

<u>Time</u>	<u>Place</u>
Sept. 10 - 7:00 p.m. - 10:00 p.m.	State Bar Building
Sept. 11 - 9:00 a.m. - 5:00 p.m.	601 McAllister
Sept. 12 - 9:00 a.m. - 4:30 p.m.	San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

September 10-12, 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) Galley proof of preprinted bill (most sent 9/2/64; remainder enclosed)

AGENDA ITEMS

1. Approval of Minutes for August 1964 Meeting (sent 8/27/64)
2. Administrative Matters

Memorandum 64-56 (Budget for 1965-66 Fiscal Year) (sent 8/20/64)

3. Approval of preprinted bill for printing

Division 1 (Preliminary Provisions and Construction)  
Memorandum 64-57 (sent 9/4/64)

Division 2 (Words and Phrases Defined)  
Memorandum 64-58 (sent 9/4/64)

Division 3 (General Provisions)  
Memorandum 64-59 (sent 8/20/64)

Division 4 (Judicial Notice)  
Memorandum 64-60 (sent 9/4/64)

Division 5 (Burden of Producing Evidence, Burden of Proof, and Presumptions)  
Memorandum 64-61 (sent 9/4/64)  
First Supplement to Memorandum 64-61 (sent 9/4/64)  
Second Supplement to Memorandum 64-61 (enclosed)  
Third Supplement to Memorandum 64-61 (to be handed out at meeting discussing comments of Southern Section of State Bar Committee which were sent 9/4/64)

Division 6 (Witnesses)  
Memorandum 64-62 (sent 9/4/64)

Division 7 (Opinion Testimony and Scientific Evidence)  
Memorandum 64-63 (sent 9/4/64)

Division 8 (Privileges)  
Memorandum 64-64 (sent 8/27/64)  
First Supplement to Memorandum 64-64 (enclosed)

Division 9 (Evidence Affected or Excluded by Extrinsic Policies)  
Memorandum 64-65 (sent 9/4/64)

Division 10 (Hearsay Evidence)  
Memorandum 64-66 (sent 9/4/64)

Division 11 (Writings)  
Memorandum 64-67 (sent 9/2/64)

Amendments, Additions and Repeals  
Memorandum 64-68 (sent 9/2/64)

MINUTES OF MEETING

of

SEPTEMBER 10, 11, AND 12, 1964

San Francisco

A regular meeting of the California Law Revision Commission was held in San Francisco on September 10, 11, and 12, 1964.

Present: John R. McDonough, Jr., Chairman  
Richard H. Keatinge, Vice Chairman  
James R. Edwards  
Sho Sato  
Herman F. Selvin  
Thomas E. Stanton, Jr.

Absent: Hon. James A. Cobey  
Hon. Alfred H. Song  
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. The following additional persons were present: Warren P. Marsden, representing the Judicial Council; Joseph Powers, representing the Association of District Attorneys; and Stephen Birdlebough, representing the Judicial Council (September 12 only).

ADMINISTRATIVE MATTERS

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

Revised Budget for 1964-65 Fiscal Year and Proposed Budget for 1965-66 Fiscal Year. The Commission considered Memorandum 64-<sup>56</sup>65. The attachment to that memorandum constituted a suggested Budget for the 1964-65 Fiscal Year and a Proposed Budget for the 1965-66 Fiscal Year. The attachment was approved as submitted.

Future meetings. Future meetings are scheduled as follows:

October 15 (evening), 16, and 17 -- Los Angeles  
November 19 (evening), 20, and 21 -- Berkeley  
December 10-12 -- Los Angeles

STUDY NO. 34(1) -- UNIFORM RULES OF EVIDENCE

GENERAL DECISIONS

Review by Legislative Counsel. The staff suggested that the pre-printed bill be reviewed by the office of the Legislative Counsel. After the matter was discussed, the Commission suggested that Senator Cobey be requested to request the Legislative Counsel to give him an opinion on the adequacy of the title of the bill and on whether everything within the bill is embraced within the title. In addition, the Legislative Counsel should be requested to check the bill to the extent that his time permits.

Substitution of "court" for "judge." The Commission determined that the word "court" should be substituted for "judge" in the various sections of the Evidence Code unless a particular section requires the use of the word "judge" instead of "court." This substitution is not to be made in preparing the preprinted bill for the printer unless it can conveniently be made in portions of the bill that will be reset anyway. The change will be made before the bill is approved for printing in the Commission's report containing the proposed Evidence Code.

