Supreme Court of California
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S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

VOLUME 5 OF 14, PAGES 993-1176 OF 3537

[FILED CONCURRENTLY WITH REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS]

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FORD MOTOR COMPANY

#34 1/8/64

Memorandum 64-4

Subject: Study No. 34(L) - Uniform Rules of Evidence (Valuation of Property)

At its November 1963 meeting, the Commission determined to reconsider the evidence in eminent domain bill. Attached are two copies of a Tentative Recommendation on this subject. Please mark your suggested changes on one copy and turn it in to the staff at the January meeting.

BACKGROUND

The evidence in eminent domain bill was originally introduced in 1961 upon recommendation of the Commission. (See attached pamphlet containing the recommendation and study of the Commission. If you were not a member of the Commission when the 1961 bill was considered, you may want to read the research study to supplement the material in the attached tentative recommendation.) The 1961 bill in an amended form passed the Legislature but was pocket vetoed by the Governor. In 1963, Senator Cobey introduced basically the same bill; it passed the Legislature, with some significant amendments, but again it was pocket vetoed by the Governor.

The Department of Public Works did not strongly object to the 1963 bill; but the office of the Attorney General advised the Governor to pocket veto the bill. We have not obtained a copy of the report made by the office of the Attorney General on the 1963 bill. However, we anticipate we will receive comments from the office of the Attorney General on the tentative recommendation on this subject. When these are considered, we will be able to determine the position of the office of the Attorney General and whether that position is sound.

The 1963 bill as introduced reflected changes approved by the Commission in the 1961 bill. Exhibit I (pink pages) is an extract of the Minutes of the August 1961 meeting of the Commission. The decisions made at this meeting were reflected in the 1963 bill (as introduced). The significant decisions made at the August 1961 meeting were:

(1) By a 4-3 vote, the Commission approved the capitalization of the reasonable net rental from hypothetical improvements as one means of determining market value. Commissioners Cobey, Edwards, Sato, and Spencer voted for permitting such capitalization. Commissioners Bradley, McDonough, and Stanton voted against the provision permitting such capitalization. [As indicated below, the 1963 bill was amended by Senator Cobey (after its introduction) to insert a compromise provision on this matter.]

(2) The Commission unanimously agreed to delete the provision in the 1961 bill that permitted an expert witness to consider offers to purchase the subject property in forming his opinion. The 1961 bill contained a provision that permitted this. The provision was added by the Senate Judiciary Committee after the 1961 bill was introduced; but the 1963 Legislature approved the bill without this provision.

(3) A provision permitting cross-examination of a witness upon whose opinion or statement a witness for an adverse party had based his opinion was approved by the Commission. No similar provision was included in the 1961 bill. The 1963 bill was approved by the Legislature with this provision included.

After the 1963 bill was introduced, the following significant changes were made:

(1) A provision was added to Section 1248.1 stating:

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on the number of comparable sales or contracts, as defined in subdivision (b) of Section 1248.2, to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases.

This provision was designed to meet the objections that the bill would add to the length of trial and that the bill, by stating that the expert could state certain facts and data, would prevent the court from exercising its discretion to prescribe reasonable limitations on such testimony. The provision states the practice presently being followed by some trial courts.

(2) A provision was added to indicate that the witness is to be granted considerable freedom in determining which property is comparable. The provision states:

Subject to subdivision (c) of Section 1248.1 [the provision set out above], in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property interest to be taken, damaged or benefited.

If the witness reasonably believes property is comparable, this provision indicates that the court should permit him to base his opinion on a sale of such property, subject, of course, to the power of the court to limit the number of comparable sales that may be stated on direct examination. The second sentence of the provision set out above was intended to make it clear that the size of the property claimed to be comparable, as compared to the size of the subject property, is a pertinent consideration in determining whether the property is comparable. Some cases listing the factors that determine whether property is comparable have not specifically included size as one of the factors.

(3) The right of a witness to base his opinion on a capitalization of income from a hypothetical improvement was restricted to cases where the party calling the witness did not believe that there were any comparable sales. The pertinent language of the 1963 bill reads:

> A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest to be taken, damaged or benefited, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization of hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

(4) The following section was added:

> 1248.5. Sections 1248.1 to 1248.4, inclusive, are intended to provide special rules of evidence applicable only to eminent domain proceedings and inverse condemnation actions, but are not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms value, damage or benefits as used in Section 1248.

This section was added to make it clear that the bill did not provide a ground for expanding the concept of just compensation to include items that previously had been held not to be compensable in an eminent domain proceeding.

(5) The words "in the open market" were added to the introductory portion of Section 1248.2, which states the test for an open market sale.

(6) A provision was added to Section 1248.1(b) to indicate that evidence of the character of the improvement proposed to be constructed by the plaintiff is not subject to impeachment or rebuttal. This states existing law. It would not be practical to permit the property owner to contest the plans for the improvement. If the improvement is not constructed in the manner proposed by the plaintiff, the property owner has an action for inverse condemnation.

(7) The bill was amended to permit sales and leases of the subject property made after the date of valuation to be considered in determining the value of the property. The bill, as introduced, restricted sales and leases to those made before the date of valuation. Where, for example, a lease is made in good faith after the date of valuation of the part remaining, such lease is certainly some evidence of the value of the part remaining.

POLICY QUESTIONS

An examination of the tentative recommendation will disclose that it follows the 1963 bill with only a few changes. The text of the 1963 bill with some, but not all, of the changes recommended by the staff is set out as Exhibit II (white pages).

The following policy matters are presented for Commission consideration:

Separate bill.

The staff suggests that the legislation relating to valuation of property be a separate bill (not included in the bill proposing the comprehensive evidence statute). Of course, the separate bill on valuation of property would be drafted so that it would fit into the comprehensive evidence statute if both are enacted.

We believe that this is a desirable course of action for two reasons: First, we would not want to prejudice the comprehensive evidence statute by including material that has twice been pocket vetoed by the Governor. Second, we believe that there is a good chance that the bill on valuation of property will be enacted on its own merits, and we would not want the bill to be prejudiced because it is included in a comprehensive evidence statute.

Bill to cover all valuations of real property.

The staff suggests that the legislation on this subject cover all valuations of real property or an interest therein, unless otherwise specifically provided by statute. We believe that the bill should not cover valuation of personal property, primarily because many of the provisions of the bill would not apply in a personal property valuation case. Exhibit II (white sheets) indicates the revisions needed to make the 1963 bill apply to all valuations of real property, or an interest therein, unless otherwise provided by statute.

Substance of bill.

The staff recommends that the substance of the legislation on this subject be as set out in the attached tentative recommendation. This tentative recommendation is in the form of a new article that would be included in the comprehensive evidence statute if that statute and the valuation of property statute were enacted. The bill would have to include provisions to take effect if the comprehensive evidence legislation is not enacted. The following matters are noted for your attention in connection with the rules set out in the tentative recommendation. Note the comments under each rule; these indicate the change in existing law, if any, that would be made by the proposed rule.

Rule 61.1. See page 3 of the tentative recommendation for text of rule and explanatory comment. This rule was not in the 1961 and 1963 bill.

Rule 61.2. See pages 4-9 of the tentative recommendation for text of rule and explanatory comment. This rule is the same in substance as the 1963 bill. Note subdivision (c) which has not been considered by the Commission. In the tentative recommendation we have added "involving opinion testimony" at the end of subdivision (c).

Rule 61.3. See pages 10-26 of tentative recommendation for text of rule and explanatory comment. This rule is the same in substance as the 1963 bill except that we have substituted "For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in subdivision (e) or determining the value of a leasehold interest" for "Where a leasehold interest is the subject of valuation" in the introductory clause of subdivision (d).

In connection with subdivision (c)(1), it should be noted that existing case law permits consideration of whether a particular use would be profitable for the purpose of determining the highest and best use of the property. Does the language "nor shall any evidence of income from hypothetical improvements be admissible for any purpose" change existing law? Should the statute be revised or should a statement be inserted in the comment to make it clear that subdivision (c)(1) does not change the existing law on highest and best use.

Rule 61.4. See pages 27-33 of the tentative recommendation for the text of rule and explanatory comment.

The introductory clause of this rule has been revised to conform to Rule 56(3). See the first portion of the comment to Rule 61.4 for language of Rule 56(3). The introductory clause in the 1963 bill read in substance: "Notwithstanding the provisions of Rule 61.3, the opinion of a witness as to the value of property is inadmissible (or, if admitted, shall be stricken on motion) if it is based wholly or in part, upon . . ." The 1963 bill would have changed existing law, for under existing law the opinion of a witness ordinarily will not be stricken unless it is based entirely upon

incompetent matters. Certainly, the fact that an appraiser considered one of the matters listed in Rule 61.4, together with numerous other competent matters, would not be sufficient to have his opinion stricken under existing law. Actually, under existing law, only the incompetent portion of his testimony will be stricken, and the remainder of his testimony will stand for such weight as the trier of fact decides to give it.

Rule 61.5. See pages 34-36 of the tentative recommendation for the text of this rule and an explanatory comment. No similar provision was contained in the 1961 or 1963 bill.

Should the following be added to this rule:

> Nothing in this article shall be construed to repeal by implication any other statute relating to the valuation of property.

We want to make it very clear that we are not changing any rules for valuation of property that are now provided by statute. The provision suggested above is the same in substance as the one included in the hearsay evidence article and the privileges article.

Rule 61.6. See page 37 of the tentative recommendation for the text of this rule and an explanatory comment. A similar provision was contained in the 1963 bill. The Commission has never considered this provision.

Amendments and Repeals. See page 38 of the tentative recommendation. Section 1845.5 also was to be repealed by the 1961 bill and the 1963 bill.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-4 EXHIBIT I

Minutes - Regular Meeting
August 18-19, 1961

Senate Bill No. 205

The Commission considered Memorandum No. 26(1961) concerning Senate Bill No. 205, the bill relating to evidence in eminent domain cases. The Commission took the following actions.

(1) Opinion of property owner. The Commission approved the amendment made to Section 1248.1 of the Code of Civil Procedure which (a) deleted the provision in the original bill that the owner of the property being condemned is "presumed to be qualified" to express opinions as to the value of the property and (b) added language to state that an opinion as to the value of the property may be expressed by the owner.

(2) Relevance. The Commission approved the revision of Section 1248.2 that inserted a requirement that the data relied upon by an appraiser be relevant to the item of value, damage or benefit concerning which the appraiser expresses his opinion.

(3) Noncompensable factors. The Commission approved Section 1248.3(f) which makes it clear that an opinion of value, damage or injury may not be based on noncompensable factors.

(4) Gross receipts leases. The Commission approved the provisions of the bill which permit an appraiser to consider a lease based on a percentage of gross receipts in determining the reasonable net rental value of the subject property (Subdivisions (c), (d) and (e) of Section 1248.2).

Under the amended bill (a) a gross receipts lease on the subject property may be considered by the appraiser in forming his opinion and (b)

in determining the reasonable rental value of the subject property where gross receipts leases are customarily used for that type of property, the appraiser may consider gross receipts leases on comparable property.

It is becoming the practice to prepare leases for commercial property on a gross receipts basis. If an appraiser is not permitted to consider gross receipts leases, his opinion will not reflect the practice in the market and as a result the owner will be deprived of evidence necessary to support his contentions as to the value of his property. Accordingly, the appraiser in these cases should not be restricted to leases that fix a flat rental fee but should be permitted to consider gross receipts leases as well.

The objection to the use of gross receipts leases is that such leases reflect to some extent the ability of the management of the tenant and are in effect profit sharing agreements. Nevertheless, the consultant pointed out that there is a trend in the law (California included) to permit an appraiser to consider gross receipts leases. In addition, appraisers who have analyzed this problem are in agreement that this evidence is necessary in order to form an accurate opinion of value and that any approach that excludes gross receipts leases would be unsatisfactory. Not only are gross receipts leases considered in valuing property in the market place but buyers and sellers in the market recognize that any good management can reach the anticipated volume of business at a particular location. Commissioner McDonough objected to the provision that limits the use of gross receipts leases to cases where rentals are customarily so fixed. He expressed the opinion that the appraiser should be permitted to consider

a gross receipts lease, whether or not gross receipts leases are customarily used for that type of property.

(5) Capitalization of hypothetical improvements. The Commission approved the provisions of the bill which permit an appraiser to consider (for the purpose of determining the value of the subject property by capitalizing its reasonable net rental value) both (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property if the land were improved by improvements that would enhance the value of the property for its highest and best use (Subdivision (e) of Section 1248.2). Commissioners Cobey, Edwards, Sato and Spencer voted for and Commissioners Bradley, McDonough and Stanton voted against the provision relating to the capitalization of hypothetical improvements.

Capitalization of the reasonable net rental value of the property (based on the assumption that the land is improved by improvements that would enhance the value of the property for its highest and best use) would be useful in any case where the land is unimproved or where existing improvements do not enhance the value of the property for its highest and best use. In these cases a capitalization of the reasonable net rental value of the land as unimproved or as improved with its uneconomical improvement would not be as useful as a capitalization study that also took into consideration the capitalization of the reasonable net rental value attributable to the land if it were improved by improvements that would enhance the value of the land for its highest and best use.

The consultant stated that this is one of the most important provisions in the bill if we are to keep up with the times. He made a statement which is summarized below:

In a number of trials in which his firm has been engaged, this approach has been used and it will be used much more. For example, it is necessary to use this approach in a case where the existing structure is old or run down and the property is a perfect location for a motel. It is frequent to find a piece of property that is underimproved or that has an obsolete improvement. In these cases, a buyer and seller in the market place consider the use to which the property can be put. The buyer will determine that he wants the property because he assumes that if he puts up a motel on the property he will have so many units and, based on managerial and other costs, his investment will yield a certain amount. Subdivision land is often sold the same way: how many units can be put on the land and what income and costs will result?

Most of the developments, at least in Southern California, use this kind of approach. Sometimes the approach is more refined, sometimes it is rather crude. But this approach does ascertain the amount that the property--not in its present condition but as improved for its highest and best use--will produce.

It is true that this approach involves the capitalization of a hypothetical improvement but this is characteristic of a rapid growing area. It is the way property is bought and sold. Admittedly, this approach would offer a jury the greatest chance for speculation. Nevertheless, it is not only a prime consideration but perhaps the prime consideration taken into account by buyers and sellers in the market. Purchasers buy property on what it will bring in--based on its highest and best use. This anticipated income is computed using a capitalization approach. Use of this approach is a necessary corollary to the valuation of property on the basis of its highest and best use.

Some trial courts in California now permit the use of this approach. There are no appellate decisions in California. Most of the appellate decisions in other states do not permit this approach to be used.

The question may be asked: why not use comparable sales rather than capitalizing hypothetical improvements? The difficulty of using the comparable sales approach is that it is difficult to find really comparable sales of commercial

property; property on one corner may be totally different from property in the same area on another corner. To find comparable sales it is necessary to go out on the periphery. Using sales that far from the subject property may make a substantial difference in the value of the property. We are not concerned with a case where there are 12 gas stations in a row and we are proposing to open the 13th. Instead, it may be the first gas station, the first motel or the first shopping center in the area.

It is not practical to limit the capitalization of hypothetical improvements approach to cases where there are no comparable sales. The difficulty is that one party will always come in with "comparable sales." For example, a sale of property across the street from the subject property will be presented as a comparable sale. But the area across the street may be one-half the area of the subject property and a motel could not be built on that property although a motel could be constructed on the subject property. Moreover, there may be one type of zoning on one half of the street and not on the other, or there may be a probability or rezoning or there may be a building existing on "comparable property" that may increase or decrease the value of the land. In the case of residential sales, comparable sales are something that can be discussed intelligently. But in the case of commerical property it is difficult and unrealistic to base valuations merely on sales of "comparable property."

A representative of the Highway Department made a statement. The substance of his statement may be summarized as follows:

Capitalization is only one of the three approaches to value: (1) comparable sales, (2) reproduction and replacement and (3) capitalization. The capitalization approach is, at best, very uncertain and unreliable. Changing the capitalization rate by one point may make a difference of thousands of dollars in the capitalized value.

