

Time

Place

June 11 - 7:00-10:00 p.m. State Bar Building
June 12 - 9:00 a.m. - 5:00 p.m. 601 McAllister Street
June 13 - 9:00 a.m. - 3:45 p.m. San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

June 11-13

Bring the following materials to the meeting (in addition to other items listed on agenda):

- (1) Printed pamphlet containing Uniform Rules of Evidence (you have a copy)
- (2) Printed pamphlets containing tentative recommendations and studies on:
 - (a) Hearsay Evidence
 - (b) Authentication and Content of Writings
 - (c) Privileges
 - (d) Witnesses
 - (e) Extrinsic Policies Affecting Admissibility
- (3) Tentative Mimeographed Recommendations (Material contained in a soft-cover binder) (sent 5/13/64)
- (4) New Evidence Code (Material contained in a loose-leaf binder) (sent 5/13/64)
- (5) Professor Degnan's Research Study (Contained in a soft-cover binder) (sent 5/13/64)

AGENDA ITEMS

1. Approval of Minutes for May 1964 Meeting (sent 5/3/64)
2. Administrative Matters (if any)

Discussion of suggestion of Professor Sherry

3. Form of Comments on Evidence Code

Memorandum 64-40 (sent 6/3/64)

4. Revised Tentative Recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions

Memorandum 64-37 (Extra copy of revised tentative recommendation attached) (sent 6/3/64)

First Supplement to Memorandum 64-37 (to be sent)

5. Organization and Content of New Evidence Code

a. Existing statutes to be included in Evidence Code or Repealed

Revised Memorandum 64-33 (sent 5/26/64)
(portion of Memorandum 64-33 not covered at May meeting)

Memorandum 64-25 (sent 5/15/64)

Memorandum 64-34 (sent 5/26/64)

b. Revisions of Evidence Code

Memorandum 64-32 (Division 1) (sent 5/26/64)
First Supplement to Memorandum 64-32
(sent 5/26/64)

Memorandum 64-36 (Division 2) (sent 5/26/64)

Memorandum 64-31 (Hearsay Evidence)
(sent 5/15/64)

Memorandum 64-38 (Authentication and Content of Writings) (to be sent)

Memorandum 64-39 (Privileges) (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

June 11, 12, and 13, 1964

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on June 11, 12, and 13, 1964.

Present: John R. McDonough, Jr., Chairman (June 11 and 12)
Richard H. Keatinge, Vice Chairman (June 12 and 13)
Hon. James A. Cobey
Hon. Alfred H. Song
James R. Edwards
Sho Sato
Herman F. Selvin
Thomas E. Stanton, Jr.

Absent: Joseph A. Ball
Angus C. Morrison, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey, and Jon D. Smock of the Commission's staff were also present. Mr. Warren P. Marsden and Mr. Steve Birdlebough, representing the Judicial Council, and Mr. Joseph Powers, representing the Association of District Attorneys, also were present. The Commission's research consultant on the Uniform Rules of Evidence, Professor Ronan E. Degnan, also was present on Saturday, June 13, 1964.

ADMINISTRATIVE MATTERS

Minutes of the May 1964 Meeting. The Commission approved the Minutes of the May 1964 meeting as submitted.

Research Contract With Stanford University. The Commission considered a staff suggestion that a research contract for the 1964-65 fiscal year be made with Stanford University in the amount of \$500. Later, when a long-term lease for office space at Stanford has been negotiated, this amount can be increased if necessary. A motion was made by Commissioner Edwards, seconded by Commissioner Stanton, and unanimously adopted that a research contract, in the same form as the contract for the 1963-64 fiscal year, in the amount of \$500 be made with Stanford University and that the Vice-Chairman be authorized to execute such contract on behalf of the Commission.

Special Advisory Committee on the Evidence Code. The Commission discussed a suggestion made by Professor Sherry that a blue-ribbon advisory committee be appointed to support the Commission's recommendations regarding a new Evidence Code. It was noted during the discussion that most if not all groups likely to be represented by such a committee already are participating in the review of the Commission's recommendations and, because of the difficult subject matter involved, it would not be feasible to expect meaningful support from persons who have not had an opportunity to thoroughly study the recommendations. Noting the favorable response to date and the probability of active support from the several groups now studying the Commission's proposals, the Commission declined to act on Professor Sherry's suggestion.

