his discretion so requires, questions calling for the opinion or inference of an expert witness need not be hypothetical in form [~~unless the judge in his discretion so requires, but~~]; and, subject to Rule 57, the witness may state his opinion or inference and the reasons therefor without first specifying the facts and data on which it is based as a hypothesis or otherwise [~~;-but-upon-cross-examination-he-may-be required-to-specify-such-data~~].

The revision makes clear that the rule is subject to Rule 57. The matter of cross-examination is covered by Rule 58.5.

Rule 58.5.

Subdivision (1) was approved to read:

(1) An expert witness may be fully cross-examined as to the reasons for his opinion and the facts and data upon which it is founded.

Subdivision (2). The matter of cross-examining an expert witness upon the basis of published works in his field of expertise was discussed. The issue was whether cross-examination should be limited to the works upon which the expert relied, whether cross-examination on any works should

be permitted if the expert relied on any other works, or whether cross-examination should be permitted on any works without limitation. Whether the hearsay rule should be relaxed to permit introduction of learned treatises in evidence was also discussed.

A motion was approved to permit cross-examination only on those works upon which the expert has relied. A motion to permit cross-examination of an expert on any learned treatises was not approved.

Rules 59 and 60.

Rules 59 and 60 were not approved because the existing law on the appointment of experts is superior.

The last sentence of Rule 60, however, was approved. That sentence permits an expert to be examined concerning the amount of his compensation for the purpose of testing his credibility.

Rule 61.

Rule 61 was approved.

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

(Article IX. Authentication and Content of Writings)

The Commission considered Memorandum 63-51 and the tentative recommendation relating to authentication and content of writings. The following actions were taken:

Background.

Page 1. On the third line, the words "authorized and" were deleted.

The first sentence of the third paragraph was revised to read: "Article IX. of the URE contains a group of rules dealing with the introduction of evidence in written form and proof of the content of writings."

Rule 67.

First paragraph. The Commission discussed the use of the term "authentication" in regard to documents not offered in evidence. The suggestion was made that the term properly used refers only to documents offered in evidence. It was concluded, however, that the term may properly be used to refer to the preliminary proof that the proponent of evidence of a writing must offer to prove that the writing is what he claims it is, whether the writing itself is offered in evidence or secondary evidence of the writing is offered in evidence.

The first paragraph was then revised to read:

Authentication of a writing is required before it may be received in evidence. Authentication of a writing is required before secondary evidence of its content may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law.

Second paragraph. The second paragraph was deleted as unnecessary.

It merely repeats the provisions of the first paragraph and Rule 8.

Rule 68.

The inconsistency of Rule 68 as drafted and Rule 63(17) was pointed out. Rule 68 refers to "an official record" while Rule 63(17) as revised refers to "a writing in the custody of a public officer or employee"; yet, both rules relate to precisely the same subject matter. The Commission decided that Rule 68 should relate to copies of all writings in the custody of a public officer and employee and instructed the staff to modify Rule 68 to reflect this policy. A suggestion was made that the word "copy" be used throughout in lieu of the term "writing" when referring to the document offered in evidence.

Rule 69.

The staff was directed to revise Rule 69 to eliminate the cross reference to Rule 63(17)(b). In lieu of the cross reference, the substance of Rule 63(17)(b) should be stated in Rule 69.

Rule 70.

Subdivision (2). The Commission discussed the suggestion of the Northern Committee of the State Bar that the proponent of secondary evidence of the content of a writing be required in every case to introduce a copy or show that he exercised reasonable diligence but could not obtain one. After the discussion, the Commission decided to retain the previously approved provisions of Rule 70.

Subdivision (3) was deleted as unnecessary. Its subject matter is covered by Rule 67.

Rule 72.

The Commission discussed whether to limit the rule to photographic records of business records only. After the discussion, the Commission decided to retain the previously approved provisions permitting photographic records, made in the course of business, of any admissible writing to be received in evidence.

Additional rule.

The staff was directed to add a rule to the authentication article that would provide in substance that the genuineness of official seals and signatures of public officials and notary publics shall be prima facie established by seals and signatures purporting to be genuine. It was suggested that the rule might be drafted in terms of a presumption of authenticity that disappears upon the introduction of sufficient evidence to warrant a contrary finding.

The rule is to replace the provisions of existing law providing for judicial notice of official seals and signatures. The kinds of seals and signatures subject to the new rule are to be broader than the kinds of seals and signatures judicially noticed under existing law. The seals and signatures to be subject to the new rule should at least be those necessary to make copies of writings in official custody under Rule 68 self-authenticating; that is, to authenticate such copies without the introduction of evidence as to the genuineness of the attached seals and signatures.

Judicial notice of official seals and signatures was disapproved because of the conclusiveness of judicial notice. In appropriate cases, parties should be able to submit evidence to show that a particular seal or signature is a forgery or is not genuine for some other reason.

Amendments and repeals of existing statutes.

C.C.P. § 1940. The repeal of this section was approved because it is superseded by Rule 71.

Recommendation.

Suggested editorial changes were submitted to the staff by individual Commissioners.

The recommendation was then approved for printing.

Voting Aye: Commissioners Selvin, Sato, Stanton, Keatinge and Edwards.

Voting No: None.

Absent: Commissioners McDonough, Cobey, Young and Ball.