Capitalization of rental property having existing improvements is speculative enough, but when the appraiser is permitted to construct a castle in the air--a structure not even built--and consider all the things that go into getting a net rental income to capitalize, you are getting into the worst type of speculation in the world. It is well enough to state that this is considered in the market. But here we are considering the trial of a case before the jury. We are trying to come out with a fair compensation for the property owner and it is going to be too confusing and misleading to the jury to try to determine that compensation if this type of evidence is used. It is hard enough as it is when other evidence, such as comparable

sales, is used. But when you speculate on nonexistent income from buildings not in existence, the jury will be confused, the trial will be lengthened, and the verdict is less likely to be a just verdict of compensation for the property owner and the condemning agency.

Moreover, this is not useful evidence; it is not reliable and probative evidence as to the value of the property or the compensation--it is the least reliable. There are so many other means of presenting and proving the fact of value without bringing in this incidental, speculative evidence that there is no justification for using evidence that is going to cause too much trouble for what you get out of it.

Limiting the capitalization of nonexisting improvements to cases where there are no comparable sales would not be of much help--you can never agree on what is comparable and what is not comparable. This type of provision would present the issue on whether these are comparable sales or not. Where there are several different contentions as to highest and best use, you may have comparable sales on one use but not on another. For example, there might be comparable sales if residential use is the highest and best use but none if commercial use is the highest and best use. A court could never determine whether or not there were comparable sales.

It was pointed out that (1) the opinion of the expert is the thing upon which the verdict is based and the other evidence is merely in support of his opinion and, accordingly, is taken into account only in weighing the opinion of the expert who is giving an opinion based on this theory and (2) the other party is free to question the expert on cross-examination and see if he can shake him on what he thinks the building will cost, rate of occupancy and capitalization, etc.

The Commission discussed whether permitting the use of this approach would extend trials. But it was noted, that this approach cannot be used in every case, for under Senate Bill No. 205 this approach can be used only if a well informed buyer and seller would consider it in determining whether to buy and sell the property in the market. It

was agreed that in some cases this approach would result in longer trials. But this is because the problem of property valuation is complex, not because this approach is not a valid one.

(6) Nature of improvements on and uses of property in the vicinity. The Commission approved subdivision (g) of Section 1248.2 which preserves the substance of the last sentence of existing Section 1845.5.

(7) Offers to purchase the condemned property. The Commission unanimously agreed to delete the provision of Section 1248.3 permitting an appraiser to consider offers to purchase the subject property in forming his opinion.

It was noted that the deleted provision was inserted in the bill by the Senate Judiciary Committee after extensive hearings on the bill. Attorneys who normally represent condemnees appeared before the Senate Judiciary Committee and advocated a much broader provision relating to offers. The provision inserted by the Committee was drafted by the Commission and is a provision that permits only a very limited number of offers to come in.

The staff expressed the opinion that the existing law permits an appraiser to consider an offer to buy the subject property in forming his opinion if the offer meets the conditions set out in Senate Bill No. 205.

The consultant suggested that the provision might be modified to exclude as a matter of law any offer made after the date of the resolution or the probability of the acquisition of the property by eminent domain. The consultant, however, still recommends that all offers be excluded for the reasons given in his research report.

A representative of the Department of Public Works objected to the provision permitting the property owner to introduce an offer to buy the subject property. He stated in substance:

> An offer is uncertain, unreliable, subject to fabrication and has very little probative effect compared to the damage it can do. An offer is the most inflammatory type of evidence; it can't be refuted and is almost impossible to deal with. Such evidence will confuse the jury.

(8) Reproduction or replacement approach. The Commission discussed Section 1248.2(f). It was noted that this provision permits the use of the reproduction or replacement approach when the improvements enhance the value of the property or property interest for its highest and best use.

The effect of this provision is to require that the land be valued for the use to which it is being put if the reproduction or replacement approach is used. For example, take a particular tract of land that is improved by a church and assume that the land itself would be worth $50,000 when used for church purposes but $100,000 when used for commercial purposes. Assume that the cost of replacement or reproduction of the church would be $250,000. If the reproduction or replacement approach is used, the land and improvement would be worth $50,000 plus $250,000 or $300,000. In other words, the land is valued for its highest and best use, which is--because the land is now improved by a church--use for church purposes. On the other hand, using the comparable sales approach, the appraiser could value the land at $100,000 (as bare land) and add thereto the salvage value of the church ($150,000 on the estimate that it would cost $100,000 to move the church to a new site) giving a total value of $250,000. Thus, the "highest and best use" provision is

intended to prevent the valuing of the land as bare land at its value for commercial purposes ($100,000) and then adding the replacement or reproduction value of the church ($250,000).

(9) Consideration of taxes in determining reasonable net rental value. The Commission approved the amendment to Section 1248.3(d) which makes it clear that taxes, as distinguished from assessed valuation, can be considered in determining reasonable net rental value.

(10) Apportioning sales price of comparable sale between land and improvements. The Commission disapproved the amendment made to subdivision (e) of Section 1248.3 which provides that an appraiser can apportion the price of a particular comparable sale between land and improvements for the purpose of comparison with the property to be taken, damaged or benefited. Subdivision (e) states the general rule that a witness may not testify to his opinion as to the value of comparable property. The justification for this provision is that the issue is the value of the subject property, not the value of other properties.

When there is allowed a break down of a comparable sale between land and improvements, it permits the appraiser to expresse an opinion as to either the value of the land or the value of the improvements. It would create problems in court. One witness would say the land is worth so much and the improvements so much; another witness would just reverse the figures. In effect, you are trying to prove the value, for example, of a piece of bare land by comparing it to a piece of improved property. It may take considerable time in court to break down the improved property between land and improvements and the estimates of the value of each would be based on speculation.

The Commission's report on Senate Bill No. 205 to the 1963 Legislature is to state that the elimination of this amendment will not prevent a witness, in discussing comparability, from stating whether or not the improvement is comparable and what the differences between the improvements on the subject and comparable properties are.

(11) Permitting cross-examination of a witness upon whose opinion a witness for an adverse party based his opinion. The Commission added the following new section to Senate Bill No. 205:

> SEC. 5. Section 1248.6 is added to the Code of Civil Procedure to read:
>
> 1248.6. If a witness testifies to his opinion of the value of the property or property interest to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statement.

This new section would, for example, permit the plaintiff to call an oil expert and cross-examine him regarding oil deposits on the subject property where an appraiser for the defendant had based his opinion as to the value of the subject property upon the opinion of the oil expert.

RULE 61.1 DEFINITION OF "VALUE OF PROPERTY."

As used in Rules 61.2 to 61.5, inclusive, "value of property" means:

(a) In an eminent domain proceeding, the amounts to be ascertained under subdivisions 1, 2, 3, and 4 of Code of Civil Procedure Section 1248.

(b) In other actions and proceedings, the value of real property or an interest therein.

~~SENATE BILL~~ ~~No.~~

ARTICLE VII-A VALUATION OF REAL PROPERTY

~~Introduced by Senator Cobey~~

~~January 17, 1963~~

~~REFERRED TO COMMITTEE ON JUDICIARY~~

~~An act to add Sections 1248.1, 1248.2, 1248.3, 1248.4, 1248.5 and 1248.6 to, and to repeal Section 1845.5 of, the Code of Civil Procedure, relating to eminent domain.~~

~~The people of the State of California do enact as follows:~~

RULE 61.2. OPINIONS OF WITNESSES AS TO VALUE OF PROPERTY

~~SECTION 1. Section 1248.1 is added to the Code of Civil Procedure, to read:~~

~~1248.1.~~ (a) The ~~amounts to be ascertained under subdivisions 1, 2, 3 and 4 of Section 1248~~ value of property being valued. may be shown only by the opinions of witnesses qualified to express such opinions and the owner of the property or property interest ~~sought to be taken, damaged or benefited.~~ Such a witness may, ~~on direct or cross examination,~~ state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal.

(b) Nothing in this section prohibits a view of the property or the admission of any other competent evidence (including but not limited to evidence as to the nature and condition of the property and the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury or referee to understand and apply the testimony given under subdivision (a) ~~of this section~~; and such evidence, *except evidence of the character of the improvement proposed to be constructed by the plaintiff*, is subject to impeachment and rebuttal.

, in an eminent domain proceeding,

in an eminent domain proceeding

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on

the number of comparable sales or contracts, as defined in subdivision (b) of ~~Section 1248.3,~~ to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases. Rule 61.3,

~~SEC. 2. Section 1248.2 is added to the Code of Civil Procedure, to read:~~

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY BE BASED

~~1248.2.~~ The opinion of a witness as to the ~~amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248~~ value of property is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest ~~to be taken, damaged or benefited~~ being valued, which facts and data must be relevant to the ~~amount~~ value to be so ascertained and may include but are not limited to:

(a) The price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest ~~to be taken, damaged or benefited~~ being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(b) The price and other terms and circumstances of any sale of or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Subject to subdivision (c) of ~~Section 1248.1,~~ Rule 61.2, in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property or property interest ~~to be taken, damaged or benefited~~ being valued.

(c) The rent reserved and other terms and circumstances of any lease which included the property or property interest ~~to be taken, damaged or benefited~~ being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

(d) Where a leasehold interest is the subject of valuation, the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of

gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest ~~to be taken, damaged or benefited~~ being valued, as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property or property interest if the land were improved by improvements that would enhance the value of the property or property interest for its highest and best use. In determining reasonable net rental value for the purposes of this subdivision:

(1) A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest ~~to be taken, damaged or benefited~~, being valued, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization on hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

(2) A witness may not base his calculation on an assumed rental under an assumed lease which is fixed by a percentage or other measurable portion of gross sales or gross income from a business on ~~such property~~ the property or property interest being valued, unless rentals of property for that kind of business are customarily so fixed.

(f) The value of the property or property interest ~~to be taken, damaged or benefited~~ being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

(g) The nature of the improvements on properties in the general vicinity of the property or property interest ~~to be taken, damaged or benefited~~ being valued and the character of the existing uses being made of such properties.

~~Sec. 2. Section 1248.2 is added to the Code of Civil Procedure, to read:~~

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY NOT BE BASED

~~1248.2.~~ Notwithstanding the provisions of ~~Section 1248.2~~ Rule 61.3, the opinion of a witness as to the ~~amount to be ascertained under subdivision 1, 2, 3 or 4 of Section 1248~~ the value of property is inadmissible (or, if admitted, shall be stricken on motion) if it is based, wholly or in part, upon:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was made by a public entity for a public use for which property may be taken by eminent domain.

(b) The price or other terms and circumstances of any offer made between the parties to the proceeding to buy, sell or lease the property or property interest ~~to be taken, damaged or benefited,~~ or any part thereof. being valued,

(c) The price at which an offer or option to purchase or lease the property or property interest ~~to be taken, damaged or benefited~~ or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under ~~Section 1248.1.~~ being valued Rule 61.2.

(d) The value of any property or property interest as assessed for taxation purposes, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest ~~to be taken, damaged or benefited.~~ being valued.

(e) An opinion as to the value of any property or property interest other than that ~~to be taken, damaged or benefited.~~ being valued.

(f) The influence upon such amount of any noncompensable items of value, damage or injury.

(g) The capitalized value of the income or rental from any property other than ~~the property to be taken, damaged or benefited.~~ that being valued.

or property interest

~~SEC. 4. Section 1248.4 is added to the Code of Civil Procedure, to read:~~ RULE 61.5. APPLICATION OF RULES 56-61.5.

Except as otherwise specifically provided by statute, Rules 56 to 61.5 apply to the determination of the value of property in any action or proceeding.

Section 1248.4 deleted—covered by Rule 56(3)

~~1248.4. If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3 or 4 of Section 1248 is inadmissible, or if such opinion is stricken, because it is based in whole or in part upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.~~

~~SEC. 5. Section 1248.5 is added to said code, to read:~~

~~1248.5. Sections 1248.1 to 1248.4, inclusive, are intended to provide special rules of evidence applicable only to eminent domain proceedings and inverse condemnation actions but are not intended to alter or change the existing substantive~~ RULE 61.6. CONCEPT OF JUST COMPENSATION NOT AFFECTED. Rules 61.1 to 61.5, inclusive, are not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms value, damage or benefits as used in Section 1248.

~~SEC. 6. Section 1248.6 is added to the Code of Civil Procedure, to read:~~

~~1248.6. If a witness testifies to his opinion of the value of the property or property interest to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party~~

Section 1248.6 deleted—covered by Rule 57.5

~~and examined as if under cross-examination concerning the subject matter of his opinion or statement. Nothing in this section makes admissible an opinion which is inadmissible under subdivision (a) of Section 1248.~~

~~Sec. 7.~~ Section 1845.5 of the Code of Civil Procedure is repealed.

REPEALER

~~Sec. 8. This act does not apply to any action or proceeding that has been brought to trial prior to the effective date of this act.~~

TO BE REPEALED

1845.5. In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vacinity of the property sought to be condemned.

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STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

A TENTATIVE RECOMMENDATION

relating to

The Uniform Rules of Evidence

Article VII-A. Opinion Evidence on Value of Real Property

May 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Draft: January 10, 1964

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning proposed Article VII-A (Opinion Evidence on Value of Real Property). The Uniform Rules of Evidence do not contain an article on this subject. This report is one in a series of reports being prepared by the Commission, each report covering a different article of the Uniform Rules of Evidence.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. MCDONOUGH, JR.
Chairman

March 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VII-A. Opinion Evidence on Value of Real Property

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

A tentative recommendation of the Commission on Proposed Article VII-A (Opinion Evidence on Value of Real Property), consisting of Rules 61.1 through 61.6, is set forth herein. This article is not contained in the Uniform Rules of Evidence, but it supplements Revised Article VII (Expert and Other Opinion Testimony) of the Uniform Rules. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Mimeographed draft dated December 31, 1963).

Proposed Article VII-A deals with opinion testimony as to the value of real property or an interest therein. In brief, the proposed article provides that the only direct evidence of value of real property is the opinions of expert witnesses and that such opinions may be based only on

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[1] A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is thirty cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

factors that buyers and sellers in the market place take into consideration to determine value. To give some certainty to this basic standard, the proposed article lists certain factors that may be considered by an expert witness when relevant and lists certain other factors upon which an opinion cannot be based.

The proposed article is based, to a large extent, on a 1960 recommendation and study made by the Commission. See Recommendation and Study relating to Evidence in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-1--A-65 (1961). Senate Bill No. 205 was introduced in 1961 to effectuate the Commission's 1960 recommendation. The bill was passed by the Legislature in amended form but was pocket vetoed by the Governor. In 1963, Senator James A. Cobey introduced Senate Bill No. 129 which was based on the 1960 recommendation of the Commission. Senate Bill No. 129 passed the Legislature in amended form but was pocket vetoed by the Governor.

The Commission has considered the objections made to its 1960 recommendation and has prepared Proposed Article VII-A with these objections in mind. Unlike the 1960 recommendation, the proposed article is not limited to valuation of property in eminent domain proceedings; it applies to all proceedings for the valuation of real property or an interest therein except where another valuation procedure is provided by statute.

The Commission tentatively recommends that Proposed Rules 61.1-61.6 be enacted as the law in California.[2] In the material which follows, the text of each proposed rule is set forth and is followed by a comment setting forth the major considerations that influenced the recommendation of the Commission.

[2] The final recommendation of the Commission will indicate the appropriate Code Section numbers to be assigned to the proposed rules.

RULE 61.1. DEFINITION OF "VALUE OF PROPERTY"

As used in Rules 61.2 to 61.5, inclusive, "value of property" means

(a) In an eminent domain and inverse condemnation proceeding, the amounts to be ascertained under subdivisions 1, 2, 3, and 4 of Section 1248 of the Code of Civil Procedure.

(b) In other actions and proceedings, the value of real property or an interest therein.

COMMENT

This definition makes Rules 61.1 to 61.5 applicable to the valuation of real property, whether such valuation is made in an eminent domain proceeding or in some other action or proceeding. Rules 61.1 to 61.5 do not apply to the valuation of personal property, nor do they apply to the valuation of real property where some other statute contains specific provisions governing the valuation of such property which are inconsistent with Rules 61.1-61.5. See Rule 61.5.

It is important to note that Rules 61.1-61.6 apply only to proceedings conducted by a court. See Revised Rule 1(14) and Revised Rule 2.

