

<u>Time</u>	<u>Place</u>
August 13 - 7:00 p.m. - 10:00 p.m.	State Bar Building
August 14 - 9:00 a.m. - 5:00 p.m.	1230 West Third Street
August 15 - 9:00 a.m. - 4:30 p.m.	Los Angeles

FINAL AGENDA.

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

August 13-15, 1964

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
 - f. Judicial Notice
 - g. Expert and Other Opinion Testimony
 - h. Burden of Producing Evidence, Burden of Proof, and Presumptions (to be sent)
 - i. General Provisions
- (3) New Evidence Code (Material contained in a loose-leaf binder) (you have this)
- (4) Comments on Evidence Code (Material contained in loose-leaf binder) (you have this)
- (5) Professor Degnan's Research Study (Contained in a soft-cover binder) (Parts I-VIII) (you have this)

AGENDA ITEMS

1. Approval of Minutes for July 1964 Meeting (enclosed)
2. Administrative Matters

Approval of portions of bill for printing

Note: All of the material hereunder listed must be approved for printing at the August meeting.

Division 10 (Hearsay Evidence)

Statute (in loose-leaf binder) (you have this)
Comments (in loose-leaf binder) (you have this)
Memorandum 64-49 (sent 7/14/64)
First Supplement to Memorandum 64-49 (enclosed)

Division 11 (Writings)

Statute (in loose-leaf binder) (you have this)
Comments (in loose-leaf binder) (you have this)
Memorandum 64-50 (sent 7/15/64)

Division 6 (Witnesses)

Revised Statute (attached to Memorandum 64-54) (to be sent)
Revised Comments (attached to Memorandum 64-54) (to be sent)
Memorandum 64-54 (to be sent)
Research Study Relating to CCP 2047

Division 7 (Opinion Testimony and Scientific Evidence)

Statute (in loose-leaf binder) (you have this)
Comments (in loose-leaf binder) (you have this)
Memorandum 64-46 (sent 7/17/64)
First Supplement to Memorandum 64-46 (to be sent)

Division 3 (General Provisions)

Statute (in loose-leaf binder) (you have this)
Comments (in loose-leaf binder) (you have this)
Memorandum 64-43 (sent 7/16/64)
First Supplement to Memorandum 64-43 (to be sent)

Division 4 (Judicial Notice)

Revised Statute (attached to Memorandum 64-55) (to be sent)
Memorandum 64-55 (to be sent)

for call

MINUTES OF MEETING

of

AUGUST 13, 14, AND 15, 1964

Los Angeles

A regular meeting of the California Law Revision Commission was held in Los Angeles on August 13, 14, and 15, 1964.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman
Hon. Alfred H. Song
Sho Sato
Herman F. Selvin
Thomas E. Stanton, Jr. (August 14 and 15)

Absent: Hon. James A. Cobey
Joseph A. Ball
James R. Edwards
Angus C. Morrison, ex officio

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

Robert Carlson -- Department of Public Works (August 14)
Norval Fairman -- Department of Public Works (August 14)
Albert W. Harris -- Office of Attorney General (August 14)
Warren P. Marsden -- Judicial Council (August 13 and 14)
Joseph Powers -- Association of District Attorneys
(August 13, 14, and 15)
Spencer Worth -- Department of Public Works (August 14)

Minutes of July 1964 Meeting. The Minutes of the July 1964 meeting were approved as submitted.

Future meetings. Future meetings are scheduled as follows;

September 10 (evening), 11 and 12 --- San Francisco
October 15 (evening), 16 and 17 --- Los Angeles
November 19-21 --- Berkeley (if possible)
December 10-12 --- Los Angeles
(possibly Palm Springs)

DIVISION 3. GENERAL PROVISIONS

In connection with its consideration of Section 458, the Commission determined that Section 311 should be revised so that it applies to the reviewing court as well as to the trial court. Section 311 was revised to read in substance as follows:

311. (a) Determination of the law of a foreign country or a governmental subdivision of a foreign country is a question of law.

(b) If such law is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of this State and the United States; or

(2) Dismiss the action without prejudice or, in the case of the reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

DIVISION 4. JUDICIAL NOTICE

The Commission considered: (1) Memorandum 64-55 and (2) Division 4 (Judicial Notice) of the proposed Evidence Code as drafted for the September 1964 Meeting.

The following actions were taken:

Section 450.

No change.

Section 451.