National Legislative Conference. The Executive Secretary reported that this year's National Legislative Conference will be held in Atlantic City.

New Jersey, on September 23-25. The Commission approved the suggestion that the Executive Secretary attend this conference and, to the extent that funds are available or, alternatively, to the extent that existing funds can be shared, also approved the attendance of the Assistant Executive Secretary.

Future Meetings. Future meetings of the Commission are now scheduled as follows:

July 23-25
August 13-15
September 10-12

Los Angeles (U.S.C.)
Los Angeles
San Francisco

PROPOSED EVIDENCE CODE - GENERALLY

The Commission considered Memorandum 64-40. The following actions were taken:

Form of comments in final recommendation and in tentative recommendation relating to presumptions

The Commission considered whether the comments to the specific sections in the final recommendation and the tentative recommendation relating to presumptions (the only tentative recommendation left to be printed) should be worded as if the bill had been enacted or should be worded as if the bill were being recommended for enactment. Wording of the comments in the final recommendation as if the bill had been enacted would permit the code publishers to print the comments without editorial change under the enacted sections, and the comments would then correctly refer to the enacted sections as existing law and the repealed sections as former law. Wording of the comments in the tentative recommendation relating to presumptions in the same fashion would permit the type used for these comments to be used in the final recommendation without editorial change if the Commission decided to word the final recommendation comments as if the bill had been enacted.

The Commission concluded that the comments in both the tentative recommendation relating to presumptions and the final recommendation should not be worded as if the bill had been enacted. The comments should be written in the light of the law existing at the time the comments are written. The comments, then, will be more intelligible in the future, for a reader who knows that the comments were written as recommendations relating to the

various sections could be confused by references to "existing law" which was not in existence at the time the comment was written and to "former law" which was in fact in existence at the time the comment was written. This style will conform to the form of the comments in the sovereign immunity recommendation.

Where a reference is made to a section that is recommended for repeal or amendment, the fact that the section is to be amended or repealed should be indicated in some appropriate manner if the context does not indicate that the section is to be amended or repealed.

Section lead lines in preprinted bill

The Commission considered and approved a suggestion that descriptive lead lines (such as those appearing in the present draft of the proposed Evidence Code) for each section of the Evidence Code be included in the preprinted bill. The lead lines, of course, would not appear in the bill actually introduced in the Legislature. Before this is done, however, the staff is to consult with the Legislative Counsel concerning the propriety of such action.

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

The Commission considered Memorandum 64-32 and the first supplement thereto and Division 1 of the Preliminary Draft of the Evidence Code. The following actions were taken:

Section 1

This section was approved as drafted.

Section 2

This section was approved as drafted.

Section 3

This section was deleted. Commissioner Stanton made a motion that this section be included, but the motion did not receive a second.

Section 4

This section was revised to read substantially as follows:

4. No proceeding taken before this code takes effect is affected by the provisions of this code, but all proceedings taken after this code takes effect shall conform to the provisions of this code so far as possible.

The staff should give further consideration to the language used in this section.

Section 5

The section from the California Commercial Code (set out in First Supplement to Memorandum 64-32) was substituted for this section and was approved for inclusion in the Evidence Code.

Section 6

This section was approved as drafted.

Section 7

This section was approved as drafted.

Section 8

This section was approved after the word "statute" was substituted for the word "law."

Section 9

This section was approved as drafted.

Section 10

This section was approved as drafted.

Section 11

This section was approved as drafted.

Section 12

This section was approved as drafted.

Section 13

This section was approved as drafted.

Section 14

This section was revised to read: "This code takes effect on January 1, 1967."

DIVISION 2. WORDS AND PHRASES DEFINED

The Commission considered Memorandum 64-36 and Division 2 of the Preliminary Draft of the Evidence Code. The following actions were taken:

Section 100

This section was approved as drafted.