RULE 61.2. OPINIONS OF WITNESSES AS TO VALUE OF PROPERTY

(a) The value of property may be shown only by the opinions of witnesses qualified to express such opinions and the owner of the property or property interest being valued. Such a witness may state the facts and data upon which his opinion is based, whether or not he has personal knowledge thereof, for the limited purpose of showing the basis for his opinion; and his statement of such facts and data is subject to impeachment and rebuttal.

(b) Nothing in this section prohibits a view of the property or the admission of any other competent evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury or referee to understand and apply the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

(c) In order to avoid unnecessary delay in the determination of the issues at the trial, the court, in the exercise of its sound discretion, may prescribe reasonable limitations (1) on the number of comparable sales or contracts, as defined in subdivision (b) of Rule 61.3, to which a witness may testify on direct examination and (2) on the extent to which a witness may state on direct examination the other facts and data upon which his opinion is based. The court may limit the extent or scope of cross-examination as it does in other cases involving opinion testimony.

COMMENT

Subdivisions (a) and (b). Under subdivisions (a) and (b), a verdict as to the value of property must be based on the opinions of qualified valuation witnesses, that is, it must be within the range of the opinions as to value. The facts and data stated by a witness as the reasons for his opinion do not become evidence in the sense that they have independent probative value upon the issue of market value. Instead, they go only to the weight to be accorded his opinion. This is existing law. E.g., City of Gilroy v. Filice, ___ Cal. App.2d ___, ___, 34 Cal. Rptr. 368, 376 (1963); People v. Hayward Building Materials Co., ___ Cal. App.2d ___, 28 Cal. Rptr. 782 (1963); So. San Francisco Unified School Dist. v. Scopesi, 187 Cal. App.2d 45, 51, 9 Cal. Rptr. 459, 464 (1960); People v. Rice, 185 Cal. App.2d 207, 213, 8 Cal. Rptr. 76, 79 (1960); Redevelopment Agency v. Modell, 177 Cal. App.2d 321, 326-327, 2 Cal. Rptr. 245, 248-249 (1960) (jury view of subject property not proper basis for verdict lower than that shown by testimony of witnesses); People v. Nahabedian, 171 Cal. App.2d 302, 310, 340 P.2d 1053 (1959). See also People v. LaMacchia, 41 Cal.2d 738, 264 P.2d 15 (1953); People v. McCullough, 100 Cal. App.2d 101, 105-106, 223 P.2d 37 (1950)(jury may not render verdict in excess of that shown by testimony of witnesses). Cf. Los Angeles County Flood Control Dist. v. McNulty, 59 Cal.2d ___, 379 P.2d 493, 29 Cal. Rptr. 13 (1963).

Subdivision (a) makes the owner of the subject property competent to give an opinion as to the value of his property, whether or not he is generally familiar with such values. This is existing law. E.g., Long Beach City H. S. Dist. v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249 (1947); Kitchell v. Acree, 216 Cal. App.2d ___, ___, 30 Cal. Rptr. 714 (1963);

Harold v. Pugh, 174 Cal. App.2d 603, 609, 345 P.2d 112 (1959); Kahn v. Lischner, 128 Cal. App.2d 480, 487, 275 P.2d 539 (1954); City of Fresno v. Hedstrom, 103 Cal. App.2d 453, 461, 229 P.2d 809 (1951). See also Holt v. Ravani, 221 Adv. Cal. App. 272 (1963)(personal property).

Subdivision (a) permits the witness to state the matters upon which his opinion is based, whether or not he has personal knowledge thereof. Under the existing practice in California, the hearsay rule does not prevent a property valuation expert from stating the matters upon which his opinion is based; but, when the hearsay is entirely unsupported and completely unreliable, the court has the inherent power to prevent its use. A good statement of the existing law is found in People v. Alexander, 212 Cal. App.2d 84, 95-96, 27 Cal. Rptr. 720, 725-726 (1963):

> The specific question involved is whether in describing comparable sales the witness may rely for the facts upon his own investigation of records in the recorder's office, and in the courts, the stamps upon deeds and the statements of those who personally participated in the sales. The important evidentiary point involved is whether or not the opinion of value which the witness has given is sustained by proper reasons. From a practical standpoint, if each person previously involved in effecting comparable sales should have to be called to the stand to establish the detailed facts of such sales, it would lengthen litigation of this kind out of all reason and would make it almost impossible for the state or defending landowners to make a proper showing as to valuation opinion within a reasonable time and at reasonable expense. Therefore, within proper limits, facts acquired by hearsay and used by a valuation expert in support of his conclusion that certain sales are comparable and therefore furnish support for his opinion concerning value have been customarily received in evidence in this state. In People ex rel. Dept. of Public Works v. Donovan, 57 Cal.2d 346, 352 [19 Cal. Rptr. 473, 369 P.2d 1], it is said:
>
> "An expert may detail the facts upon which his conclusions or opinions are based, even though his knowledge is gained from inadmissible or inaccurate sources. [Citations omitted.]" The evidence here complained of was within the permissible scope defined by the authorities. It will be noted that this rule does not permit hearsay evidence of the opinion of other persons as to valuation.

In connection with this portion of subdivision (a), it should be noted that Proposed Rule 57.5 is designed to provide protection to a party who is confronted with an expert witness who is relying upon the opinion or statement of some other person. Proposed Rule 57.5 will permit a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions and statements relied on by adverse witnesses and cross-examining them concerning the subject matter of their opinions and statements. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 10.

Subdivision (a) also makes it clear that the statement of the matters upon which an opinion is based is subject to impeachment and rebuttal. Since the opinion of the expert is only as sound as the reasons upon which it is founded, reasonable cross-examination to impeach the expert and rebuttal evidence to show that the opinion is based on incorrect facts or data is essential. This is the existing practice in California. See C.C.P. § 1872, retained by Revised Rule 58.5: expert "may be fully cross-examined" on reasons for his opinion.

Subdivision (b). The trial court in its discretion usually permits the trier of fact to view the property being valued. C.C.P. § 610; Laguna Salada etc. Dist. v. Pacific Dev. Co., 119 Cal. App.2d 470, 477, 259 P.2d 498, 502 (1953). Subdivision (b) makes it clear that a view of the property is not precluded by subdivision (a), but such view does not become evidence in the sense that it has independent probative value upon the issue of market value. This is existing law. Redevelopment Agency v. Modell, 177

Cal. App.2d 321, 326-327, 2 Cal. Rptr. 245 (1960). See also State v. McCullough, 100 Cal. App.2d 101, 105, 223 P.2d 37, 40 (1950). Contra, County of San Diego v. Bank of America, 135 Cal. App.2d 143, 149, 286 P.2d 880, 883-884 (1955) (dictum).

Subdivision (b) also makes it clear that subdivision (a) does not affect the right to introduce evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain case and that the defendant in such a case is not permitted to impeach or rebut evidence as to the character of the improvement proposed to be contructed. See People v. Ayon, 54 Cal.2d 217, 5 Cal. Rptr. 151 (1960). Under existing law, if the condemner makes structural alterations or construction changes that were not planned at the time the award was made and there are additional damages as a result, these may be recovered in an inverse condemnation action. See People v. Ayon, supra. Cf. Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).

Subdivision (b) recognizes that testimony as to the nature and character of the property is necessary if the trier of fact is to understand and apply the testimony as to the value of the property. "Both parties may elicit on direct examination the expert's description of such tangible characteristics of the condemned property as physical condition, geology, location, improvements, present use, use permits, title flaws, and the present uses of other properties in the vicinity. See e.g., City of Los Angeles v. Cole (1946) 28 C.2d 509, 518, 170 P.2d 928, 933-34; Santa Clara County F. C. etc. Dist. v. Freitas (1960) 177 C.A.2d ___, ___, 2 C.R. 129, 131-32; Los Angeles County F. C. Dist. v. Abbot (1938) 24 C.A.2d 728, 737, 76 P.2d 188, 193; see also C.C.P. § 1845.5." CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 324 (1960).

Subdivision (c). This subdivision permits the trial court to exercise its sound discretion in prescribing reasonable limitations on the facts and

data that a witness may state on direct examination. Since County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the California trial courts appear to have only very limited discretion to exclude relevant evidence in cases in which the evidence would formerly have been excluded upon the ground that the probative value of the evidence was insufficient to justify the amount of time necessary to present it or the potential confusion of the issues. See discussion in CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 335-337 (1960). But see; e.g., People v. Stevenson & Co., 190 Cal. App.2d 103, 11 Cal. Rptr. 675 (1961); Los Angeles County v. Bean, 176 Cal. App.2d 521, 1 Cal. Rptr. 464 (1959). Subdivision (c) will not prevent a witness from stating on direct examination the facts and data upon which his opinion is based; but this subdivision will permit the court, for example, to require the witness to select the five or ten sales he considers most comparable to state on direct examination.

Subdivision (c) should be of assistance to the trial courts in their effort to avoid unnecessary delay in the determination of the issues in a real property valuation case. The subdivision states the practice now followed by some trial courts.

RULE 61.3. FACTS AND DATA UPON WHICH OPINION MAY BE BASED

The opinion of a witness as to the value of property is admissible only if the court finds that the opinion is based upon facts and data that a willing purchaser and a willing seller, dealing with each other in the open market and with a full knowledge of all the uses and purposes for which the property is reasonably adaptable and available, would take into consideration in determining the price at which to purchase and sell the property or property interest being valued, which facts and data must be relevant to the value to be so ascertained and may include but are not limited to:

(a) The price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation.

(b) The price and other terms and circumstances of any sale of or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. Subject to subdivision (c) of Rule 61.2, in determining whether property is comparable, the court shall permit the witness a wide discretion in testifying to his opinion as to which property the witness believes is comparable. In determining whether property is comparable, all factors affecting comparability shall be taken into consideration, including but not limited to whether such property is of the same or similar size to the property or property interest being valued.

(c) The rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the data of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property.

(d) For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in subdivision (e) or determing the value of a leasehold interest, the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation, including but not limited to a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on such property in cases where the rental is customarily so fixed.

(e) The capitalized value of the reasonable net rental value attributable to the property or property interest being valued, as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, which may be based on a consideration of (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property or property interest if the land were improved by improvements that would enhance the value of the property or property interest for its highest and best use. In determining reasonable net rental value for the purposes of this subdivision:

(1) A witness may not base his calculation on an assumed rental of hypothetical improvements on the property or property interest being valued, nor shall any evidence of income from hypothetical improvements be admissible for any purpose, if the party on whose behalf the witness is called has, or intends to have, any witness testify regarding any comparable sales or contracts, as defined in subdivision (b). This paragraph does not apply where the sole purpose of basing the capitalization on hypothetical improvements is to rebut a capitalization of hypothetical improvements used by an opposing party.

(2) A witness may not base his calculation on an assumed rental under an assumed lease which is fixed by a percentage or other measurable portion of gross sales or gross income from a business on the property or property interest being valued unless rentals of property for that kind of business are customarily so fixed.

(f) The value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

(g) The nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

COMMENT

Rule 61.3 states the matter upon which an opinion as to the value of real property, on an interest therein, may be based. Rule 61.3

should be considered in connection with Revised Rule 57 which permits the witness to state on direct examination the reasons for his opinion and the matter upon which it is based and permits the judge to require that the witness states the matter upon which his opinion is based before testifying in terms of opinion. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 9.

Prior to County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the witness in an eminent domain case was not permitted to state on direct examination the matter upon which his opinion was based. The Faus case held that the witness was permitted to state on direct examination the comparable sales upon which he based his opinion. The extent to which the Faus case permits the witness to state other valuation date on direct examination is not clear. Revised Rule 57 will make it clear that the witness may state the reasons for his opinion and the matter upon which it is based on direct examination. Revised Rule 57 is, of course, subject to Rule 45; and, in a property valuation case, also is subject to subdivision (c) of Rule 61.2.

The uncertainty created by the Faus case as to the valuation evidence admissible on direct examination will be eliminated by Revised Rule 57. Moreover, that rule will eliminate the situation that existed prior to the Faus case (and still exists in some trial courts) whereby it was necessary for a party to attempt to get his valuation data into evidence through cross-examination of the adverse party's witnesses. Thus, prolonged cross-examination was generated as parties attempted to introduce evidence through indirection that they could not

introduce directly. Under this system, the witness principally relying upon particular data never was given the opportunity to explain its relevance--he was always asked about the data that supported the adverse party's case. Insofar as the Faus case declared that sales evidence is admissible on direct examination, it has expedited the admission of this data. Revised Rule 57 will make it clear that the same rule is applicable to all valuation data. The rule does not make any new evidence admissible--it merely provides that what is admissible may be shown on direct examination by the witness who relied on it. Thus, no additional time should be required to prepare the case for trial. In fact, by permitting the evidence to be introduced at the trial in an orderly manner, Revised Rule 57 may actually expedite the preparation of a case for presentation. Accordingly, by substituting a direct method for the introduction of relevant evidence for an indirect method, by eliminating the uncertainty concerning the admissibility of this evidence on direct examination, Revised Rule 57, together with Rule 61.2(c) and 61.3(b), should shorten trial time and will result in better informed juries.

Introductory clause. In formulating and stating his opinion as to the value of property, the witness should be permitted to rely on and testify concerning any matter that a willing, well-informed purchaser or seller would take into consideration in determining the price at which to buy or sell the property. This basic standard is set out in the introductory clause of Rule 61.3. Since the trier of fact is trying to determinine the "market" value of the property, it should consider the factors that would actually be taken into account in an arm's length transaction in the market place.

To give some certainty to the basic standard set out in the introductory clause of Rule 61.3, subdivisions (a) through (g) of Rule 61.3 list certain factors that may be considered by the witness when relevant and Rule 61.4 lists certain other factors upon which an opinion cannot be based. For example, in modern appraisal practice, there are three basic approaches to the determination of value. These involve consideration of the sales prices of comparable property and other market data, the capitalization of the income attributable to the property, and the cost of replacing or reproducing the improvements on the property less depreciation and obsolescence. In Rule 61.3, specific recognition is given to these methods of appraising property for they are relied upon extensively to determine market value outside the courtroom.

Subdivision (a). This subdivision permits the witness to consider sales or contracts to sell and purchase the subject property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. If the sale is not too remote in time and is one freely made in the open market, there is no reason why the witness should not be permitted to consider it in forming his opinion as to the value of the property.

Subdivision (a) states the established rule for sales made before the date of valuation. E.g., Los Angeles County Flood Control Dist. v. McNulty, 59 Cal.2d ___, 379 P.2d 493, 29 Cal. Rptr. 13 (1963); Eatwell v. Beck, 41 Cal.2d 128, 134, 257 P.2d 643 (1953); Bagdasarian v. Gragnon, 31 Cal.2d 744, 755-759, 192 P.2d 935 (1948); Harold v. Pugh, 174 Cal. App.2d 603, 609, 345 P.2d 112 (1959). See also County of

Los Angeles v. Bean, 176 Cal. App.2d 521, 1 Cal Rptr. 464 (1959) (cross-examination of owner as to prior sale of subject property).

Although the California law is somewhat unclear, there is some authority permitting the witness to consider a sale of the subject property made after the date of valuation. Royer v. Carter, 37 Cal.2d 655, 548, 551-552, 233 P.2d 539 (1951). Cf. County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 79-80, 291 P.2d 98 (1955) (sale of comparable property); Hayward Union H.S. Dist. v. Lemos, 187 Cal. App.2d 348, 351, 9 Cal. Rptr. 750 (1960) (use of comparable property after date of valuation). See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 332-333 (1960).

Subdivision (b). This subdivision permits the witness to consider sales or contracts to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. This is established law. E.g., County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955) (held proper to refuse to strike testimony of witness who relied on the price paid for comparable property seven months after the date of valuation). See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 331-335 (1960).