"English common law." The Commission considered a suggestion of the Committee of the Conference of California Judges that a general reference to "the common law" be added to subdivision (a). "The Committee believes that the common law as it exists in England and in this country should be judicially noticed and should be included within [Section 451(a)]."

The Commission did not adopt this suggestion.

The Commission intended to use the term "decisional law" to refer to the nonstatutory or common law. The URE refers to "the common law . . . in force in every state, territory, and jurisdiction of the United States." The New Jersey report substitutes "decisional," and the Commission accepted the New Jersey terminology as an improvement. Apparently, the Committee of the Conference of California Judges wishes to go further than the URE and extend mandatory judicial notice to the decisional or common law of England.

The only time when this extension would be significant would be when a decision in a particular case required application of the law of England. If it is necessary to consider the law of England as of some authoritative value in determining what the law of California is, the Commission believes that the power of the judge to do so is covered in the requirement that the judge notice the law of California. This is more fully explained in the comment relating to "legislative facts." But when it is necessary to apply the law of England to decide a particular case, the Commission believes that English decisional law should be treated the same as English statutory law.

Regulations. The Committee of the Conference of California Judges recommended that the state and federal regulations listed in Section 451 should be made the subject of discretionary judicial notice (unless requested) under Section 452 instead of mandatory judicial notice under Section 451. The Commission did not adopt this suggestion.

The Commission noted that notice of the statutes mentioned in subdivision (c) is required by the statutes referred to. Government Code Section 11383 provides, "the courts shall take judicial notice of" Government Code Sections 11384 and 18576 contain similar language. 44 U.S.C. § 307 provides that the "contents of the Federal Register shall be judicially noticed." There is some uncertainty whether this mandatory language in Section 307 applies to state courts, but there is some respectable opinion that it does. See Comment to this section on pages 401 and 402. The Commission does not recommend any

change in the Government Code sections, and the Commission is powerless to do anything about the section in the United States Code. Accordingly the Commission determined that the reference to these sections should be retained in Section 451.

"Rules of court." The Committee of the Conference of California Judges recommended that the rules of court listed in Section 451 should be made the subject of discretionary judicial notice (unless requested) under Section 452 instead of mandatory judicial notice under Section 451. In response to this suggestion, the Commission determined to limit the rules of court listed in Section 451 to the rules promulgated by the California Judicial Council and the rules promulgated by the United States Supreme Court.

Section 452.

Various changes in language suggested by the Committee of the Conference of California Judges were considered unnecessary in view of the redrafting of the language contained in the tentative recommendation.

Subdivision (b). Subdivision (b) was revised to read in substance:

(b) Regulations and legislative enactments of (1) governmental agencies and public employees of the United States and (2) public entities and public employees of any state of the United States.

The Comment to subdivision (b) should be revised to make the distinction between regulations and legislative enactments clear.

Subdivision (c). This subdivision was revised to read in substance:

(c) Records of any court of record of the United States or of any state of the United States.

Subdivision (d). This subdivision was revised to read in substance:

(d) Rules of court of any court of record of the United States or of any state of the United States.

Section 453.

Subdivision (c) was deleted and in subdivision (a), after "meet the request", the following was added "; and". This revision was made at the suggestion of the Committee of the Conference of California Judges. Subdivision (c) was deleted because it was unnecessary and its presence might have created some difficulty.

The Commission also considered a suggestion from the Subcommittee of the Judicial Council that Section 453 be deleted as unnecessary because it merely states the practice a good judge would follow. In connection with this suggestion, the Commission considered the suggestion of the Committee of the Conference of California Judges that the time and nature of the notice required be stated more specifically. The Commission also considered the New Jersey version of this requirement. The Commission noted that subdivision (a) is a middle position between these various views and determined to retain the subdivision. It was also noted that a notice given at the pretrial conference (required by suggestion of Committee of Conference of California Judges) might not be timely in the case of an issue of foreign law.

This section should have an additional provision to state in substance:

If the judge denies the request to take judicial notice of the matter, he shall at the earliest practicable time advise the parties and indicate for the record that he has denied the request.

This provision was added at the suggestion of the subcommittee of the Judicial Council.

Sections 454 and 455.

The suggestion of the Committee of the Conference of California Judges that Sections 454 and 455(b) be combined in one section and revised was considered. The Commission concluded that the Committee's suggestion would unduly complicate the procedure for taking judicial notice and unduly limit the cases where judicial notice can be taken.

Section 458.