Section 115

A suggestion to change "burden of proof" to "burden of persuasion" was not adopted.

The following changes were made in Section 115: "requirements" was changed to "requirement"; "either" was deleted; and "specifically" was deleted. In addition, a phrase is to be added to recognize that the defendant in a criminal case may have a burden of proof to raise a reasonable doubt.

Section 130

This section was deleted.

Section 135

This section was deleted. Its substance is to be added to Section 300 and to any other sections where it is necessary to limit the scope of the sections.

Section 140

The definition of criminal proceeding (excluding the portion relating to the Government Code proceeding) in the Privileges Division (Section 902) is to be substituted for the definition in Section 140, and the definition in the Privileges Division is to be revised to reflect this change.

The staff is to review Sections 902 and 140 and eliminate any inconsistency in the use of the word "proceeding."

Section 155

The second sentence should be added to the general provisions portion of the statute.

Section 160

This section was deleted.

Section 165

The word "the" in the first line was changed to "a" and the words "under a statute section" were deleted.

Section 175

This section was revised to read:

175. "Judge" includes a court commissioner, referee, or similar officer, who is authorized to conduct and is conducting a court proceeding or court hearing.

Section 190

This section was revised to read:

190. "Person" includes a natural person, firm, association, organization, partnership, business trust, or corporation.

Section 215

The words "city and county" were added to this definition.

Section 220

The word "includes" was substituted for "is coextensive with."

Section 230

This definition was approved. The use of this definition in the various sections of the Evidence Code should be checked to make sure that regulations are included in cases where a regulation should be included in a particular statutory provision.

Section 235

The second sentence was revised to read: "In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States."

Section 245

This definition was revised to read: "'Statute' includes a provision of the Constitution." The comment should explain why this definition is provided, i.e., to avoid any implication that we do not recognize provisions of the Constitution in particular sections that recognize exceptions to such sections.

Section 250

After the word "means" the words "(a) a jury or (b)" was inserted and the words "and a jury" was deleted at the end of the section.

Section 255

A semicolon was inserted after each paragraph in subdivision (a) and "or" was inserted in paragraph (5) after the semicolon.

In paragraph (5), subdivision (a), the words "the court's process" were substituted for "subpena."

It was suggested that use of the words "the process of the court" or the equivalent be checked to determine whether they are appropriate if it is discovered that another court may have to issue process to compel attendance in the court where the hearing is held.

Subdivision (b) was divided into two subdivisions to read substantially as follows:

(b) A declarant is not unavailable as a witness if the exemption, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

(c) A declarant is not unavailable as a witness if unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense, but this subdivision does not apply where the evidence offered is a deposition.

DIVISION 5

BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

The Commission considered Memorandum 64-37, the first and second supplements thereto, and the tentative recommendation relating to the Burden of Producing Evidence, Burden of Proof, and Presumptions. The following actions were taken:

Comments of State Bar Committee

Presumptions recommendation generally. The Commission considered the desirability of the presumptions recommendation in the light of the conflicting views of the members of the State Bar Committee. The Commission concluded that the recommendation will remove an anachronism from existing law and that it should be retained.

Sections 500 and 510. The Commission considered the criticism of the Northern Section of the State Bar Committee. The Commission concluded that, although the sections are vague, they do correct the erroneous provisions of Code of Civil Procedure Section 1981 (to be repealed) and reveal that the burdens of producing evidence and proof are allocated by the courts upon the basis of a variety of factors. Hence, the sections should be retained.

Revised Tentative Recommendation

Section 511. Section 511 and its comment were approved as presented in the tentative recommendation.

Sections 600 and 604. The revisions to these sections and their comments were approved.

Section 606. The staff was directed to add language to Section 606 or at some other appropriate place in the statute to make clear that neither a presumption affecting the burden of proof nor a presumption affecting the burden of producing evidence places any evidentiary burden upon the defendant in a criminal case in regard to any element of the crime with which he is charged.

The staff was directed to add language approved by Commissioner Sato to the comments to explain the policy underlying the above revision.