Subdivision (b) also provides that the witness is to be granted considerable freedom in determining which property is comparable. If the witness reasonably believes property is comparable, the court should permit him to base his opinion on a sale or contract to sell and purchase such property, subject, of course, to the discretion of the court under

Rule 61.2(c) to limit the number of comparable sales that may be stated on direct examination. This provision of subdivision (b) will change the rule of the Faus case, supra, under which the trial judge must initially determine the question of comparability of the market and the properties for the purpose of admitting or excluding the evidence of comparable sales. As indicated in Faus, "[m]anifestly, the trial judge in applying so vague a standard [the standard set out in Faus] must be granted a wide discretion." 48 C.2d at 678, 312 P.2d 684. The result of the Faus case has been that condemnation trials have been lengthened, sometimes as much as several days. Although this result has not ensued solely from the fact that the trial court must determine initially for each sale whether the property was comparable, this requirement has been a factor in lengthier trials. The proposed changed will not prevent the court from excluding sales of property where the property or market obviously is not comparable, but it will do much to eliminate the time now consumed by the requirement that the trial judge rule on the comparability of each sale under the vague standard of the Faus case. Moreover, the right given the trial judge under Rule 61.2(c) will permit him to restrict the number of comparable sales that may be stated on direct examination. Thus, the proposed provision will permit the expert to select those comparable sales he will state on direct examination without running the risk that the particular trial judge will be unduly strict in his interpretation of what constitutes comparable property. For those sales that are not obviously not comparable, the trier of fact, whether judge or jury, must ultimately weigh the probative value of the comparable property's selling price for the purpose of weighing the witness' opinion testimony.

The net result of this provision of subdivision (b) and of Rule 61.2(c) should be to reduce the amount of time consumed in property valuation trials.

Subdivision (b) also states that all factors affecting comparability are to be considered in determining whether property is comparable, including whether the property thought to be comparable is of the same or similar size to the subject property. Although the Faus case did not specifically mention size as a factor in determining comparability, this is a factor taken into account in determing comparability. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 333 (1960). The significance of the factor will depend, of course, upon the circumstances in the particular case. See Covina Union High School Dist. v. Jobe, 174 Cal. App.2d 340, 349-350, 345 P.2d 78, 84 (1959) (where there was no sale of similar size and zoning to the property being valued, the trial court did not abuse its discretion by admitting into evidence considerably smaller sales of different zoning).

Subdivision (c). This subdivision permits the witness to consider the rental income from the subject property in forming his opinion as to its value. "[I]t is the general rule that income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property." People v. Dunn, 46 Cal.2d 639, 641, 297 P.2d 964, 966 (1956). This information is essential in determining the capitalized value of the reasonable rental income from the subject property and in determining the value of a lease on the subject property. And in an eminent domain case, a lease of the portion of the parcel not taken, whether made

before or after the date of valuation, would be significant in determining damage or benefit to the part remaining.

Subdivision (c) is limited to rental income (as distinguished from the income or profits attributable to a business conducted on the property). Evidence of profits derived from a business conducted on the property has been traditionally considered too speculative, uncertain, and remote to be considered in determining market value. People v. Dunn, 46 Cal.2d 639, 641, 297 P.2d 964, 966 (1956) (dictum). This limitation on the factors a witness may consider has been criticized. E.g., CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 45-47 (1960); 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, A-55--A-60 (1961). Cf. People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963) (although the income or profits that might be obtained from devoting land to a particular use is not a proper measure of compensation, the jury may consider profitability of a particular actual or proposed use in arriving at the highest and best use of the property).

Although subdivision (c) does not authorize the witness to consider the profits from a business in forming his opinion, it makes clear that he may consider a lease on the subject property where the rental is fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted thereon. Although the element of personal management is a factor that may have some effect on the amount of rental received under such a lease, this type of lease represents a major trend in modern real estate transactions. Winner, Rules of Evidence in Eminent Domain Cases, 13 ARK. L. REV. 10, 20 (1958-59).

Buyers and sellers know the potential business volume for a given location and know that any good management can reach that volume. If leases based on a percentage of gross receipts were excluded from consideration, many leases entered into in the open market could not be considered in the courtroom. In People v. Frahm, 114 Cal. App.2d 61, 249 P.2d 588 (1952), evidence of a rental based on a percentage of gross profits was held admissible. In a more recent case, the trial court admitted figures of gross receipts on a month-to-month lease as a basis for proving market value. People v. Stevenson & Co., Case No. 705457 (Parcels 2A & 2B) (Superior Ct Los Angeles County, Aug. 1959).

Subdivision (d). Subdivision (d) permits the witness to consider the rent reserved and the other terms and circumstances of any lease of comparable property freely made in good faith within a reasonable time before or after the date of valuation. This information is significant in determining the reasonable rental value of the subject property--information which is needed in using a capitalization of income approach and in determining market value of a leasehold interest.

Subdivision (d) makes it clear that the witness may consider leases of comparable property where the rental is fixed by gross receipts from a business on such property in cases where the rental is customarily so fixed. This limitation will restrict the consideration of gross receipts leases of comparable property to those cases where such leases are the best available evidence as to the fair rental value of the subject property.

Take a concrete example. Assume that the highest and best use for a particular corner lot is a gas station. If the Standard Oil Company

approached the owner of the lot to lease it for a gas station, the company would take into account traffic studies indicating with reasonable accuracy the amount of gas which could be sold at the station. This would indicate to the company the estimated revenue from the station and, hence, the amount that could profitably be invested in the station. On the other hand, if a prospective purchaser of the land approached the owner, the purchaser, too, might consult experts to determine the amount of rental income that could be derived from a lease for a gas station. The rentals in leases of this nature are, in many areas, now customarily fixed by a percentage of the gross receipts.

Neither the Faus case nor any California case reported since that time deals specifically with the question of the admissibility of comparable rents for the purpose of indicating the value of a leasehold interest. Code of Civil Procedure Section 1845.5 appears to sanction the use of comparable rentals for this purpose in eminent domain cases. But, although it would be the best type of evidence, California trial courts apparently seldom permit comparable rentals to be used in determining reasonable rental value for the purpose of a capitalization of income approach. Compare CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-36 (1961) with CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 33 (§ 2.21), 45-47 (§§ 3.10, 3.13) (1960). The holdings in People v. Dunn, 46 Cal.2d 639, 297 P.2d 964 (1956) (capitalization of income) and People v. Frahm, 114 Cal. App.2d 61, 249 P.2d 538 (1952) (valuation of lease) give some indication that existing law permits a witness to consider the type of evidence covered by subdivision (d). But, whether or not this subdivision changes existing law, the rule it

states is essential if the value of property determined in a court is to reflect the value of property determined in the market place.

Subdivision (e). This subdivision makes it clear that the witness may, when it is relevant, base his opinion of value upon a consideration of the capitalized value of the reasonable net rental value of the property being valued. He may not, however, base his opinion on the capitalized value of the income or profits attributable to the business conducted on the property. Except in the very unusual case where the party calling the witness contends that there are no comparable sales, the witness is restricted to capitalizing the reasonable net rental value of the property as it exists.

Under existing law, a witness may base an opinion upon the capitalized value of the reasonable net income from the property being valued. People v. Dunn, 46 Cal.2d 539, 297 P.2d 964 (1956). The change in existing law, if any, would result from the recommendation of the Commission that the witness be permitted to state on direct examination the matters upon which he based his opinion. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), page 9.

In County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957), the cases holding that the witness could not state the reasons for his opinion on direct examination were overruled. The overruled cases involved evidence of income from the property as well as sales, even though the Faus case itself involved only sales. Despite the fact that all authorities for the exclusion of a capitalization of income study on direct examination appear to have been overruled, the existing practice

in California varies among the various trial courts: Some permit a capitalization study to be stated on direct examination; others restrict the extent to which such a study may be stated on direct examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 303-306 (1960) suggests that a capitalization of study may be presented on direct examination. See e.g., Sill Properties, Inc. v. GMAG, Inc. ___ Cal. App.2d ___ 33 Cal. Rptr. 155 (1963) (evidence as to business profits or losses admissible in a non-eminent domain case); City of Oakland v. Partridge ___ Cal. App.2d ___, 29 Cal. Rptr. 388, 391-392 (1963); People v. Hayward Building Materials Co., ___ Cal. App.2d ___, 28 Cal. Rptr. 782 (1963) See also De Luz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544 (1955)(use of capitalization approach in assessment for property tax).

Subdivision (c) of Rule 61.2 permits the trial court to exercise its sound discretion in prescribing reasonable limitations on the facts and data that a witness may state on direct examination. This provides ample protection in cases where the detailed presentation of capitalization study on direct examination would not justify the amount of time necessary to present it or would unnecessarily confuse the trier of fact.

Paragraph (2) of subdivision (e) provides that a witness may not base his capitalization study on an assumed rental under an assumed lease which is fixed by a percentage of gross receipts from a business conducted on the property unless rentals of property for that kind of business are customarily so fixed. See the comment to subdivision (d) for a discussion of the desirability of permitting consideration of gross receipts leases in appropriate cases. In People v. Frahm, 114

Cal. App.2d 61, 249 P.2d 588 (1952), it was held that a witness may base his opinion of the value of property upon a reasonable rental income fixed by a percentage of the gross receipts, and for this purpose evidence of a gross receipts lease may be offered in evidence. In the Frahm case, the court permitted an expert to testify not only to the existing income from the lease, but also to what the reasonable rental income would be from a hypothetical lease if the property were then leased at prevailing market prices.

Although the mathematical delicacy of the capitalization study is well known, such a study is still one of the primary considerations of buyers and sellers in the open market and should not be excluded from court valuation procedures where the trier of fact is seeking to determine the price which would be fixed in an open market transaction. Where a capitalization study is manifestly illogical and unreasonable, the court, in the exercise of its discretion, may strike it from the record as speculative. Where there are substantial variances in such studies, still within the realm of reason, it is within the province of the trier of fact to consider the credibility of the respective witnesses. With the very stringent limitations it provides on the use of capitalization of income from hypothetical improvements and on consideration of gross receipts leases, subdivision (e) provides a desirable certainty that does not now exist.

Subdivision (f). This subdivision permits the witness to consider, when relevant, a summation study (reproduction less depreciation) in forming his opinion of the value of improved property. This is the third of the major methods of ascertaining the value of property, the other

two being the comparable sales approach and the capitalization of the reasonable net rental value approach.

Perhaps because of its apparent simplicity, the majority of the jurisdictions have admitted reproduction evidence for the purpose of proving market value. See 5 NICHOLS, EMINENT DOMAIN 244 (2d ed. 1950); 2 ORGEL, VALUATION UNDER EMINENT DOMAIN 9-10, 56 (2d ed. 1953); Winner, Rules of Evidence in Eminent Domain Cases, 13 ARK. L. REV. 10, 21 (1958-59). The California courts, representing a distinct minority, often summarily exclude such data on direct examination except in those instances when there would be no feasible alternative--particularly in situations in which the property involved is service type and is not ordinarily bought and sold on the market. Compare City of Oakland v. Partridge, ___ Cal. App.2d ___, 29 Cal. Rptr. 388 (1963) (excluding summation study as not applicable in the particular case) with City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933). See Joint Highway Dist. No. 9 v. Ocean Shore R. R., 128 Cal. App. 743, 18 P.2d 413 (1933) for possible distinction. For discussion and analysis, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-61--A-65 (1961). See also Annot., Eminent Domain--Value--Cost, 172 A.L.R. 236, 255-56 (1948). The effect of the Faus case on the apparent California rule is not clear.

If the expert bases his opinion upon a consideration of a summation study, he should be permitted to state the study on direct examination, subject, of course, to the power given the trial court under Rule 61.2(c) to limit the amount of detail that may be stated on direct examination. If the witness is clearly wrong or on weak ground in relying on a summation study, this can be shown on cross-examination.

And if such methodology is clearly inapplicable, the court may exclude such study as not relevant.

Subdivision (g). This subdivision permits the witness to consider the nature of the improvements on properties in the general vicinity of the property being valued and the character of the existing uses being made of such properties. This is relevant, for example, in determing the highest and best use of the property being valued. Subdivision (g) states existing law as found in Code of Civil Procedure Section 1845.5. See also Hayward Union High School Dist. v. Lemos, 187 Cal. App.2d 348, 9 Cal. Rptr. 750 (1960) (uses of comparable property after date of valuation may be considered).

RULE 61.4. FACTS AND DATA UPON WHICH OPINION MAY NOT BE BASED

Notwithstanding the provisions of Rule 61.3, the following matter is not a proper basis for an opinion on the value of property or an interest therein:

(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was made by a public entity for a public use for which property may be taken by eminent domain.

(b) The price or other terms and circumstances of any offer made between the parties to the proceeding to buy, sell or lease the property or property interest being valued, or any part thereof.

(c) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease, unless such option, offer or listing is introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Rule 61.2.

(d) The value of any property or property interest as assessed for taxation purposes, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(e) An opinion as to the value of any property or property interest other than that being valued.

(f) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage or injury.

(g) The capitalized value of the income or rental from any property or property interest other than that being valued.

COMMENT

Rule 61.4 states certain matters that are not a proper basis for an opinion on the value of property or an interest therein. This rule should be considered in connection with Revised Rule 56(3) which states:

> (3) The opinion of a witness may be held inadmissible or may be stricken if the judge finds that it is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may then give his opinion after excluding from consideration the matter determined to be improper.

Revised Rule 56(3) states existing law. See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VII. Expert and Other Opinion Testimony (Draft of December 31, 1963), pages 7-8.

Subdivision (a). This subdivision requires the witness to exclude from his consideration sales of comparable property to persons that could have acquired such property by condemnation. This will change existing California law. California, contrary to the weight of authority, allows such sales to be considered if sufficiently voluntary. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES A-38 (1961); People v. City of Los Angeles, ____ Cal. App.2d ____, 33 Cal. Rptr. 797, 804-805 (1963).

A sale to a person having the power of condemnation does not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. These sales, therefore, are

not sales in the "open market" and should not be considered in a determination of market value. Moreover, sales to condemners often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and the severance damage or benefit to the remainder. Thus, to permit the consideration of sales to condemners introduces "aggravating and time consuming collateral issues tending to promote confusion rather than clarity." Blick v. Ozaukee County, 180 Wis. 45, 48, 192 N.W. 380, 381 (1923). The limited number of times that such a sale can be labeled "voluntary," the complexity and strong possibility of prejudicing the condemnee when severance damages are involved in the taking of either the subject or comparable property, and the greatly increased amount of time and confusion involved in presenting this evidence, as compared to a normal sale, all combine to favor the exclusion of such sales.

Subdivision (b). Subdivision (b) requires the witness to exclude from his consideration any offers between the parties to buy or sell the property being valued. Pretrial settlement would be greatly hindered if the parties were not assured that their offers during negotiations are not evidence against them. Such offers should be excluded under the general policy of excluding evidence of an offer to compromise impending litigation. Subdivision (b) is consistent with Revised Rule 52 (which would change the existing California law under which statements made during settlement negotiations may be used as admissions). See Tentative Recommendation relating to the Uniform Rules of Evidence: Article VI. Extrinsic Policies Affecting Admissibility (Draft of December 31, 1963), pages 27-28.

Subdivision (c). Under this subdivision, offers or options to buy or sell the property being valued or any other property by or to third persons should not be considered on the question of value except to the extent that an offer to sell by the owner of the property being valued constitutes an admission.

Oral offers are often glibly made and refused in mere passing conversation. Because of the Statute of Frauds such an offer cannot be turned into a binding contract by its acceptance. The offerer risks nothing, therefore, by making such an offer and there is little incentive for him to make a careful appraisal of the property before speaking. Thus, an oral offer will often cast little light upon the question of the value of the property. Another objection to permitting oral offers to be considered is that they are easy to fabricate.

An offer in writing in such form that it could be turned into a binding contract by its acceptance is better evidence of value than an oral offer. But written offers should not be considered because of the range of the collateral inquiry which would have to be made to determine whether they were an accurate indication of market value. Such an offer should not be considered if the offerer desired the property for some personal reasons unrelated to its market value, or if, being an offer to buy or sell at a future time secured by an option, it reflected a speculative estimate rather than present value, or if the offerer lacked the necessary resources to complete the transaction should his offer be accepted, or if it was subject to contingencies. Not only would the range of collateral inquiry that would be necessary to determine the validity of a written offer as a true indication of value be great, but

it would frequently be very difficult to make the inquiry because the offerer would not be before the court and subject to cross-examination.