The suggestion of the Committee of the Conference of California Judges that subdivisions (b) through (e) be deleted and subdivision (a) be revised was considered. It was concluded that the statute is clearer if subdivisions (b) through (e) are retained. Moreover, the appellate court should have an obligation to take judicial notice in appropriate cases.

Subdivision (b). This subdivision was revised to read in substance:

(b) The reviewing court shall judicially notice (1) each matter properly judicially noticed by the judge and (2) each matter that the judge was required to judicially notice under Section 451 or 453 but failed to notice. The reviewing court may judicially notice any matter specified in Section 452. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

This revision adopts the substance of a suggestion of the Subcommittee of the Judicial Council. In response to another suggestion of the Subcommittee, the words "and has the same power as the judge under Section 311" were deleted and Section 311 was revised to apply to appellate courts as well as trial courts. See Minutes on Division 3 (General Provisions).

Subdivision (e). In response to a suggestion of the Subcommittee of the Judicial Council, the words "such information and its source shall be made a part of the record in the action, and" were deleted.

DIVISION 6. WITNESSES

The Commission considered Memorandum 64-54 together with the text of Division 6 (Witnesses) of the proposed Evidence Code and the Comments thereto. The following actions were taken in regard to specific sections (and, to the extent that specific action was not taken in regard to any section, the staff was asked to make such changes as it believed were necessary and that the Commission probably would make):

Sections 703 and 704.

The Commission directed the staff to revise these sections to eliminate the statement of a specific rule regarding the procedure to be followed in criminal cases when the judge finds that the testimony would be of importance.

Sections 722 and 723.

In connection with its consideration of Division 7 (Opinion Testimony and Scientific Evidence), the Commission agreed to revise subdivision (b) of Section 722 to read:

If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion.

The Commission also agreed to expand the "unless" clause to include any of the named publications that has been admitted in evidence, without regard to consideration or reliance by the expert.

The Commission also approved the deletion of specific language in

subdivision (a) of Section 723 as to the relevance of a court appointment of an expert, revising this subdivision to read:

(a) The fact of the appointment of an expert witness by the judge may be revealed to the trier of fact.

Section 771.

At the request of Commissioner Keatinge, the Chairman ruled that this section had been previously approved by the Commission. There being only four members present, the Commission failed to agree on any specific change regarding the scope of coverage of this section.

Section 776.

The Commission agreed that this section should be revised to state that (1) a party examined under this section may be cross-examined by all other parties to the action, but his counsel and any party whose interest is not adverse to his own may cross-examine such party only as if under direct examination; (2) a witness other than a party may be cross-examined by all parties to the action.

The Commission approved the addition of the third paragraph to this section, regarding the construction of the section when several parties are represented by the same counsel.

Section 788.

Paragraphs (1) and (2) of subdivision (a) were revised to read:

- (1) An essential element of the crime is false statement or the intention to deceive or defraud; and
- (2) The witness has admitted his conviction for the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.

The section was approved as revised.

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

The Commission considered Memorandum 64-46 and the First Supplement thereto, together with the text of Division 7 (Opinion Testimony and Scientific Evidence) of the proposed Evidence Code and the Comments thereto. The following actions were taken:

Section 800

Subdivision (b) of this section was revised to eliminate the phrase "or to the determination of any disputed fact that is of consequence to the determination of the action." As revised, this subdivision was approved in the following form:

- (b) Helpful to a clear understanding of his testimony.

Section 801

Subdivision (a) of this section was revised to restate precisely the test stated in the leading California case, People v. Cole, 47 Cal.2d 99, 301 P.2d 854 (1956). As revised, this subdivision was approved in the following form:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

Section 802

The staff was directed to revise subdivision (a) of this section to reflect the principle that a witness testifying in the form of an opinion may not state on direct examination any reason or matter in support of his opinion that a rule of law precludes from being used as a basis for the opinion. Exact language was not agreed upon.

The Commission approved the elimination of subdivision (b) from this section.

Section 803

The Commission approved a suggestion to revise this section to require the exclusion of testimony based in whole or in significant part on improper matter upon objection being made.

Section 804

Subdivision (c) of this section was revised for consistency to read:

(c) An expert opinion otherwise admissible is not inadmissible because it is based on the opinion or statement of a person who is unavailable for cross-examination pursuant to this section.

Sections 805 and 830

These sections were approved as submitted.