Section 607. Section 607 was approved. The portion of the comment explaining the manner in which the section will change existing law is to be revised to state more explicitly the changes being made in existing law.

Section 665. Section 665 and its comment were approved.

Civil Code Section 164.5. A proposal to modify the section to state only the substance of Code of Civil Procedure Section 1963(40) was not approved.

Code of Civil Procedure Section 1963(14). The comment was approved.

Code of Civil Procedure Section 1963(27). The comment was approved.

Code of Civil Procedure Section 1983. The comment was approved.

DIVISION 8. PRIVILEGES

The Commission considered Memorandum 64-39, the first supplement thereto, and the Division 8 of the Preliminary Draft of the Evidence Code. The following actions were taken:

General form of definitions in particular articles

The Commission agreed that the definitions in the articles on particular privileges should be arranged in logical (rather than alphabetical) order.

Newsman's Privilege

The Newsman's Privilege set out in the First Supplement to Memorandum 64-39 was approved for inclusion in the Evidence Code. Although the language of the statute was approved, the staff indicated the privilege might be divided into several sections when it is included in the Evidence Code.

Commissioner Stanton suggested that the Comment emphasize at the beginning that the Newsman's Privilege is now recognized in California.

Section 900

This section was approved after the word "specifically" was deleted.

Section 901

This section was approved as drafted.

Section 902.

This section was revised to read:

902. "Criminal proceeding" means:
- (a) A criminal action; and
 - (b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for wilful or corrupt misconduct in office.

Section 903

This section was approved after the words "or to hold a public office" were inserted after "public entity" in the third line of the text of the section.

Section 904

This section was approved as drafted.

Section 905

This section was approved as drafted.

Section 910

This section was approved as drafted.

Section 911

This section was approved after the technical revision suggested by the staff was adopted.

Section 912

Subdivision (a) was approved after the technical revisions suggested by the staff were adopted. The suggestion of the Conference of Judges that the last sentence of subdivision (a) be deleted was not adopted.

The suggestion by the staff for a technical correction in subdivision (b) was adopted. The suggestion of the Conference of California Judges that subdivision (b) be deleted was discussed but not adopted. It was suggested that this matter be considered at the July meeting.

Subdivisions (c) and (d) were approved as drafted.

Section 913

This section was approved as drafted.

Section 914

This section was approved as drafted.

Section 915

This section was approved as drafted.

Section 916

This section was approved as drafted.

DIVISION 10. HEARSAY EVIDENCE

The Commission considered Memorandum 64-31 and the draft Division 10 of the proposed Evidence Code relating to hearsay evidence. The following actions were taken:

Drafting of hearsay rule and exceptions; Section 1200.

The Commission approved the proposal to state the general hearsay rule in Section 1200. Sections creating exceptions to the general hearsay rule are to be worded in substance as follows:

A statement . . . is not made inadmissible by the hearsay rule

To facilitate reference to Section 1200, a second sentence was added to read:

This section shall be known as and may be cited as the hearsay rule.

Section 1200 was then approved.

Section 1201 was approved.

Section 1202 was revised by changing "tending to impair" to "offered to attack". As revised, the section was approved.

Section 1203.

The Commission approved URE Rule 64 in principle. The Commission started to consider which exceptions to the hearsay rule should be included in the rule and which should be excluded; however, those Commissioners approving the principle of Rule 64 were not all present when the individual exceptions were considered and no agreement was reached on the inclusion of any of the exceptions. The Commission deferred further consideration until

a larger quorum would permit either the exclusion of Rule 64 entirely or the addition of some substance to its provisions.

Joe Ball Amendment

The Commission directed the staff to reconsider and submit a recommendation on the suggestion made by Commissioner Ball that a party should have the right to cross-examine the declarant of any hearsay admitted against him. To be considered in connection with the proposal are the inclusion of a provision stating that the unavailability of the declarant for cross-examination does not affect the admissibility of the statement and the nature of the exceptions to be included. The Commission indicated that the section drafted should be applicable to all hearsay exceptions except those, such as admissions, where considerations of policy indicate that the principle of the section should not apply.

Section 1204 was approved.