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DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION  
(Sections 1-12)

The Commission considered Memorandum 64-57. The following actions were taken:

Section 2. The comma after the word "construed" in the second sentence was deleted.

Section 4. The word "the" between the words "or" and "context" was deleted.

DIVISION 2. WORDS AND PHRASES DEFINED  
(Sections 100-250)

The Commission considered Memorandum 64-58. The following changes were made in Division 2 of the proposed Evidence Code:

Section 110. This section was revised to read:

"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

Section 115. The second paragraph of this section was revised to read:

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

The third paragraph of this section was deleted entirely.

Section 120. This section was revised to read in substance as follows:

"Civil action" includes special proceedings of a civil nature and all actions and proceedings other than a criminal action.

Section 140. This section was revised to read in substance as follows:

"Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Section 145. This section, defining "finding of fact," was deleted entirely.

Section 150. This section was renumbered Section 145, and was revised to read:

"The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.

Section 155. This section was renumbered Section 150.

Section 160. This section, defining "judge," was deleted because its substance is stated in Section 300 and because the Commission replaced the statutory reference to judge with the word "court." Section 215 was

renumbered Section 160 and revised to read:

"Law" includes constitutional, statutory, and decisional law.

Section 210. This section was revised to read:

"Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact (including the credibility of a witness or hearsay declarant) that is of consequence to the determination of the action.

Section 215. This section was renumbered Section 160 and revised as indicated supra.

Section 235. This section was revised to read:

"Trier of fact" means (a) the jury and (b) the court when it is trying an issue of fact other than one relating to the admissibility of evidence.

Section 240. The introductory clause in subdivision (a) was revised to delete the reference to subdivision (c), which was deleted in its entirety. The words "or precluded" were added to paragraph (1) of subdivision (a) following the word "exempted," and "preclusion" was added to the listed conditions in subdivision (b). Paragraph (6) of subdivision (a) was deleted, and paragraph (4) was revised to read:

(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

DIVISION 3. GENERAL PROVISIONS  
(Sections 300-445)

The Commission considered Memorandum 64-59. The following changes were made in Division 3 of the proposed Evidence Code:

Section 300. This section was revised to read in substance as follows:

Except as otherwise provided by statute, this code applies in every action before the Supreme Court, a district court of appeal, Superior court, municipal court, or justice court, including proceedings conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

Section 312. This section was revised to read in substance as follows:

Except as otherwise provided by law, where the trial is by jury:  
(a) All questions of fact are to be decided by the jury.  
(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

Section 320. This section was revised to read:

Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

Section 321. This section was deleted, and the staff was requested to include its substance in the Comment to Section 320.

Section 352. This section was revised to read:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

[Section 353.] A new section was added to read:

If at the hearing there is no bona fide dispute between the parties as to a fact, such fact may be proved by any relevant evidence, and exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

Section 353. This section was renumbered Section 354.

Section 354. This section was renumbered Section 355.

DIVISION 4. JUDICIAL NOTICE  
(Sections 450-459)

The Commission considered Memorandum 64-60. The following changes were made in Division 4 of the proposed Evidence Code:

Section 453. Subdivision (b) was deleted from Section 453 and restated as separate Section 457. Subdivision (a) was revised to accommodate this change.

Section 457. This section was renumbered Section 458.

Section 458. This section was renumbered Section 459.

DIVISION 5. BURDEN OF PRODUCING EVIDENCE,  
BURDEN OF PROOF, AND PRESUMPTIONS  
(Sections 500-667)

The Commission considered Memorandum 64-61 and the First, Second, and Third Supplements thereto. The following changes were made in Division 5 of the proposed Evidence Code:

Section 500. This section was revised to read:

The burden of producing evidence on a specific issue is on the party to whom it is assigned by law. In the absence of such assignment, the party who has the burden of producing evidence shall be determined by the court, as the ends of justice may require upon an issue of that nature, taking into account:

- (a) The most desirable result in terms of public policy in the absence of evidence;
- (b) The peculiar knowledge that litigants are likely to have concerning such an issue;
- (c) The probability of the existence or nonexistence of the fact in issue; and
- (d) The relative ease of proving the existence of the fact in issue as compared with proving the nonexistence thereof.