In view of these considerations and the fact that the value of such evidence is slight, offers should be excluded entirely from consideration as a basis for determining market value except that an offer to sell which constitutes an admission should be admissible for the reasons that admissions are admissible generally.

The existing California law on whether offers to buy or lease the subject property or comparable property is not clear. One writer has suggested that the trend appears to be to admit on direct examination offers to buy or lease the subject property as one of the reasons for the witness' opinion of value. On the other hand, he states that offers to buy or sell comparable property are probably inadmissible on direct examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 338-339 (1960). Compare with 3 CAL. LAW REVISION COM'N, REP., REC. & STUDIES A-41--A-47 (1961). See also Mears v. Mears, 180 Cal. App.2d 484, 505, 4 Cal. Rptr. 618, 631 (1960) (dictum).

Subdivision (c) states existing law insofar as it permits a witness for an adverse party to consider the owner's offer to sell when it constitutes an admission. People v. Ocean Shore R.R., 32 C.2d 406, 196 P.2d 570 (1948), affirming 181 P.2d 705, 728-729 (1947); Hull v. Sheehan, 108 Cal. App.2d 804, 805, 239 P.2d 704, 705 (1952). But see State v. Murray, 172 Cal. App.2d 219, 229, 342 P.2d 485, 491 (1959) (dictum). However, consistent with Rule 61.2, subdivision (c) provides that such an offer to sell is not independent evidence of value upon which a verdict may be based; it goes merely to the weight to be given to the opinion of the witness.

Subdivision (d). This subdivision requires the witness to exclude assessed valuation for taxation purposes from his consideration in forming his opinion as to the value of property. The assessed value of property is merely another person's--the assessor's--opinion of its value. In many instances the assessed value is not current and does not reflect recent market changes. And it is well recognized that property is usually assessed for purposes of taxation at far below its market value. For a comprehensive discussion, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES H-48--H-50 (1961).

Under existing law, assessed value is not a proper basis for an opinion, but older cases permitted the witness to be cross-examined on assessed valuation to test his knowledge of and familiarity with the property. Central Pac. Ry. v. Feldman, 152 Cal. 303, 310, 92 Pac. 849, 852 (1907). Cf. Stroman v. Lynch, 91 Cal. App.2d 406, 409, 205 P.2d 409 (1949). In recent years, more and more courts have criticized the admission of assessed valuation even for limited purposes, and it probably is no longer a proper inquiry on cross-examination. CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE 262-263, 310 (1960).

Subdivision (e). This subdivision states that a witness may not base his opinion upon an opinion as to the value of any property other than that being valued. Opinions as to the value of comparable property should be excluded from consideration because their consideration would require the determination of many other collateral questions involving the weight to be given such opinions which would unduly prolong the trial. Opinion evidence on value should be confined to opinions of the value of the property being valued. This is existing law. E.g., Sacramento and San Joaquin

Drainage Dist. v. Jarvis, 51 Cal.2d 799, 336 P.2d 530 (1959); People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963) (opinion based on opinion of another person as to value). Cf., People v. Johnson, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962).

Subdivision (f). This subdivision requires that the witness exclude from consideration in forming his opinion as to value the influence upon the value of the property of any noncompensable items of value, damage, or injury. Evidence of value, damage or injury based on noncompensable elements is not a proper basis for an opinion under existing law. E.g., Sacramento and San Joaquin Drainage Dist. v. State Reclamation Board, ____ Cal. App.2d ____, 29 Cal. Rptr. 847 (1963).

Subdivision (g). This subdivision is a specific example of the kinds of matters excluded from consideration under subdivision (e). The capitalized value of the income or rental from any property other than that being valued would require the determination of many collateral questions which would unduly prolong the trial.

RULE 61.5. APPLICATION OF RULES 61.1 TO 61.4

Except as otherwise provided by statute, Rules 61.1 to 61.4, inclusive, apply to the determination of the value of property in any action or proceeding.

COMMENT

Rule 2 restricts the Uniform Rules--including Article VII-A (Rules 61.1-61.6)--to proceedings conducted by a court; Rule 61.1 limits Article VII-A to proceedings for the valuation of real property or an interest therein; Rule 61.5 makes it clear that Rules 61.1 to 61.4 apply only to the extent that some other applicable statute does not contain inconsistent provisions. Thus, the proposed rules will provide one uniform set of principles that will apply in all court proceedings for the valuation of real property or an interest therein unless the Legislature by statute has determined that different rules are to apply in the particular case. See, for example, City of North Sacramento v. Citizens Utilities Company, ___ Cal. App.2d ___, 32 Cal. Rptr. 308 (1963) (condemnation of property of public utility under special procedure provided by Public Util. Code § 1401 et seq.).

Obviously, the new provisions will be most used in eminent domain and inverse condemnation proceedings. But the principles contained in the new provisions are sound for all court proceedings which are governed by principles of valuation contained in judicial decisions (as distinquished from those governed by valuation principles set out in special statutory provisions). For example, the new provisions will be used in cases involving fraud in the sale of real property. Civil Code Section 3343 provides in part: "One defrauded in the purchase, sale or exchange of property is

entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." The "actual value" referred to in Section 3343 is given its ordinary meaning--market value. Bagdasarian v. Gragnon, 31 Cal.2d 744, 753, 192 P.2d 935 (1948) ("neither sound policy nor business custom suggest that the words 'actual value' as used in Section 3343 should be construed differently from the identical language in the eminent domain statutes. No California cases have been found which are contrary to this interpretation").

The new provisions will also apply to determine "market value" in cases involving permanent injury to land or improvements. "The different kinds of real property and varying types of injury make it unwise to establish a fixed rule governing damages, and consequently a number of alternative theories are applied. [Citations omitted.] However, the basic and normal rule uses diminution in value as the measure, i.e., the difference between the market value of the land before and after the injury. [Emphasis in original.]" 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1630 (1960).

On the other hand, the proposed article will not apply, for example, to assessments of taxable property by the assessor because the review of the assessor's decisions is by the County Board of Equalization, not by a court. The board acts judicially, and "the board's decision in regard to specific valuations and the method of valuation employed are . . . reviewable only for arbitrariness, abuse of discretion, or failure to follow the standards prescribed by the Legislature." De Luz Homes v. San Diego, 45 Cal.2d 546, 564, 290 P.2d 544 (1955). It should be noted, however, that assessors "generally estimate value by analyzing market data on sales of similar

property, replacement costs, and income from the property." De Luz Homes v. San Diego, 45 Cal.2d 546, 563, 290 P.2d 544 (1955).

RULE 61.6. CONCEPT OF JUST COMPENSATION NOT AFFECTED

Rules 61.1 to 61.5, inclusive, are not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting "just compensation" as used in Section 14 of Article I of the State Constitution or the terms "value," "damage," or "benefits" as used in Section 1248 of the Code of Civil Procedure.

COMMENT

This rule is included to make it clear that the substantive law relating to eminent domain and inverse condemnation proceedings--other than the rules of evidence--is not affected by the proposed rules. Thus, the rules of evidence provided in Rules 61.1 to 61.5 do not provide a ground for expanding the concept of just compensation to include matters that are now not compensable in an eminent domain or inverse condemnation proceeding.

AMENDMENTS AND REPEALS

Section 1845.5 of the Code of Civil Procedure provides:

> 1845.5. In an eminent domain proceeding a witness, otherwise qualified, may testify with respect to the value of the real property including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to highest and best use and market value of the property sought to be condemned the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.

This section should be repealed. It is superseded by Rules 61.1 to 61.6 and by Revised Rules 56 to 61.

#34(L) 2/14/64

Memorandum 64-14

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

Senator Grunsky has indicated that his subcommittee wishes to hold hearings on the tentative recommendation on Hearsay Evidence in March. Accordingly, we suggest that consideration be given to revisions of this tentative recommendation at the February meeting. This memorandum presents one problem for resolution by the Commission.

The following is an extract from the Minutes of the September 22-24, 1963, meeting:

> The Commission approved a revision to its recommendation in regard to hearsay evidence. Under the revision, if a person who made a prior identification can no longer remember the person identified but is available and testifies that the prior identification was accurate, a witness who saw the prior identification may testify as to who was identified on the prior occasion. This revision will codify in part the decision in People v. Gould, 54 Cal.2d 621 (1960). The Gould case required corroborating evidence; but the requirement of corroboration will not be stated in the revised rules of evidence because the rules state only the conditions for the admission of evidence--they do not concern the question of what is sufficient evidence to support a verdict.

Exhibits I (pink sheets) and II (yellow sheets) present two alternative drafts of a proposed subdivision (1.1) of Rule 63 for Commission consideration. In connection with these drafts, the following policy matters should be considered:

1. Should evidence of an extrajudicial identification be restricted to an identification of the defendant or should it be extended to cover the identification of any person who participated in the crime for which the defendant is charged? The comments in Exhibits I and II give a reason why the broader hearsay exception should be provided.

2. Should evidence of an extrajudicial identification be admissible only when the evidence of the identification is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime?

It should be noted that under subdivision (1)(b) evidence of a prior identification would be admissible as a prior inconsistent statement if the witness denies having made the identification or states that the person he identified in the extrajudicial identification is not the person who participated in the crime. Thus, no foundational showing by the witness that he made the identification and that it was accurate is required where the witness denies having made the identification or states that it was not accurate.

Subdivision (1.1)(Exhibit I) would admit evidence of an extrajudicial identification if the witness testifies that he made the identification and it was accurate.

Subdivisions (1)(b) and (1.1)(Exhibit I) would change the rule of the Gould case in the case where the witness does not recall whether he made the extrajudicial identification. It would seem that this would be a rare case and that the evidence of the extrajudicial identification would be as probative and as reliable in this case as in the case where the witness denies having made the extrajudicial identification or testifies that it was not accurate.

The staff believes that subdivision (1.1)(Exhibit II) is the better alternative. We see no justification for keeping out evidence of the extrajudicial identification merely because the witness does not recall

making it and admitting evidence of the extrajudicial identification when the witness denies having made it.

See the comments to the two alternatives set out in Exhibits I and II for the reasons (taken from the Gould case) for admitting evidence of the extrajudicial identification. These reasons seem applicable whether or not the witness remembers making the extrajudicial identification.

3. Both alternatives set out in Exhibits I and II are drafted to state that evidence of the extrajudicial identification "is admissible." This language is used on the assumption that the Commission will approve the scheme to be proposed by the staff for redrafting the Hearsay Evidence Article in the form of a statute. See Memorandum 64-13 for a discussion of the problem. We will consider this problem in connection with Memorandum 64-13 and will redraft the extrajudicial identification exception if the staff's suggestion on redrafting the Hearsay Evidence Article is not acceptable to the Commission.

4. If the alternative set out in Exhibit I is approved by the Commission, the question of whether the evidence should be admissible only if the witness no longer remembers the person he identified should be considered. The Supreme Court's justification for this exception to the hearsay rule suggests that this requirement should not be included in the hearsay exception. If the Commission desires to include it, the following language should be added at the end of subdivision (2) of the proposed subdivision: "and that he is not now able to identify such person."

Respectfully submitted,

John H. DeMoully,
Executive Secretary

EXHIBIT I

SUBDIVISION (1.1): PREVIOUS IDENTIFICATION BY TRIAL WITNESS

In a criminal action or proceeding, evidence of an identification made prior to the hearing by a person who is a witness at the hearing is admissible if:

(1) The witness identified the defendant or another as a person who participated in the crime and such identification would have been admissible if made by the witness while testifying at the hearing; and

(2) The evidence of the identification is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime.

COMMENT

This subdivision codifies to a limited extent an exception to the hearsay rule that was recognized in People v. Gould, 54 Cal.2d 621, 354 P.2d 684, 7 Cal. Rptr. 273 (1960). See Study at 433-436. Although the Gould case involved the identification of the defendant, subdivision (1.1) makes the same principle applicable where the identification was of a person other than the defendant. Thus, the prosecution might use evidence admissible under this subdivision to help to establish the identity of a co-conspirator, and the defendant might use such evidence to create a reasonable doubt as to his guilt by showing that a person who observed the crime being committed identified another as the person who committed the crime.

Under existing law and under subdivision (1.1), evidence of an extrajudicial identification is admissible in a criminal case not only to corroborate an identification made at the trial but also as independent evidence of identity. The witness' earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in his mind. The failure of the witness to repeat the earlier identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the person identified with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available for cross-examination. People v. Gould, supra, 54 Cal.2d at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

Evidence of the extrajudicial identification is admissible under subdivision (1.1) only if the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime. The Gould case did not impose this requirement and, apparently, evidence of the extrajudicial identification is admissible under the Gould case even where the witness denies making the identification or has forgotten whether he made it. If the witness denies having made the identification or claims that the identification was not accurate, evidence of the extrajudicial identification is not admissible under this subdivision but would be admissible as a prior inconsistent statement under subdivision (1)(b). Where the witness testifies that he does not remember making

the extrajudicial identification, evidence of such identification would not be admissible under subdivision (1)(b) or under subdivision (1.1). The evidence is excluded in this case because the witness cannot be effectively cross-examined concerning the identification.

Subdivision (1.1) does not determine what constitutes evidence sufficient to uphold a conviction. Thus, it has no effect on the holding in the Gould case that evidence of an extrajudicial identification of an accused will not sustain a conviction unless confirmed either by identificationtion at the trial or by other evidence tending to connect the accused with the crime.

EXHIBIT II

SUBDIVISION (1.1): PREVIOUS IDENTIFICATION BY TRIAL WITNESS

In a criminal action or proceeding, evidence of an identification made prior to the hearing by a person who is a witness at the hearing is admissible if the witness identified the defendant or another as a person who participated in the crime and such identification would have been admissible if made by the witness while testifying at the hearing.

COMMENT

This subdivision codifies an exception to the hearsay rule that was recognized in People v. Gould, 54 Cal.2d 621, 354 P.2d 684, 7 Cal. Rptr. 273 (1960). See Study at 433-436. Although the Gould case involved the identification of the defendant, subdivision (1.1) makes the same principle applicable where the identification was of a person other than the defendant. Thus, the prosecution might use evidence admissible under this subdivision to help to establish the identity of a co-conspirator, and the defendant might use such evidence to create a reasonable doubt as to his guilt by showing that a person who observed the crime being committed identified another as the person who committed the crime.

Under existing law and under subdivision (1.1), evidence of an extra-judicial identification is admissible in a criminal case not only to corroborate an identification made at the trial but also as independent evidence of identity. The witness' earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in his mind. The failure of the

witness to repeat the earlier identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the person identified with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available for cross-examination. People v. Gould, supra, 54 Cal.2d at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

Subdivision (1.1) does not determine what constitutes evidence sufficient to uphold a conviction. Thus, it has no effect on the holding in the Gould case that evidence of an extrajudicial identification of an accused will not sustain a conviction unless confirmed either by identification at the trial or by other evidence tending to connect the accused with the crime.

34(L) 2/17/64

Memorandum 64-13

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

BACKGROUND

Late in 1962 we distributed the printed tentative recommendation on Article VIII (Hearsay Evidence). Since then we have encouraged interested persons and organizations to submit comments on the printed tentative recommendation. We have received comments from a number of interested persons and groups and we anticipate that we will receive additional comments after March 1.

In this memorandum we present the comments received to date for Commission consideration and action. The comments are attached as exhibits to this memorandum and are discussed in the memorandum itself. We want to consider these comments at the February meeting because the special subcommittee of the Senate Judiciary Committee plans to hold hearings on this subject in March during the Special Session.

Before considering the various comments on the Hearsay Evidence recommendation, we suggest that the Commission consider the problem of drafting the substance of the article in the form of a statute. We plan to submit a tentative outline of the entire new evidence statute for Commission consideration within the next few months. It seems clear now, however, that the material on Hearsay Evidence will be a separate division or chapter of the comprehensive evidence statute. Hence, at this time we can consider the form which this portion of the comprehensive evidence statute should take. If the Commission approves the staff's suggestions

on how the portion of the statute relating to hearsay evidence should be drafted, we will be able to prepare the material in the form of a chapter or division of the comprehensive statute for consideration at a future meeting. In addition, we can consider the language of the various hearsay exceptions in light of the tentative decision made on the form of the statute.