Additional section on coerced hearsay statements

The Commission directed the staff to add a section making a hearsay statement inadmissible against a criminal defendant if the statement would be inadmissible under the confessions exception against the hearsay declarant.

Organization of Chapter 2, Exceptions to the Hearsay Rule

The Commission approved the suggestion that the exceptions to the hearsay rule be grouped into articles. For example, sections 1250 and 1251 would be in an article relating to prior statements of witnesses, Sections

1252 and 1253 would be in an article relating to former testimony,
etc.

Sections 1250 and 1251 were approved.

Section 1252.

In the definition of "former testimony", the word "official" was changed to "governmental" in subdivision (a)(2). The staff was directed to modify subdivision (a)(3) to refer to testimony given under oath or affirmation in a deposition in another action. A new subdivision (a)(4) is to be added that includes within "former testimony" testimony given under oath or affirmation in an arbitration proceeding and transcribed by an official reporter.

Section 1253 was approved.

Section 1254

Subdivision (b) was revised in substance to read:

A statement which narrates, describes, or explains an act, condition, or event is not made inadmissible by the hearsay rule if it was made while the declarant was perceiving the act, condition, or event.

Sections 1255-1258 were approved.

Section 1259

The Commission instructed the staff to add a provision that in substance would require a party offering an authorized admission to introduce his evidence of the authority to make the statement first--

subject to the judge's discretion to alter the order of proof.

Section 1260

Subdivision (c), requiring the statement to be admissible if offered as testimony at the hearing, was deleted. The restriction would be appropriate for statements not made in furtherance of the conspiracy, but is not a desirable limitation on the admissibility of statements that are required to be made as part of the conspiracy and in furtherance of the object thereof.

Subdivision (d) was modified by deleting "proof" and substituting therefor "evidence sufficient to sustain a finding".

Section 1261 was approved.

Section 1262

Subdivision (c) was deleted. Subdivision (b) was modified to read:

(b) The statement would be admissible if offered against the declarant in an action upon that liability, obligation, or duty.

Section 1263

Subdivision (c) was deleted as unnecessary in light of the section added to the chapter on general hearsay provisions stating the same rule.

Subdivision (b)(3), requiring that the hearsay declarant be unavailable before his declaration against interest is admissible, was deleted.

Sections 1264-1267

The Commission directed that the phrase, "unless it was made in bad

faith", be deleted. In lieu thereof, there should be a provision similar to that in Sections 1284 and 1285 that provides:

This section does not make a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

Section 1268 was revised in substance to read:

A statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear and when the declarant in making such statement had no motive or reason to deviate from the truth.

Section 1270 was approved.

Section 1271 is to be revised in light of the new section to be drafted expressing the Joe Ball Amendment.

Section 1272 was approved.

Sections 1273-1275 were deferred and will be considered in connection with authentication and best evidence problems relating to copies of writings.

Section 1280

The word "writing" was substituted for "document" in the first line.

Section 1281

The Commission approved the section without any reference to Vehicle Code Section 40834.

Remaining sections

No problems were raised concerning the remainder of the sections in the hearsay division.

DIVISION 11. WRITINGS

The Commission considered Memorandum 64-38, a Draft of Division 11 of the Evidence Code, and the comments received in regard to the Commission's tentative recommendation relating to Authentication and Content of Writings. The following actions were taken:

Section 1400

Section 1400 was revised to read:

(a) Authentication of a writing means the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is and that it was made or signed by the person the proponent of the evidence claims made or signed it or the establishment of such facts by any other means provided by law.

(b) 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.

Section 1401

The Commission directed the staff to insert in the code at an appropriate place the following provision:

A certificate of the acknowledgement of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1181) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

Section 1401 was then deleted as unnecessary.

Section 1402

The Commission directed the staff to insert in the code at an appropriate place the following provision:

The official record of a writing purporting to establish or affect an interest in property is prima facie evidence of the content of the original recorded writing and its execution and delivery by each person by whom it purports to have been executed if:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and

(b) A statute authorized such writing to be recorded in that office.