Section 510. This section was revised to read:

The burden of proof is on the party to whom it is assigned by law. In the absence of such assignment, the party who has the burden of proof shall be determined by the court, as the ends of justice may require upon an issue of that nature, taking into account:

- (a) The most desirable result in terms of public policy in the absence of proof;
- (b) The peculiar knowledge that litigants are likely to have concerning such an issue;
- (c) The probability of the existence or nonexistence of the fact in issue; and
- (d) The relative ease of proving the existence of the fact in issue as compared with proving the nonexistence thereof.

Section 511. This section was revised to read:

Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096.

Section 600. This section was revised to read:

Subject to Section 607, a presumption is an assumption of fact that the law requires to be made when another fact or group of facts is found or otherwise established in the action. A presumption is not evidence.

Section 601. The words "in the law of this State" were deleted from the second sentence of this section.

Section 602. The word "establishes" was substituted for the word "creates" in this section.

Section 603. The words "other than" were substituted for the word "except" in this section.

Section 605. This section was revised to read in substance as follows:

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

Section 607. The words "by rule of law" were deleted from this section.

Section 608. The following sentence was added to this section after the word "applied":

An inference is a deduction that may logically and reasonably be drawn from a fact or group of facts found or otherwise established in the action.

Section 620. This section was revised to read:

The presumptions established by this article and all other presumptions declared by law to be conclusive are conclusive presumptions.

Section 623. The word "contradict" was substituted for "falsify" in the last line of this section.

Section 630. This section was revised to read:

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The presumptions established by this article and all other rebuttable presumptions established by law that meet the description in Section 603 are presumptions affecting the burden of producing evidence.

Section 643. The subdivisions in this section were renumbered (a), (b), (c), and (d). No change was made in the substance of this section.

Section 645. The word "nation" was substituted for the word "country" in this section. No other change was made in this section.

Section 660. This section was revised to read:

The presumptions established by this article and all other rebuttable presumptions established by law that meet the description in Section 605 are presumptions affecting the burden of proof.

DIVISION 6. WITNESSES  
(Sections 700-791)

The Commission considered Memorandum 64-62. The following changes were made in Division 6 of the proposed Evidence Code:

Section 702. This section was revised to read in substance as follows:

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

Section 703. Subdivision (a) of this section was revised to read:

(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

No change was made in subdivision (b).

Subdivision (c) was revised to read:

(c) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

Section 704. This section was revised to conform to the changes made in Section 703. No other substantive changes were made in this section.

Section 720. The second sentence of subdivision (a) was revised to read in substance as follows:

Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

Subdivision (b) was amended to substitute the word "shown" for the word "provided."

Section 721. This section was deleted in its entirety because it is

unnecessary; the matters dealt with are sufficiently covered in other sections.

Section 722. This section was renumbered Section 721.

Section 723. This section was renumbered Section 722.

Section 724. This section was renumbered Section 723.

Section 765. In subdivision (b), the word "relevant" was substituted for the word "pertinent."

Section 772. This section was revised to read:

Subject to the limitations of Chapter 6 (commencing with Section 780), a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each adverse party to the action in such order as the court directs.

A specific reference to the scope of cross-examination of a criminal defendant is unnecessary because the rules are substantially the same even though differently expressed.

Section 776. The staff was directed to revise this section to state explicitly that a person who was in any of the relationships specified in Code of Civil Procedure Section 2055 at the time of the act or omission giving rise to the cause of action and a person who was in any of such relationships at the time he obtained knowledge of the matter concerning which he is sought to be examined may be examined as if under cross-examination pursuant to this section. The Commission also approved a statement limiting the right of cross-examination in substantially the following form:

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the

witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified. [A witness is identified with a party if he is in any of the relationships named or he be named in this section.]

Section 780. Subdivisions (c) and (d) were revised to eliminate the words "fact or," and subdivision (i) was revised to eliminate the words "or matter."

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE  
(Sections 800-896)

The Commission considered Memorandum 64-63. The following changes were made in Division 7 of the proposed Evidence Code:

Section 800. The introductory clause in this section was revised to read:

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . .

Section 801. The introductory clause in this section was revised to read:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . .

The "unless" clause in subdivision (b) was revised to read:

unless an expert is precluded by law from using such matter as a basis for his opinion.

Section 802. This section was revised to read in substance as follows:

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion.

Section 804. No change was made in subdivision (a).

A new subdivision (b) was added to read:

Unless the party seeking to examine the person upon whose opinion or statement the expert witness has relied has the right apart from this section to cross-examine such person in the action, this section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) an agent or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

Subdivision (b) was renumbered subdivision (c).

Subdivision (c) was renumbered subdivision (d) and revised to read:

An expert opinion otherwise admissible is not ~~made~~ ~~iradmissible~~ by this section because it is based on the opinion or statement of a person who is unavailable for cross-examination pursuant to this section.

DIVISION 8. PRIVILEGES  
(Sections 900-1072)

The Commission considered Memorandum 64-64 and the First Supplement thereto. The following changes were made in Division 8 of the proposed Evidence Code:

Section 900 was revised to read in substance as follows:

Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division and do not govern the construction of any other division.

Sections 901-904. These sections were renumbered Sections 902-905, respectively, to accommodate the placement of the definition of "proceedings" as the first definition in this series.

Section 905. This section was renumbered Section 901 to list the definitions in order of importance of subject matters instead of alphabetically.

Section 916. Paragraphs (1) and (2) of subdivision (b) were revised to read in substance as follows:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

Section 917. The phrase "clergyman-penitent," was inserted in this section following the reference to the "psychotherapist-patient" privilege.

Section 984. Subdivision (b) of this section was revised to read:

A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

Section 996. The introductory portion of this section was revised

to read:

There is no privilege under this article as to an issue concerning the condition of the patient if such issue has been tendered by: . . . .

Section 1006. The last two lines of this section were revised to

read:

the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.

Section 1016. The introductory portion of this section was revised

to read:

There is no privilege under this article as to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: . . . .

Section 1026. This section was revised to read:

There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.

Section 1041. The word "identity" was substituted for the word "information" immediately preceding the "if" clause in subdivision (a) of this section and in the second line of subdivision (b) of this section.

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES  
(Sections 1100-1156)

The Commission considered Memorandum 64-65. The following changes were made in Division 9 of the proposed Evidence Code:

Section 1100. This section was revised to read:

Except as otherwise provided by statute, any otherwise admissible evidence (including testimony in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

DIVISION 10. HEARSAY EVIDENCE  
(Sections 1200-1341)

The Commission considered Memorandum 64-66. The following changes were made in Division 10 of the proposed Evidence Code:

Section 1203. An introductory clause was added to subdivision (b) of this section to read:

Unless the party seeking to examine the declarant has the right apart from this section to cross-examine the declarant in the action, . . . .

Subdivision (d) was revised to read:

A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for cross-examination pursuant to this section.

Section 1238. A new section was added to read in substance as follows:

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:

- (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
- (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
- (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

Section 1271. Subdivision (b) was deleted from this section and the remainder of the section revised to accommodate this deletion.

Section 1280. Subdivision (b) was deleted from this section and the remainder of the section revised to accommodate this deletion.

DIVISION 11. WRITINGS  
(Sections 1400-1605)

The Commission considered Memorandum 64-67. The following changes were made in Division 11 of the proposed Evidence Code:

Section 1419. A new subdivision (b) was added to this section to read:

A writing is sufficiently authenticated to be received in evidence if there is evidence sufficient to sustain a finding of its authenticity even though such evidence does not meet all of the conditions specified in subdivision (a).

Section 1561. The section reference in the last line of subdivision (b) of this section was corrected to read: "Section 1560."

AMENDMENTS AND REPEALS

The Commission considered Memorandum 64-68, and approved the recommended adjustment or repeal of the following code sections:

Business and Professions Code Section 25009.

Code of Civil Procedure Sections 1, 125, 1947, 2009,  
2066.

Government Code Section 19580.

Penal Code Section 939.6.

The Commission specifically considered and decided to make no change in Code of Civil Procedure Sections 1878, 2002-2005, 2009-2015.6, 1985-1997, 2064-2070.

All adjustments and repeals were approved by the Commission.

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APPROVAL OF PREPRINTED BILL FOR PUBLICATION

The Commission approved publishing the preprinted bill with the changes made at this meeting.