Section 870

This section was revised by adding a new subdivision to state that a person may express his opinion as to the sanity of another when the witness is qualified under Section 800 (nonexpert) or Section 801 (expert) to testify in the form of an opinion. The modifying reference to "mental" preceding the word "sanity" was deleted throughout the section as being unnecessary.

Sections 890-896

These sections were approved as submitted.

DIVISION 10. HEARSAY EVIDENCE

The Commission considered Memorandum 64-49, the first Supplement thereto, and the drafts of the proposed Evidence Code Division 10 and of the Comments to that division. The following actions were taken:

Section 1200.

The revision of this section and the cross-reference to it in Section 155 were approved.

Section 1204, Section 1220, Section 1221.

Section 1220, the confessions rule, was modified to refer to any hearsay statement that would be inadmissible because of constitutional limitations, and its substance was then substituted for Section 1204. Section 1220 was then deleted, and the words "in a civil action" appearing in Section 1221, the admissions rule, were changed to "in an action".

As revised, Section 1204 reads in substance:

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the Constitution of this State.

Section 1205.

Section 1205, expressing the principle of URE Rule 64, was disapproved.

Section 1222.

The words "of it" were deleted following the word "adoption".

Section 1224.

The words "within the scope of his express or implied authority to act" were removed from subdivision (a). The word "also" was deleted from subdivision (b). As modified the section was approved.

Sections 1226-1227.

These sections were approved in principle. The staff was directed to re-draft them using language similar to that used in the explanatory material in the memorandum. The versions in the draft statute do not limit admissibility to the situation where the evidence is offered against the person whose right or liability is subject to being affected by the act of the declarant.

Subdivision (b) of Section 1227 was reworded in substance to read:

(b) The statement was made during the time the party against whom it is offered now claims that the declarant was the holder of such right or title.

Section 1228 was approved.

Sections 1235 and 1236.

Subdivision (a) was deleted from both sections. The cross-reference in Section 1235 was changed to Section 770, and the cross-reference in Section 1236 was changed to Section 791. As modified, the sections were approved.

Subdivision (a) was deleted in order to make the hearsay exceptions for prior inconsistent and prior consistent statements of witnesses coextensive with the right to introduce such statements. Without the modification, the judge might still be required in some instances to instruct the jury to

consider such statements on the question of credibility only.

A motion to delete Sections 1235 and 1236 and thus restore the existing law was not approved.

The staff was directed to prepare a memorandum on the effect of these sections as revised and indicating what alternatives are available.

Section 1237.

The opening paragraph was modified to read:

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately and is contained in a writing which:

The Commission discussed several proposals to modify subdivision (c) to prevent the memorandum from going to the jury unless introduced by the adverse party, but the subdivision was retained without change.

Rule in People v. Gould.

The Commission discussed a proposal by the Attorney General that the rule in People v. Gould be codified. That case held that a prior identification by a trial witness is admissible to prove the matter stated. A motion to approve a limited form of the rule--which would admit in a criminal case evidence of a prior identification only if the trial witness verifies that a true prior identification was made--was not approved.

It was pointed out that Section 1200 as amended at the last meeting--permitting hearsay exceptions to be created by court decision--retains, in effect, the rule in the Gould case; for that rule is a hearsay exception created

by court decision. A motion to delete the reference to "rule of law" in Section 1200 was not approved.

Section 1240.

Subdivision (a) was revised to read:

(a) Purports to narrate, describe, or explain an act, condition or event perceived by the declarant; and

Section 1241.

The staff was directed to redraft Section 1241 in tabular form to parallel Section 1240.

Section 1242.

The staff was directed to revise Section 1242 to limit the admissibility of dying declarations to those respecting the cause and circumstances of the death of the declarant.

The staff was directed to substitute the requirement that the statement be made on the personal knowledge of the declarant for the requirement that "the statement would be admissible if made by the declarant at the hearing."

Section 1252.

Section 1252 was deleted as undesirable if the declarant is available to testify concerning his symptoms and unnecessary in the light of Section 1251 if the declarant is unavailable as a witness.

Section 1253.

Section 1253 was revised to read:

Evidence of a statement is inadmissible under this article unless the statement was made under circumstances such as to indicate its trustworthiness.

This revision was made to permit the judge to consider evidence indicating trustworthiness as well as evidence indicating a motive to deceive in determining whether to admit evidence under the state of mind exception.

A similar revision is to be made wherever the "motive or reason to deviate from the truth" language appears in the hearsay division.

Section 1260.

The staff was directed to add a sentence to the comment explaining the reason for the exception.