Section 1402 was then deleted as unnecessary. Section 1280 in the division on hearsay evidence was also deleted as unnecessary.

The Commission then directed the staff to insert in the code at an appropriate place a section similar to that approved above that applies to any recorded document. The language approved was as follows:

The official record of a writing is prima facie evidence of the content of the original recorded writing if:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and

(b) A statute authorized such a writing to be recorded in that office.

Section 1403

The preliminary paragraph of Section 1403 was revised to read:

A purported copy of a writing in the custody of a public employee, or of an entry in such a writing, is presumed to be a copy of such writing or entry if:

Subdivision (b) was then deleted as unnecessary since it duplicates the general authentication provisions of Section 1400.

The staff was directed to revise subdivision (c) to provide for authentication of copies of foreign documents by a chain of certificates and by an officer who is authorized to attest copies even though he is not

the custodian. The revision is to be based on an amendment that has been proposed to Rule 44 of the Federal Rules of Civil Procedure by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure, and the Columbia Law School Project on International Procedure.

Section 1405

The Commission directed the staff to revise Section 1405 (the ancient documents rule) to include a provision indicating that nothing in Section 1405 precludes a determination that a document has been authenticated even though all of the factors stated in the rule have not been shown. The section is also to be revised to indicate that the judge is to determine only that there is evidence sufficient to sustain a finding that the factors have been met. Thus, in substance, the revised section is to state that a foundational showing of sufficient evidence to sustain a finding of the factors listed in the rule is always sufficient circumstantial evidence of authenticity to permit the writing to be admitted and to sustain a finding of genuineness, but a lesser showing may be sufficient circumstantial evidence of authenticity to warrant admission of the writing.

Section 1415

The Commission considered the suggestion of the Committee of the Conference of California Judges that the presumption of authenticity of official seals and signatures be limited to official seals and signatures on certificates purporting to authenticate documents. The Commission decided to retain the more comprehensive provisions of Section 1415 as drafted.

The Commission also rejected the suggestion that signatures on out-of-state domestic documents be accompanied by a statement authenticating the signature.

The Commission directed the staff to revise subdivision (c) in accordance with the judges' suggestion that the presumption be extended to lower foreign officers' signatures and seals accompanied by an American foreign service officer's certificate. The subdivision should be comparable to the provisions of the code relating to the presumption of the authenticity of copies of foreign documents.

The Commission directed that the phrase "in any state, territory, or possession of the United States" be revised to read "within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands". A similar revision is to be made in Section 1403 relating to the authenticity of copies of official writings.

The staff was directed to restrict the reference to notaries to notaries within the United States.

Section 1420 (Best evidence rule)

Subdivision (c) was revised to require that an at-trial request for the production of a document be made out of the presence of the jury in a criminal case when either the prosecution or the defense is making the request.

An additional subdivision was added to create a new exception to the best evidence rule providing in substance:

The writing has been produced at the hearing and made available for inspection by the adverse party.

Section 1421 is to be revised to require that an actual copy, not oral testimony, of the content of the writing be introduced if the exception to the best evidence rule in the new subdivision added to Section 1420 is relied on.

DISPOSITION OF EXISTING STATUTES

The Commission considered Revised Memorandum 64-33 and Memorandum 64-34 together with Parts IV and V of the research consultant's study on the disposition of existing sections in Part IV of the Code of Civil Procedure.

The following actions were taken:

Section 1982

The staff reported that the substance of this section was included in the authentication portion of the Evidence Code on the assumption that the section provided a special rule concerning authentication of altered instruments, but that the consultant recommended the repeal of this section as being unnecessary and redundant in light of judicially declared substantive law covering the same question. After the Commission approved the repeal of this section, Commissioner Edwards raised a further question in regard to the effect of this section in light of the recent case of Arneson v. Webster, 226 Adv. Cal. App. 474, 38 Cal. Rptr. 88 (1964). The staff is to research the problem further.

Section 1983

The Commission reaffirmed its previous decision to repeal this section.

Section 2061

The Commission deferred consideration of the first sentence of this section until it considers the functions of judge and jury.