FORM OF STATUTE ON HEARSAY EVIDENCE

An analysis of the Hearsay Evidence Article as revised reveals that it contains a number of general provisions relating to hearsay evidence (Rules 62, 63 (opening paragraph), 65, 66, and 66.1) and a large number of exceptions to the Hearsay Rule (subdivisions 1 through 32 of Rule 63). Further examination reveals that Rule 63 is very complex and extremely long because the various exceptions are tabulated following the word "except" in the opening paragraph of Rule 63. Moreover, a particular exception makes sense only if one reads it in connection with the opening paragraph of Rule 63.

When we previously considered the Hearsay Evidence Article we determined that we would not attempt to express it in statutory form in the tentative recommendation. We recognized, however, that Rule 63 was very complex and extremely long and it was generally agreed that Rule 63 should be split into a number of separate sections when the final statute is drafted.

We believe it highly desirable to break up Rule 63 into a number of separate statute sections. Generally speaking, each exception should be

a separate section and a complete sentence. The easy way to make each exception a complete sentence is to insert the words "is admissible" in the language stating the exception.

If we are to phrase the exceptions to the hearsay rule so that they state that a particular type of statement "is admissible" it is necessary to make it clear that the statement is not made admissible if it is privileged or otherwise is made inadmissible by some other provision of law. The Model Code of Evidence faced this same problem and met it with the following rule:

> RULE 10. CONDITION IMPLIED IN RULES DECLARING EVIDENCE ADMISSIBLE.
>
> Subject to Rule 3 [same as URE Rule 3 (Exclusionary Rules Not to Apply to Undisputed Matter) which was deleted by the Law Revision Commission], each Rule stating that evidence is admissible contains by implication the provision, "if relevant and not subject to exclusion by another of these Rules."
>
> Comment:
>
> The Rule prevents the necessity of inserting the condition in each Rule that provides for the admissibility of evidence. Evidence may be admissible under one Rule and subject to exclusion by reason of a claim of privilege or for some other reason recognized in another Rule. For example, evidence of a statement made by a witness testifying at a trial may be admissible against him in a later proceeding under Rule 506, as an exception to the rule against hearsay; but if in making the statement he was erroneously compelled to incriminate himself, the evidence is inadmissible under Rule 232.

Rule 10 of the Model Code of Evidence applied to the entire code. We do not propose that a similar rule be made applicable to our entire evidence statute because we can deal with the problem when it arises in particular sections (other than in hearsay) and we would be concerned about the effect of the rule on sections that will be added to the new statute from our existing statute on evidence.

In view of the above discussion, the staff suggests that the Hearsay Evidence Chapter tentatively be organized as follows:

CHAPTER HEARSAY EVIDENCE

ARTICLE 1. GENERAL PROVISIONS

Section 1. Definitions. [Rule 62]

Note: It appears that most of the definitions in the hearsay article will need to be made applicable to the entire statute. For example, "unavailable as a witness" is used in sections outside the hearsay article. That definition uses the word "declarant" which also is defined; and the definition of "declarant" uses the word "statement" which is defined. In addition, the definition of "State" appears to be unnecessary. We merely mention this problem, but suggest that action be deferred until a later time when we can consider the general problem of definitions.

Section 2. General rule excluding hearsay evidence.

Note: This section is based on the opening paragraph of Rule 63 which should be revised to read:

> Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except as provided in Article 2 of this chapter.

Section 3. Credibility of declarant. [Rule 65]

Section 4. Multiple hearsay. [Rule 66]

Section 5. Savings clause. [Rule 66.1]

ARTICLE 2. EXCEPTIONS TO HEARSAY RULE

Section 10. Article does not make evidence admissible that is subject to exclusion on grounds other than hearsay.

Note: This section is new. It would read:

> Although the sections contained in this article declare that certain evidence is admissible, such evidence may be excluded if it is not relevant evidence or if it is subject to exclusion on some ground other than Section 2.

Section 11. Previous statement of trial witness.

Note: This is subdivision (1) of Rule 63 which should be revised to read:

> A statement made by a person who is a witness at the hearing, but not made at the hearing, is admissible if the statement would . . .

Additional sections covering other hearsay exceptions revised to use the words "is admissible."

Section 44. Evidence admissible under other statutes.

Note: This is subdivision (32) of Rule 63 which should be revised to read:

> Hearsay evidence declared to be admissible by any other statute section is admissible.

We strongly urge the Commission to approve this scheme tentatively. We believe that it will simplify and clarify the proposed statute and may simplify some of the problems we will face in revising particular hearsay exceptions to meet objections.

REVIEW OF TENTATIVE HEARSAY EVIDENCE RECOMMENDATION

Attached as exhibits are comments received from the following persons or organizations:

Exhibit I. Committee of Municipal Court Judges' Association of Los Angeles County (pink sheet)

Exhibit II. California Commission on Uniform State Laws (gold sheet)

Exhibit III. County of Los Angeles--Office of the District Attorney (green sheets)

Exhibit IV. Professor Kenneth Culp Davis (yellow sheets)

Exhibit V. Committee of the Conference of California Judges (white sheets)

Exhibit VI. Hollywood Bar Association (blue sheet)

Exhibit VII. Attorney General Mosk (Extract from official transcript of Hearing of Joint Legislative Committee for the Revision of the Penal Code (buff sheets)

Exhibit VIII. Office of County Counsel--San Bernardino County

We anticipate we will be receiving additional comments after March 1.

General analysis of comments.

The Committee of the Municipal Court Judges' Association of Los Angeles County congratulates the Commission "for the excellent study and recommendations that have been made." The Committee suggests only that Rule 62(6)(c) be revised.

The California Commission on Uniform State Laws has no suggestions to make with regard to the tentative recommendation.

The Office of the District Attorney--Los Angeles County has a number of specific comments on the tentative recommendation.

Professor Kenneth Culp Davis suggests a distinction should be made between judge tried cases and jury cases, but he makes no specific suggestions for revision of the tentative recommendation. He states: "The report, in my opinion, misses the boat. It proposes to turn the clock back, and it won't succeed."

The Committee of the Conference of California Judges makes a number of specific suggestions for revision. In most cases the Committee's suggestions go to the form in which the proposed rule should be drafted. We will not consider these suggestions now, but will take them into account when we prepare the draft of the portion of the statute relating to hearsay evidence.

The office of the San Bernardino County Counsel has made a careful study of the tentative recommendation. Generally speaking, the comments do not object to the tentative recommendation.

The Hollywood Bar Association has no recommendations to submit. They comment: "We believe that the Commission has made an exhaustive study and and that their efforts are accurately reflected in the proposed recommendations."

Attorney General Mosk made two specific points in his objection to our tentative recommendation, but he further stated: "Many of these points I have made could be called surface criticisms, and I will concede that they are. But a deeper analysis, I am sure, will reveal deeper problems."

General problems in tentative recommendation.

Form of proposed statute. This matter is discussed in a previous portion of this memorandum. We plan to draft the tentative recommendation in the form of a portion of the proposed statute for consideration by the Commission at a subsequent meeting.

Definitional problems. In Memorandum 64-15 (relating to the General Provisions Article) we suggest certain definitions. The need for these definitions is apparent when various hearsay evidence provisions are considered. We will use the definitions when we draft the tentative recommendation in the form of a portion of the proposed statute.

General philosophy of tentative recommendation. We suggest that you read Exhibit IV (the comments of Professor Davis). Those members of the Commission who are engaged in trial practice will be in a position to better evaluate the comments of Professor Davis. It might be noted, however, that a statute based on the philosophy contained in the Davis letter would have little chance of enactment.

Preliminary determination on admissibility. Many of the hearsay exceptions are conditioned on a finding by the judge. Others should be but are not. E.g., subdivision (29.1). Whether the phrase "if the judge finds" should be used; whether the determination should be made on evidence

sufficient to sustain a finding or by a preponderance of evidence, and the like, are not considered in this memorandum. The memorandum on Rule 8 will consider what technique should be used to clarify this matter. Whatever determination is made in connection with Rule 8 will be reflected in the revised draft of the tentative recommendation in the form of a portion of the comprehensive statute.

Form of exceptions. The Committee of the Conference of California Judges comments that the form of the subdivisions under Rule 63 should be uniform, and that the subject matter of the hearsay evidence should be stated first and that any modifying or conditional phrases, or exceptions should be stated in the latter provisions of the subdivisions or as a separate paragraph as is done in Rule 63(1). Earlier in this memorandum we suggested the need to revise the form of the subdivisions so that each is a separate section. If this suggestion is adopted, we will consider this comment in redrafting the subdivisions as separate sections. If the suggestion is not adopted, we should consider the comment in connection with each of the subdivisions of Rule 63.

Consideration of specific comments.

Rule 62(6)(c). See Tentative Recommendation, pages 309-310. The Committee of the Municipal Court Judges' Association of Los Angeles County made only one comment and that comment concerned Rule 62(6)(c):

> The only suggestion for a change is as to Rule 62(6)(c). The language offered by the Uniform Rules of Evidence appears to be preferable to the language recommended by the Commission. While it is true that the language recommended by the Commission is taken from Section 2016(d)(3)(iii) of the Code of Civil Procedure, there is no reason why "age" in and of itself should make a witness unavailable. It is the "physical or mental illness" that makes a witness unavailable, not "age." Also, "imprisonment" should not make a witness "unavailable," as witnesses who are imprisoned can be and frequently are brought to court to testify.

The office of the Los Angeles County District Attorney comments:

> Rule 62(6)(c) includes in its definitions of the term "unavailable" one who is imprisoned or sick or infirm. It appears obvious that the testimony of such a person would usually be inherently unreliable, and the presence of a convict can be obtained by an order of the court and his testimony tested by cross examination. Further, the testimony of sick or infirm persons can usually be obtained by the court holding a bedside hearing.

In view of the above objections, it is suggested by the staff that subdivision (6)(c) be revised to read:

> (c) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness.

This would restore the original URE test. If this change is made, consideration should be given to whether the definition of "unavailable as a witness" should apply in C.C.P. Sec. 2016 (d)(3)(iii) (pages 350-351 of tentative recommendation) and in Penal Code Sections 1345 and 1362 (page 353 of tentative recommendation). It would appear that the revised definition should apply to these existing code sections.

Rule 62--additional definitions. The Committee of the Conference of California Judges suggests that two new definitions be added to Rule 62.

The first definition would define "physical or mental condition of a person." See definition on page 3 of Exhibit V (white pages). We do not believe that this should be defined in Rule 62. The only place we find the term used is in subdivision (12) of Rule 63.

The second definition would define "family history." We believe that this is a good suggestion. The phrase "family history" is used in subdivisions (23), (24), (26), and (26.1). The use of a general definition would shorten these subdivisions and would seem to create no problems.

Rule 63(1). There were no comments on this subdivision.

Witkin, California Evidence §§ 695, 696 (1958) points out that there is a distinction between the so-called "recent fabrication" exception and the "statement before alleged improper motive arose" exception:

> § 695. . . . Where the impeachment has been made on the grounds of bias or other improper motive, a consistent statement made prior to the time the bias or motive was alleged to have arisen tends to show that the witness was not influenced by it in testifying on the stand. Accordingly the prior consistent statement is admissible in rehabilitation. . . .
>
> § 696. . . . The charge, express or implied, that the testimony was recently fabricated by the witness, is similar to the charge that it was influenced by improper motives (supra, § 695), and rehabilitation by proof of prior consistent statements is equally proper. . . .

Our analysis of the cases indicates (1) that the "recent fabrication" exception is broader than the "statement before alleged motive arose" exception and (2) that, in view of recent cases, the "recent fabrication" exception has been interpreted to cover cases of bias or other improper motive as well. The flexibility of the "recent fabrication" exception, and its tendency to merge with the "statement before alleged motive arose" exception, are well illustrated in People v. Walsh, 47 C.2d 36, 41, 301 P.2d 247 (1956). Defendants W and S, building inspectors, were charged with bribery--taking money from contractors to fix violations. Cross-examination of the contractor witnesses showed their past and present hostility to defendants and friendliness with the police. The prosecutor was then allowed to introduce the contractors' checks (to defendants) and prior oral statements to the effect that the money was used for bribes. The District Court of Appeal held the rehabilitation improper because the witnesses were as much biased against the defendants at the time of the prior consistent statements as at the time of the trial; i.e., the statements were not made before the alleged motive arose. But the Supreme

Court, without extended discussion, treated the cross-examination as an implied charge of recent fabrication, observing that "inferences of fabrication since the alleged bribes could be fairly drawn by the jurors."

The flexible "recent fabrication" rule was again stretched in People v. Bias, 170 Cal. App.2d 502, 512, 339 P.2d 204 (1959), where the court suggested that, under the theory of recent cases, the "charge" of fabrication may be "implied": "The very fact that defendant sought to impeach her [a prosecution witness] on an important circumstance of the crime, proving a statement at the preliminary examination contrary to that made at the trial, is in effect a charge of recent fabrication."

We have concluded that Rule 63(1) is satisfactory without making an express reference to bias or improper motive, but we believe that a statement should be contained in the comment to indicate that the "recent fabrication" exception of Rule 63(1)(b) embraces the "statement before alleged improper motive arose" exception.

If, however, the Commission desires to make the law entirely clear, the following new paragraph could be added to Rule 63(1):

> Is offered after an express or implied charge has been made that his testimony at the hearing is influenced by bias or improper motive and the statement is one made before the bias or motive is alleged to have arisen and is consistent with his testimony at the hearing; or

This new paragraph would follow paragraph (b) of the revised rule. The new paragraph would codify existing law.

In addition, the Commission should consider revising Rule 63(1)(b) to read:

> (b) Is offered after evidence of a prior inconsistent statement ~~or of a recent fabrication~~ by the witness has been received, or after

an express or implied charge has been made that his testimony at the hearing was recently fabricated, and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

Rule 63(3). The Committee of the Conference of California Judges suggests one change in substance in subdivision (3)(b): To substitute "to cross-examine" in place of "for cross-examination with an interest and motive similar to that which he has at the hearing."

The staff suggests that the language of the revised rule be retained. This requirement is necessary to insure a sufficient guarantee of trustworthiness to permit the former testimony to be used. Merely because the person against whom the former testimony is now being offered was a party to the former proceeding does not mean that the former testimony should be admitted. The party may have considered the former testimony insignificant in the former proceeding and thus did not object to it or cross-examine concerning it. Moreover, under the revised provision, unlike existing law it is not required that the former testimony have been given in a former action between the same parties relating to the same subject matter.

A possible response to the suggestion of the Committee would be to add two additional paragraphs to subdivision (3) to read:

(c) The former testimony was given in a former action or proceeding, relating to the same matter, between the same parties or their predecessors in interest.

(d) The former testimony was given in a former trial of a criminal action in the presence of the defendant against whom it is now offered and the defendant was given and had the opportunity to cross-examine the witness.

These additional paragraphs are not recommended by the staff, but they are based on Code of Civil Procedure Section 1870(8) ("The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter") and Penal Code Section 686(3) ("the testimony on behalf of the people or the defendant of a witness deceased, insane, out of

jurisdiction, or who cannot with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.")

Rule 63(3.1). The Committee of the Conference of California Judges recommends that this subdivision be eliminated. The Committee "feels that said rule is contrary to the California law as it now exists and that the said admission of testimony against a person who was not a party to the previous action or proceeding is dangerous and unfair."

The office of the District Attorney of the County of Los Angeles comments:

> Rule 63(3.1)(b) limits former testimony to that offered in a civil action or against the People in a criminal action. There appears to be no valid reason for changing the present rule which permits former testimony, whether given for or against a criminal. The recent case of People v. Volk, 221 A.C.A. 367, is an example of the fallacy of this provision.

(The office of the District Attorney of the County of Los Angeles apparently overlooked subdivision (3) which would make the testimony in People v. Volk admissible. People v. Volk involved testimony at the preliminary hearing that was offered at the trial in the same criminal action where the witness could not be located at the trial. Under subdivision (3)(b) such testimony would continue to be admissible.)

The office of the County Counsel of San Bernadino County comments on subdivision (3.1): "One's natural reaction is to oppose any such radical reduction of the right to cross-examine. However such testimony should be more reliable than many other types of hearsay which are admitted."