Section 1261.

The staff was directed to correct the comment which states that the statements covered are admissible if they would have been admissible at the hearing, whereas the statute merely requires the statements to be upon the personal knowledge of the declarant.

Sections 1271 and 1280.

The staff was directed to add a provision to both the business records exception and the official records exception providing that neither exception makes admissible in a criminal action a report of a law enforcement officer respecting a specific investigation, offense, or arrest. A motion to limit the

admissibility of such reports in civil actions to those reports, or portions thereof, based on the reporting officer's personal knowledge was defeated. Those opposed to the motion indicated that such a provision would give rise to a negative implication that business records based on hearsay information are admissible.

Section 1272.

Subdivision (b) was revised to read:

The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Section 1280.

The words "of any state" were deleted after "public entity".

Section 1281.

The word "law" was substituted for the word "statute" in each place where it appears in the section.

Section 1290.

In subdivision (b), the words "a governmental agency" were deleted and the words "an agency of the United States or a public entity" were substituted.

In subdivision (d) the words "correct" and "made by a certified shorthand reporter" were deleted.

Section 1302.

The staff was directed to revise the language of the section to conform it

to the style of Sections 1300 and 1301.

Article 11. (Sections 1310-1316).

The words "racial ancestry" were changed to "race, ancestry" throughout the article on family history.

Sections 1312-1313.

The phrase "relationship by blood or marriage" was inserted in both sections.

Reputation exceptions.

The clause, "and the evidence is offered to prove the truth of the matter reputed", and similar expressions were deleted from all of the reputation exceptions.

Sections 1321-1322.

The words "if any" were deleted.

Approval for printing.

With the changes noted above, the hearsay division was approved for printing.

DIVISION 11. WRITINGS

The Commission considered Memorandum 64-50 and the July draft of Division 11 of the Evidence Code. The following actions were taken:

Organization.

The overall organization of Division 11 was approved.

Section 1400.

"(a)" was inserted before "the introduction" and "(b)" was inserted before "the establishment".

Section 1402.

The end of the first sentence was revised to read:

must account for the alteration or appearance thereof.

As revised, the section was approved.

Article 2 (Sections 1410-1422).

The principle of listing several means of authenticating documents was approved. The article was approved except as specifically noted below.

Sections 1412-1413.

Sections 1412 and 1413 were combined into one section by adding at the end of Section 1412 the phrase "including a subscribing witness".

Section 1414.

The word "genuineness" was substituted for "execution".

Section 1416.

The phrase "if he has knowledge" was changed to "if the judge finds that he has knowledge".

Section 1417.

"Handwriting" was changed to "writing." The staff was directed to modify the section to make clear that the judge must make each of the findings enumerated.

Section 1418.

Section 1418 was revised to read in substance as follows:

Where a writing sought to be introduced is more than thirty years old, the comparison under Section 1417 may be made with a writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine.

Section 1419.

Subdivision (b) was deleted as unnecessarily duplicative of Section 1422.

Section 1420.

Section 1420 was revised to read:

A writing is sufficiently authenticated to be received in evidence if there is sufficient evidence to sustain a finding that the writing was received in response to communications sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

Section 1421.

The word "writer" was changed to "author".

Section 1422.

The staff was directed to place the section at the beginning of the article and to delete the word "other".

Section 1451.

The words "its use" were added before the word "authorized" in subdivision (a).

Subdivision (a)(3) was modified to read:

A nation recognized by the executive power of the United States or a department, agency, or officer thereof.

References to "sovereign" were deleted from all provisions containing such references.

Section 1500.

The staff was directed to determine whether the several subdivisions in Section 1500 might be expressed as separate sections.

Section 1501.

The staff was directed to revise subdivision (d) to eliminate from its provisions writings described by Section 1500(g).

Section 1511.

The second sentence, requiring the affixing of a seal to certify a writing, was deleted. The words "attested or" were inserted immediately before "certified" in the first sentence.

Section 1512.

Subdivision (b) was revised to read:

The presumption established by this section is a presumption affecting the burden of producing evidence.

Section 1552.

Section 1552 was not approved.

Section 1562.

The staff was directed to revise the language relating to the presumption to use language similar to that used elsewhere in the code.

Code of Civil Procedure § 1947.

A proposal to repeal the section was considered but not acted upon.

Code of Civil Procedure § 1950.

The section was left unchanged in the Code of Civil Procedure.

Approval for printing.

Division 11, as revised, was approved for printing.