The Commission approved the repeal of the introductory clause in this section and the substitution of the following:

The jury is to be given the instructions specified in this chapter on all proper occasions.

Commissioners McDonough and Stanton disapproved the Commission's action and voted against the codification of specific instructions in the Evidence Code.

Subdivision 1. The Commission approved the repeal of this subdivision and the substitution of an instruction in substantially the following form:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Subdivision 2. The Commission approved the repeal of this subdivision and the substitution of an instruction in substantially the following form:

You are not bound to decide in conformity with the testimony of any number of witnesses against a lesser number or against other evidence which appeals to your mind with more persuasive force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative persuasive force of the evidence.

The Commission disapproved including a general instruction regarding the sufficiency of the testimony of one witness worthy of belief.

Subdivision 3. The Commission disapproved the proposed instruction to be substituted for this subdivision and, instead, approved the substance of existing subdivision 3 in substantially the following form:

A witness false in one part of his or her testimony is to be distrusted in others.

Subdivision 4. The Commission disapproved the proposed instruction to be substituted for this subdivision and, instead, approved the substance of existing subdivision 4 in substantially the following form:

The testimony of an accomplice ought to be viewed with distrust.
Evidence of an oral admission of a party, other than his own testimony, ought to be viewed with caution.

Subdivision 5. The Commission approved the repeal of this subdivision and the substitution of an instruction recommended by the consultant in substantially the following form:

The judge shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden is to prove by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt.

The staff was directed to make a similar conforming change to this section in the Commission's tentative recommendation relating to burden of producing evidence, burden of proof, and presumptions.

Subdivisions 6 and 7. The Commission approved the inclusion of these subdivisions in the Evidence Code in substantially the same form as they now appear in this section, but indicating in the Comment to this section that, while the language used is not entirely satisfactory, the case law adequately spells out its meaning. The Commission also approved the addition of a new sentence to this section, leaving to the staff's discretion whether it should be stated as a separate paragraph in this section or as a separate subdivision. As approved, the entire section, including the new sentence which is subject to revision, reads substantially as follows:

Evidence is to be appraised not only by its own intrinsic weight, but also according to the evidence which it is in the

power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust.

In determining what inferences to draw from the evidence or facts in the case against a party, you may consider, among other things, the party's failure to explain or to deny such evidence or facts in the case against him by his testimony or by his wilful suppression of evidence relating thereto, if such be the case.

Section 2079

The Commission approved the repeal of this section.

Section 2042

The Commission approved the inclusion of a revised version of Section 2042 in the Evidence Code, to read substantially as follows:

Ordinarily, the order of proof in civil actions should be as provided in Section 607 of the Code of Civil Procedure and in criminal actions as provided in Penal Code Sections 1093 and 1094. However, the judge in his discretion shall regulate the order of proof.

Section 2043

The Commission approved the inclusion of a revised version of Section 2043 in the Evidence Code, to read substantially as follows:

(a) Subject to subdivisions (b) and (c), if either party requests it, the judge may exclude from the courtroom any witness of an adverse party not at the time under examination so that such witness will not hear the testimony of other witnesses.

(b) A party to the action may not be excluded under this section.

(c) If a person other than a natural person is a party to the action, one of its officers or employees, to be designated by its attorney, is entitled to be present.

Section 2044

The Commission approved the repeal of the last sentence of Section 2044 and disapproved the inclusion of the substance of this sentence in the Evidence Code as subdivision (b) of Section 352. It was noted that this sentence is confusing and misleading because it does not mean what it says and would create a standard for the exclusion of evidence that is inconsistent with the broader power expressed in subdivision (a) of Section 352. Commissioner Cobey voted against the repeal and exclusion of this sentence in the Evidence Code.

The Commission approved the substance of the existing law stated in the remainder of Section 2044, together with a specific reference to Section 352, in substantially the following form:

The judge shall exercise reasonable control over the mode of interrogation so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be; but, subject to this section and to Section 352, the parties may put such pertinent and legal questions as they see fit.