Rule 63(5). The office of the District Attorney of the County of Los Angeles states:

> Rule 63(5) contains an extremely broad dying declaration exception which in conjunction with Rule 63(10) would make admissible false confessions of guilt by dying criminals to benefit their confederates.

It should be noted that Rule 63(10) makes the evidence objected to admissible; Rule 63(5) is not needed for that purpose unless Rule 63(10) is redrafted to make such confessions inadmissible.

Rule 63(6). A majority of the Committee of the Conference of California Judges were in favor of this subdivision as recommended by the Commission. One member dissented as to paragraph (c); two members dissented as to paragraph (b) because this paragraph "does not make it sufficiently clear that there must be a causal connection between the alleged violation of the State of Federal Consitutions and the obtaining of the confession."

The Attorney General (Exhibit VII, pages 2-3--buff colored paper) and the office of the District Attorney of Los Angeles County (Exhibit III, page 2--green paper) object to subdivision (c) which provides that a confession is inadmissible if made while the defendant was illegally detained.

Consideration should be given to deleting the phrase "relative to the offense charged" from the introductory clause of Rule 63(6).

Rule 63(7), (8). There were no objectios to these subdivisions. The Committee of the Conference of California Judges suggests changes in form which we will consider when we redraft the tentative recommendation in the form of a statute. Exhibit VIII specifically approves subdivision (8).

Rule 63(9). The Committee of the Conference of California Judges suggests the following changes in this subdivision:

(1) In paragraph (a), delete "before the determination of" and insert "during."

(2) In paragraph (a), after "discretion" insert "as to order of proof."

(3) In paragraph (b), delete "prior to the termination" and insert "during the existence" and delete "independent."

The Attorney General suggests that subdivision (b) should permit evidence of a statement of a co-conspirator to come in if the judge in his discretion, permits it to come in subject to proof of the existence of the conspiracy. In other words, subdivision (b) would be the same as to order of proof as is subdivision (a).

Subdivision (b) changes existing California law. Witkin, California Evidence 264 (1958) states:

> (1) Ordinarily proof of the existence of the conspiracy should precede proof of the declarations. But this rule yields to convenience, and the trial judge has power to allow the statements to be introduced, subject to a continuing objection and a later motion to strike if the prosecution does not connect them up. (See People v. Griffin, supra, 98 C.A.2d 47, 52; People v. Ferlin (1928) 203 C. 587, 599, 265 P.230.)

In addition, the Committee of the Conference of California Judges states: "We have eliminated the word 'independent' from Rule 63(9b ii) to comply with the rules set forth in People v. Collier, 111 Cal. App. 215; and People v. Curtis, 106 Cal. App.2d 321, to the effect that the acts and declarations of conspirators are properly received in evidence in proof of the 'fact' of the existence of a conspiracy." The following is a quotation from People v. Curtis:

> [7] Generally, the hearsay rule prohibits the reception in evidence of the acts done and the declarations made by one defendant, out of the presence of his codefendant, against such codefendant. One of the exceptions to the hearsay rule is provided by section 1870(6) of the Code of Civil Procedure, which reads: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . . 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy." [8] The section refers to declarations made by an alleged conspirator out of the presence of his confederate. Section 1870 also provides that evidence may be given of "[t]he act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty." (Subd. 7.) Section 1850 reads: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." [9] An act, declaration, or omission of

one alleged conspirator in the presence of his alleged confederate is not hearsay and is admissible in evidence. [10] An act, declaration, or omission of an alleged conspirator which forms a part of the transaction which is in dispute--the agreement coupled with an overt act--is not hearsay and is admissible in evidence. [11] An act or declaration of an alleged conspirator, not a part of the transaction which is in dispute, made out of the presence of his alleged confederate, is hearsay, and is not admissible in evidence until prima facie proof has been made of the existence of the conspiracy, subject to the power of the trial judge to regulate the order of proof. The very existence of a conspiracy is generally a matter of inference deduced from acts of the persons accused, and frequently from their declarations, written and verbal.

The distinction between admissible and inadmissible acts and declarations of alleged conspirators is lucidly explained in People v. Collier, 111 Cal. App. 215, 240 [295 P. 898]: "Now it must be apparent that when an agreement is not in writing parol evidence is admissible to prove its contents. And when the agreement is in parol, evidence of the conversations of the parties tending to disclose the agreement made is evidence of the very fact to be proved and hence is evidence of the res gestae. Hence, when the conspiracy charged in the indictment is an 'agreement' to do or not to do a certain act evidence of the conversations and acts of the conspirators which constitute the agreement is admissible to prove the agreement. Thus, when, as a part of the agreement, one or more of the conspirators undertakes to ask for a bribe, one or more agrees to accept a bribe, one or more agrees to do or not to do some act for the purpose of effectuating the compact, and one or more of the conspirators gives his assent to the compact either by express words or by actions from which such assent might be implied, evidence of such facts, when the agreement is in parol, is competent evidence of the acts or declarations which form 'a part of the transaction' which is in dispute, and, as such is admissible under the express provisions of section 1850 of the Code of Civil Procedure. On the other hand, if a witness were asked to relate a conversation which he had had with one of the alleged conspirators such testimony would be hearsay and would not be admissible under section 1870, subdivision 6 of the Code of Civil Procedure, until after the conspiracy had been proved, and, by thus permitting evidence of the acts and declarations of a conspirator against his coconspirator, this subdivision becomes an enlargement of rather than a limitation upon the ordinary hearsay rule." (Cf. People v. Raze, 91 Cal. App.2d 918, 921, 922 [205 P.2d 1062].) In People v. Daener, 96 Cal. App.2d 827, we said, page 831 [216 P.2d 511]: "The agreement may be inferred from the declarations, acts and conduct of the alleged conspirators. (People v. Benenato, 77 Cal. App.2d 350, 358 [175 P.2d 296].) 'If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy (People v. Yeager, supra [194 Cal. 452 (299 P. 40)]; People v. Sisson, 31 Cal. App.2d 92 [87 P.2d 420].) It may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end (People v. Montgomery, 47 Cal. App.2d 1 [117 P.2d 437]).' (People v. Torres, 84 Cal. App.2d 787, 794 [192 P.2d 45].)"

In reviewing the cases involving declarations of co-conspirators, we find that the existing law--i.e., permitting the declarations of co-conspirators to come in subject to later proof of the conspiracy--has worked well in practice. The existing law permits the prosecution to present its case in a logical manner. The proposed revised rule would result in confusion in some cases. We strongly urge that the rule advocated by the Attorney General be approved by the Commission and that subdivision (9)(b) be conformed to subdivision 9(a) on the order of proof of the declaration.

We suggest that the phrase "independent evidence" be deleted from subdivisions (a) and (b) and the phrase "otherwise admissible evidence" be substituted therefore. We believe that this will meet the objections of the Committee of the Conference of California Judges.

Rule 63(10). The Committee of the Conference of California Judges suggested that this subdivision be rewritten, but the committee did not suggest any change in substance. We will consider their suggestion when we redraft the subdivision in statutory form.

Two members of the Committee disapproved subdivision (10) for the following reasons:

> By reason of the decision by a District Court of Appeal in the case of People v. Spriggs, 220 A.C.A. 348, to the effect that the declaration of another person that he committeed the crime is inadmissible hearsay, and since the Supreme Court granted a hearing in the Spriggs case, and in the absence of additional safeguards to assure the trustworthiness of the declarant, it is suggested that the Committee not recommend favorable action on this subdivision until our Supreme Court renders its decision.

The office of the County Counsel of San Bernardino County makes the following comment regarding subdivision (10):

> This is another very substantial enlargement of the present hearsay exception. It seems as though the new rule will be more

logical. Formerly a declaration against interest had to be against pecuniary interest and even that exception was rather narrowly defined. A person would be even less likely to make a statement which would subject him to the risk of criminal liability than to make a statement which could cost him, perhaps, a nominal sum of money. How broadly the courts will interpret the exception to cover hatred, ridicule, or social disgrace remains to be seen. In the privileges article an example was given where X confessed to P, a psychotherapist, that X had murdered Y. D, charged with murder of Y could compel P to testify regarding X's confession. [Privileges recommendation changes to eliminate the exception that permitted D to compel P to testify to X's confession.]

The office of the District Attorney of Los Angeles County makes the following comment concerning subdivision (10):

> Rule 63(10) contains a very broad permissible use of declarations against interest but excludes statements made while the declarant was in custody insofar as such statements may be used against a defendant in a criminal action. Under this rule, evidence of other individuals that they committed the crime for which the defendant is being tried could be used on behalf of the defendant. Such a rule would lead to an increased number of perjurious defenses and would create chaos in criminal trials. Further, there appears no sound reason for the exception that declarations of a person in custody cannot be used against a defendant.

Rule 63(12). The Committee of the Conference of California Judges disapproved paragraph (c) of subdivision (12). Two members of the Committee believe that the subject matter of paragraph (c) should be included in the subdivision in language substantially as follows:

> (c) His previous symptoms, pain or physical sensation made to a physician relative to an issue of declarant's bodily condition.

The Office of the County Counsel of San Bernardino County states: "Only paragraph (c) is intended to be a change from present law. It does not appear to be an important one.

Rule 63(13). There were no objections to this subdivision.

Rule 63(14). There were no objections to this subdivision. Consideration might be given to making subdivision (14) consistent with subdivision (13). This could be accomplished by revising subdivision (14) to read:

> Evidence of the absence from the records of a business (as defined in subdivision (13) of this rule) of a record of an asserted act, condition or event, to prove the non-occurence of the act or event, or the non-existence of the condition, if the judge finds that:
>
> (a) It was the regular course of that business to make records of all such acts, conditions or events, at or near the time of the act, condition or event, and to preserve them; and
>
> (b) The sources of information and method and time of preparation of the records of that business [~~are such as to indicate that the absence of a record of an act, condition or event warrants an inference that the act or event did not occur or the condition did not exist~~] were such as to indicate their trustworthiness.

The revision would make it clear that the proponent of the evidence under subdivisinn (14) must make the same showing as under subdivision (13)--i.e., that the records of the business are trustworthy. Just what kind of a showing is required under subdivision (14)(b) of the revised rule and just how it differs from the showing under subdivision (13) if not clear. In this connection, the case that held that evidence of the absence from the record of a business was evidence that an act or event did not occur or a condition did not exist stated:

> The primary purpose of admitting evidence of any character in any case, is to arrive at the truth in controversy. Hence, if a business record is otherwise admissible under Section 1953f [now Revised Rule 63(13)], we see no reason why it should not be equally admissible to disprove an affirmative as to prove an affirmative, just as competent to prove the falsity of a fact affirmed as to prove the truth of the fact affirmed. We are unable to conceive of any kind of evidence which does not, in a measure, partake of both an affirmative and negative character. If it proves an affirmative, it thereby logically disproves the reverse.

Note that the court requires the same foundational showing to prove the absence of a record as to prove the existence of a record. The proposed revision of Rule 63(14) would retain the existing law in this respect.

Rule 63(15). The Committee of the Conference of California Judges approves Rule 63(15)(a), (b), and (c), provided that whenever the author of such writing is called as a witness by the party against whom

the writing is offered and concerning the subject matter of the writing, such witness may be examined as an adverse witness as on cross-examination.

The Committee also suggests that consideration be given to the admissibility of reports prepared by agencies of government prior to the litigation dealing with natural or physical conditions, for example, reports that might be used in water, mining, oil subsidence cases, but which would not qualify for admission under subparagraph (b). The Commission considered this matter when the tentative recommendation was prepared. See discussion of Rule 63(15)(c) on pages 522-524 of the study.

Rule 63(16). The Committee of the Conference of California Judges approves this subdivision if the words "or report" is deleted from the first line of the subdivision.

This subdivision is discussed in a supplement to this memorandum.

Rule 63(17). The Committee of the Conference of California Judges would revise paragraph (a) of subdivision (17) to read:

> (a) A writing purporting to be a copy of a writing recorded or filed pursuant to law in the office of a public officer, or a writing in the custody of such an officer, and offered to prove the contents of such writing if the original would be admissible and a copy meets the requirements of authentication under Rule 68.

This revision presents several policy questions:

(1) We have used the words "a writing in the custody of a public officer or employee" to include a copy of a writing recorded or filed pursuant to law in the office of a public officer or employee. The Committee suggests that subdivision (17)(a) be revised to read:

> (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record of a writing recorded or filed pursuant to law in the office of a public officer or employee or to prove the content of a writing in the custody of a public officer or employee, a writing purporting to be a copy thereof.

This seems to be an unnecessary change. However, to make subdivision (a) consistent with Revised Rule 68, the words "or of an entry therein" should be added after "a writing in the custody of a public officer or employee." See Tentative Recommendation on Authentication and Content of Writings, page 12. Thus, subdivision (a) should read:

> (a) If meeting the requirements of authentication under Rule 68, to prove the content of a writing in the custody of a public officer or employee or of an entry therein, a writing purporting to be a copy [~~thereof~~] of such writing or entry.

(2) The Committee suggests that the requirement that "if the original would be admissible" be added to subdivision (17)(a). The theory of subdivision (17)(a) is that it permits proof of the official record by a copy. Whether the official record is admissible depends on whether a hearsay exception exists that makes it admissible.

See the comment to subdivision (17). See also, Revised Rule 68 (Authentication). If this suggestion is adopted by the Commission, paragraph (a) of subdivision (17) might be revised to read:

> (a) A purported copy of a writing in the custody of a public employee, or of an entry therein, is admissible if:
> (1) The copy of the writing or entry meets the requirements of authentication under Rule 68; and
> (2) The writing in the custody of the public employee, or the entry therein, would itself be admissible.

Rule 63(18). There were no objections to this subdivision.

Rule 63(19). There were no objections to this subdivision.

Rule 63(20). This subdivision is discussed in a supplement to this memorandum.

Rule 63(21). There were no objections to the substance of this provision.

Rule 63(21.1). There were no objections to this subdivision.

Rule 63(22). No change in substance was recommended by persons commenting on this subdivision. This subdivision is discussed in a supplement to this memorandum.

Rule 63(23). The Committee of the Conference of California Judges would revise this subdivision to require the proponent of the evidence to show that the declarant "in making such statement had no apparent motive or reason to deviate from the truth." No reason is given for changing the burden of producing evidence of motive or reason to deviate from the truth to impose it on the proponent rather than on the person objecting to the evidence.

Rule 63(24). The Committee of the Conference of California Judges recommends the same change in this subdivision as in subdivision (23).

Rule 63(26). No change in the substance of this subdivision was recommended by persons sumitting comments.

Rule 63(26.1). No change in the substance of this subdivision was recommended by persons submitting comments.

Rule 63(27). No change in the substance of this subdivision was recommended by persons submitting comments. This subdivision is discussed in a supplement to this memorandum.

Rule 63(27.1). The Committee of the Conference of California Judges recommends that the proponent of the evidence have the burden of showing that the "statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth."

Rule 63(28). No change in the substance of this subdivision was recommended by persons submitting comments.

Rule 63(29). The Committee of the Conference of California Judges recommends that the words "real or personal" be inserted before "property" in the introductory clause of this subdivision. In this connection, it is noted that Section 17 of the Code of Civil Procedure provides in part:

> The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:
> 1. The word "property" includes both real and personal property;

Hence, the suggested revision seems unnecessary, since the general definitions applicable to the Code of Civil Procedure will apply unless we provide for conflicting definitions. Note also that "real property" and "personal property" are defined in Section 17 of the Code of Civil Procedure.

Rule 63(29.1). There were no comments on this subdivision. The subdivision does present the problem whether the words "if the judge finds" should be inserted in cases where the hearsay evidence is admissible subject to the finding of a condition. Here, the judge must find that statement has been since generally acted upon as true by persons having an interest in the matter. Hence, the least that should be done to this section is to change the word "when" to "if."

Rule 63(30). There were no comments on this subdivision.

Rule 63(31). There was only one comment on this subdivision. The office of the County Counsel of San Bernardino County states:

> This is C.C.P. 1936 modified only to conform to the general format of the hearsay statute. The courts have held that "books of science or art" do not include medical books since medicine is not an exact science. Consequently a doctor can be cross-examined as to his knowledge regarding various medical books, but the books themselves cannot be used as substantive evidence. The commission considered the possibility of broadening this exception by stating specifically that medical books are included. There is no indication why the commission decided against this desirable change.