Section 2045

The Commission approved restating the first sentence of this section as a separate section in the Evidence Code, defining "direct examination" and "cross-examination" in the same form as set out in the existing law, subject to the staff's revision of these definitions in light of the Commission's action with respect to the scope of cross-examination. As tentatively approved, subject to conforming revision, the section reads as follows:

The examination of a witness by the party producing him is denominated the direct examination. The examination of the same witness upon the same matter by an adverse party is denominated the cross-examination.

It was recognized that these definitions will be adjusted in light of the action taken with respect to Sections 2048 and 2055.

The Commission approved restating the second sentence of Section 2045 as a separate section in the Evidence Code, to read substantially as follows:

Unless the judge otherwise directs, the direct examination of the witness must be completed before the cross-examination begins.

Section 2046

The Commission approved the definition of "leading question" in substantially the same form as set out on page 3 of the memorandum, directing the staff to revise the second sentence thereof to clarify its meaning.

Section 2047

The Commission deferred consideration of this section until it considers what rule should apply in a case where the witness has refreshed his memory with a writing that he cannot produce at the trial.

Section 2048

The Commission agreed to continue the existing law with respect to the permissible scope of cross-examination in criminal cases. However, in civil cases, the Commission approved the "English rule," which permits cross-examination of a witness on any matter relevant to the case, thereby

permitting "wide open" cross-examination of any witness in a civil case. The staff was directed to draft language to accomplish this purpose, and to make conforming changes in the definition of "cross-examination." Commissioner Stanton voted against this extension of the scope of cross-examination.

Section 2049

The Commission reaffirmed its previous decision to repeal this section.

Section 2050

The Commission approved the substance of this section as set out on page 5 of the memorandum, tentatively agreeing to substitute "re-examined" for "cross-examined" subject to the staff's research as to the exact meaning of this section. It was the consensus of opinion that the section is intended merely to indicate that a witness who has been discharged cannot be recalled by the party who called him initially, nor can he be recalled for cross-examination by an adverse party, without leave of the court; but this rule is without prejudice to an adverse party's right to cross-examine the witness or to call the witness as his own witness.

Section 2051

The Commission reaffirmed its previous decision to repeal this section.

Section 2052

The Commission reaffirmed its previous decision to repeal this section.

Section 2053

The Commission reaffirmed its previous decision to repeal this section.

Section 2054

The Commission approved its previous revision of this section as set out in its recommendation on witnesses [p. 723] but agreed to clarify that revision by amending it to read substantially as follows:

Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question may be put to the witness concerning the writing that has been shown to the witness until the opposite party has been given an opportunity to inspect the writing.

The Commission agreed to make no special provision regarding writings that already have been admitted in evidence; these are to be handled the same as any other writing.

Section 2055

The Commission approved the inclusion of the substance of this section in the Evidence Code. The Commission approved the first paragraph of this section in substantially the following form:

A party to the record of any civil action, or a person for whose immediate benefit such action is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or any public employee of a public entity when such public entity is a party to the action, may be examined by an adverse party as if under cross-examination at any time during the presentation of evidence by the party calling the witness. The party calling such adverse witness is not bound by his testimony, and the testimony by such witness may be rebutted by the party calling him for such examination by other evidence.

The staff was directed to determine what effect, if any, would result from the deletion of the phrase, "subject to the rules applicable to the examination of the other witnesses," which deletion was approved by the Commission.

The Commission directed the staff to redraft the last paragraph of this section to state the principle that any party other than the party with whom the witness is identified may examine a witness called under Section 2055 as if under cross-examination and that the party with whom the witness is identified is the only party that is limited to examining the witness as if under direct examination. The Commission also approved the principle that parties represented by the same counsel should be deemed to be a single party for the purposes of this section.

In connection with the discussion of this section, the Commission suggested a broad definition of cross-examination in substantially the following form:

Cross-examination is the examination of a witness by a party ~~other~~ than the party that produced the witness, or the examination of a witness called by a party under Section 2055.

Section 2056

The Commission approved the inclusion of this section in the Evidence Code in substantially the same form as the existing law, to read as follows:

A party examining a witness is entitled to answers responsive to his questions, and answers which are not responsive shall be stricken on motion of any party.