Additional Hearsay Exception. In its tenative recommendation relating to the Privileges Article, the Commission approved the following additional exception to the hearsay rule (in connection with the repeal of the Dead Man Statute):

> (5.1) When offered in an action or proceeding brought against an executor or administrator upon a claim or demand against the estate of a deceased person, a statement of the deceased person if the judge finds it was made upon the personal knowledge of the declarant.

See Tentative Recommendation on Privileges Article, pages 117-119. We have not made a general distribution of this tentative recommendation for comments.

Rule 63(32). There were no comments on this subdivision.

Rule 64. The office of the District Attorney of Los Angeles County points out that discovery by the prosecution is very limited in criminal cases and, hence, it might be desirable to retain Rule 64.

Rule 65. There were no comments on this subdivision.

Rule 66. There were no comments on this subdivision.

Rule 66.1. There were no comments on this subdivision.

Amendments and Repeals of Existing Statutes. There were no objections to the amendments and repeals except, as noted below. One member of the Committee of the Conference of California Judges objects to repealing Section 1850. See comment on page 16 of Exhibit V (white pages).

The office of the County Counsel of San Bernardino County (Exhibit VIII) commented:

> C.C.P. 2047 will be changed rather substantially by permitting a witness to refer to a document not prepared by him, and by permitting the opposing attorney to inspect a document used to refresh the witness's memory, even when the witness does not take it with him to the witness stand. Probably the court would hold that this does not require disclosure of a document containing privileged information. The witness might be deemed to have waived his privilege (like the lawyer-client privilege) by referring to

the document to refresh his memory, but this should not compel him to hand over a document (like part of an adoption file) when the privilege belongs to another party or when disclosure is forbidden by statute. It would be a good idea to say so, if this is the law.

Witnesses will have to be careful what they use to refresh their memory prior to trial if they don't want the opposing attorney to see their files.

It is noted, also, that Code of Civil Procedure Section 117g refers to the Uniform Business Records as Evidence Act and will require a conforming amendment.

Additonal objections. We will redraft the rules in statutory form to reflect Commission action at the February meeting and will consider this portion of the proposed new statute and additional objections to the tentative recommendation (if any are received) at the March meeting. We also plan to make a careful study of the Hearsay Evidence Provisions when we prepare the tentative recommendation in statutory form.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 64-13

EXHIBIT I

MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
Elisabeth Eberhard Zeigler, Judge

December 30, 1963

California Law Revision Commission
School of Law
Stanford, California

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

The members of the committee of the Municipal Court Judges' Association of Los Angeles County have studied the California Law Revision Commission's tentative recommendations on the hearsay evidence article of the Uniform Rules of Evidence. May we offer our congratulations to the Commission for the excellent study and recommendations that have been made.

The only suggestion for a change is as to Rule 62(6)(c). The language offered by the Uniform Rules of Evidence appears to be preferable to the language recommended by the Commission. While it is true that the language recommended by the Commission is taken from Section 2016(d)(3)(iii) of the Code of Civil Procedure, there is no reason why "age" in and of itself should make a witness unavailable. It is the "physical or mental illness" that makes a witness unavailable, not "age". Also, "imprisonment" should not make a witness "unavailable", as witnesses who are imprisoned can be and frequently are brought to court to testify.

We appreciate the opportunity you have afforded us to study and to comment on your recommendations.

Very truly yours,

Elisabeth E. Zeigler
Chairman of Municipal Court
Judges' Association Committee

EEZ:mks

EXHIBIT II

BROBECK, PHLEGER & HARRISON
Attorneys at Law
One Eleven Sutter Street
San Francisco 4

January 3, 1964.

Mr. John H. DeMoully,
Executive Secretary,
California Law Revision Commission,
School of Law,
Stanford University,
Stanford, California.

Dear Mr. DeMoully:

As you will recall, Mr. George Richter, the chairman of the California Commission on Uniform State Laws, has designated me to act by way of liaison with the California Law Revision Commission in connection with the Hearsay Evidence Article of the Uniform Rules of Evidence. On September 6, 1963, you wrote me in regard to this matter, enclosing a copy of a tentative recommendation and research study prepared by the California Law Revision Commission.

This is to inform you that the California Commission on Uniform State Laws has no suggestions to make with regard to the tentative recommendation and research study.

Sincerely,

S/ALVIN J. ROCKWELL
Alvin J. Rockwell

AJR:mb

EXHIBIT III

COUNTY OF LOS ANGELES
OFFICE OF THE DISTRICT ATTORNEY
600 Hall of Justice
Los Angeles 12, California

January 7, 1964

Mr. Spencer M. Williams
County Counsel
County of Santa Clara
70 West Rosa Street
San Jose 10, California

Dear Spence:

At your request, we have reviewed the tentative proposals on Hearsay Evidence and Privileges Articles of the Uniform Rules of Evidence prepared by the California Law Revision Committee. There are a number of provisions which we feel are unwise changes in the law of evidence.

As to Article VIII, Hearsay Evidence, we object to the following proposals:

1. Rule 62 (5)(c) includes in its definitions of the term "unavailable" one who is imprisoned or sick or infirm. It appears obvious that the testimony of such a person would usually be inherently unreliable, and the presence of a convict can be obtained by an order of court and his testimony tested by cross examination. Further, the testimony of sick or infirm persons can usually be obtained by the court holding a bedside hearing.

2. Rule 63 (3.1)(b) limits former testimony to that offered in a civil action or against the People in a criminal action. There appears to be no valid reason for changing the present rule which permits former testimony, whether given for or against a criminal. The recent case of People v. Volk, 221 A.C.A. 367, is an example of the fallacy of this provision.

3. Rule 63(5) contains an extremely broad dying declaration exception which in conjunction with Rule 63(10) would make admissible false confessions of guilt by dying criminals to benefit their confederates.

4. Subdivision Rule 63 (6) (c) provides that a confession is inadmissible if made while the defendant was illegally detained. While the commission does not clearly state it in their comment the effect of this recommendation would be to hamper law enforcement agencies by the adoption of the federal McNabb-Mallory Rule which has been rejected by the Supreme Court of the State of California. (See People v. Rogers, 46 Cal. 2d 3.)

5. Rule 63 (10) contains a very broad permissive use of declarations against interest but excludes statements made while the declarant was in custody, insofar as such statements may be used against a defendant in a criminal action. Under this rule, evidence of other individuals that they committed the crime for which the defendant is being tried could be used on behalf of the defendant. Such a rule would lead to an increased number of perjurious defenses and would create chaos in criminal trials. Further, there appears no sound reason for the exception that declarations of a person in custody cannot be used against a defendant.

6. The commission declines to adopt Rule 64 on the grounds that discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise. While this comment may be true in civil matters, it is absurd as applied to the People in a criminal case. (See Jones v. Superior Court, 58 Cal. at 56.)

We also find the following provisions of the Privileges Articles to be objectionable:

[omitted]

We have attempted to point out only the provisions which we feel are particularly objectionable in the commission recommendations. Our failure to mention other provisions should not be taken as an indication of approval for the rest of the material.

Sincerely yours,

s/

Manley J. Bowler
Chief Deputy District Attorney

MJB:kmh

Memo 64-13

EXHIBIT IV

THE UNIVERSITY OF CHICAGO

Chicago 37 · Illinois

The Law School

January 20, 1964

Mr. John H. DeMoully
California Law Revision Commission
Stanford University School of Law
Stanford, California

Dear John:

Many thanks for sending me the report of the California Law Revision Commission on hearsay.

The report, in my opinion, misses the boat. It proposes to turn the clock back, and it won't succeed.

More specifically, the report goes wrong at page 308, where the unsupported assertion appears that "the tentative recommendation would make a broader range of hearsay evidence admissible in the courts of this State than is now the case." The report makes this assertion without even any awareness of what proceedings will be subject to the new rules; the report merely refers vaguely to "the California law of evidence."

One has to turn to the Chadbourn report, beginning at page 407, to discover what the proposed rules will apply to. The rules will apply "in every criminal or civil proceeding conducted by or under the supervision of a court in which evidence is produced." In the footnote to that statement appears the exceedingly important qualification: "Except to the extent to which the Uniform Rules of Evidence 'may be relaxed by other procedural rule or statute applicable to the specific situation.'" Then appears the example of the Small Claims Court, before which the proposed rules will be "relaxed."

With all respect, I want to raise the exceedingly elementary question whether the Commission is aware of the fact that the jury-trial rules of evidence, including especially the hearsay rule, are "relaxed" in most cases that are tried without juries. I want to raise the elementary question whether the Commission is aware of the fact that probably about two-thirds of all trials in superior courts of California are without juries, and that in the lesser courts of California a still higher proportion are without juries.

On the basis of statistics in recent reports of the Judicial Council of California, I think it may be a good guess that more than nine-tenths

of the trials to which the proposed rules will be applicable are without juries. In the nonjury trials, the hearsay rule is "relaxed" to some uneven extent from case to case and from judge to judge.

From this approach, I think it highly improbable that "the tentative recommendation would make a broader range of hearsay evidence admissible in the courts of this State than is now the case." This statement at page 308 of the report has no support whatsoever, and the only way it could be supported would be through a study of the present practices in nonjury trials, which probably account for more than nine-tenths of all trials in courts of California. Even if the statement is true with respect to jury cases, which are probably less than one-tenth of the trials, I think the statement is unjustifiable unless some sort of study of nonjury trials supports it.

The reality seems to me to be that today's evidence practices in California make a lot of sense because the jury-trial rules are relaxed in more than nine-tenths of all trials. And application of the California Law Revision Commission's proposed rules to the nonjury trials of California will, as I see it, be a move in the wrong direction.

Even in jury cases, I am not convinced that the recommendations will be a step forward. What is important here is the difference between the formal system and what actually happens in trials, plus the further fact that the codification proposed will probably tend to have more effect than today's relative looseness. Nothing in the report or in the Chadbourn study discerns the crucial realities emphasized by some of the best students of evidence. An example is Professor Jack Weinstein of Columbia University: "So quickly has the exclusionary hearsay rule waned that there are few cases today where the outcome of a well-tried case would have been different had it not been for the hearsay rule, where a good court was prevented from admitting persuasive hearsay. Not all lawyers and courts, of course, have fully exploited present tendencies." See the whole Weinstein article, Probative Force of Hearsay, 43 Ia. L. Rev. 331 (1961), which has in it ninety-nine times as much wisdom as the Chadbourn report.

The proposed rules of the California Law Revision Commission fail to recognize the fundamental truth captured by McCormick in one sentence: "The trustworthiness of hearsay ranges from the highest reliability to utter worthlessness." The proposed rules assume, wrongly, that the hearsay rule and its exceptions can be made to fit McCormick's fundamental truth. They don't fit it.

If more than nine-tenths of trials in California are without juries, then in preparing rules of evidence for all trials, we need to release our minds from jury thinking and to prepare rules for nonjury trials. We can then provide for the needed adaptation for the small minority of trials that use juries. The rules proposed by the California Law Revision Commission are dominated by jury thinking. The proposed rules should be prepared by minds that are released from jury thinking.

When our minds are released from jury thinking, we shall see the merit of building on our valuable experience under the satisfactory provisions of the Administrative Procedure Act that "Any oral or documentary evidence may be received" and that a finding may be supported by "reliable, probative, and substantial evidence" without regard to the question whether the evidence is "competent."

When our minds are released from jury thinking, we shall see that when the only available alternative to giving the hearsay as much weight as it seems to deserve is to decide without evidence, our belief that direct evidence is usually better than hearsay is unhelpful because it is irrelevant.

When our minds are released from jury thinking, we shall see the nonsense of a hearsay rule that operates in the same way irrespective of the reliability or unreliability of the hearsay and irrespective of the availability or unavailability of the declarant; we shall see that even somewhat unreliable hearsay may for some purposes in some circumstances be better than no evidence.

If you want figures showing that five-sixths of all trials in courts of general jurisdiction in the United States today are without juries, I refer you to § 14.03 of the 1963 pocket parts of my Administrative Law Treatise. (If you want support for some of my remarks to you at the lunch table about judicial notice, see § 15.09 of the same pocket parts.)

I was much pleased to become a bit acquainted with you in Los Angeles, John, and I hope the future will often bring us together.

Warm regards.

Sincerely yours,

Kenneth Culp Davis

KCD:fs

EXHIBIT V.

Chambers of

THE SUPERIOR COURT

Los Angeles 12, California

January 28, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully, Executive Secretary

Gentlemen:

The Honorable Vernon W. Hunt, President of the Conference of California Judges, several months ago appointed a special committee of the Conference to work with your Commission on the study of the Uniform Rules of Evidence. The members of said committee are as follows:

Justice Mildred Lillie
Justice, District Court of Appeal
Los Angeles, California

Judge Mark Brandler
The Superior Court
Los Angeles, California

Judge Raymond J. Sherwin
The Superior Court
Fairfield, California

Judge James C. Toothaker
The Superior Court
San Diego, California

Judge Howard E. Crandall
The Municipal Court
San Pedro, California

Judge Leonard A. Diether
The Superior Court
Los Angeles, California
Chairman of the Committee

The Committee has studied and reviewed the tentative recommendations of your Commission on the Uniform Rules of Evidence relating to hearse

evidence as expressed in your report of August 1962, and has prepared a report of its recommendations and conclusions, copies of which are enclosed herewith. Please deliver a copy of said report to each member of the Commission

If the Commission desires, the Committee will be happy to furnish the Commission with additional information as to the reasons or basis for its recommendations and conclusions.

The Committee will be happy to study and review any additional tentative recommendations of the Commission on the Uniform Rules of Evidence.

Yours very truly,

s/

Leonard A. Diether
Chairman of the Committee of the
Conference of California Judges to
Work with the California Law
Revision Commission on Uniform
Rules of Evidence

LAD:IM
Encls.

REPORT OF THE SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES TO WORK WITH THE CALIFORNIA LAW REVISION COMMISSION ON THE STUDY OF THE UNIFORM RULES OF EVIDENCE RELATIVE TO HEARSAY EVIDENCE

The Committee approves the tentative recommendations of the Commission on all Rules relating to hearsay evidence not specifically mentioned herein.

RULE 62

DEFINITIONS

The Committee recommends that Rule 62 be amended to include the definitions hereinafter set forth. The Committee believes that such definitions will simplify and shorten Rule 63.

Rule 62(9) Physicial or mental condition of a person as used in these rules shall include the then existing state of mind, emotion or physicial sensation, statements of intent, plan, motive, design, mental feeling, pain and bodily health.

Rule 62(10) Family history shall mean a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact.

RULE 63

HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS

The Committee recommends that the form of the subdivisions under Rule 63 should be uniform, and that the subject matter of the hearsay evidence should be stated first and that any modifying or conditional phrases, or exceptions should be stated in the latter provisions of the subdivisions or in a separate paragraph as is done in Rule 63(1).

RULE 63(3)

FORMER TESTIMONY OFFERED AGAINST A PARTY TO THE FORMER ACTION OR PROCEEDING

The Committee recommends that Rule 63(3) be rewritten as follows:

Former testimony of a declarant if the judge finds that the declarant is unavailable as a witness and any one of the following exists:

(a) It is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine, except that testimony in a deposition taken in another action or proceeding and testimony given in a preliminary examination in another criminal action or proceeding is not admissible under this subparagraph against the defendant in a criminal action or proceeding unless it was received in evidence at the trial of such other action or proceeding.

The admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time.

RULE 63(3.1)

FORMER TESTIMONY OFFERED AGAINST A PERSON NOT A PARTY TO THE FORMER ACTION OR PROCEEDINGS

The Committee recommends that Rule 63(3.1) be eliminated. It feels that said rule is contrary to the California Law as it now exists and that the admission of testimony against a person who was not a party to the previous action or proceedings is dangerous and unfair.

RULE 63(6)

CONFESSIONS

The majority of the Committee are in favor of the subdivision as recommended by the Commission.

Two members dissent as to subparagraph (b) and one member dissents as to subparagraph (c).

The view of one member of the Committee is that subparagraph (a), amply protects the rights of the defendant and that under the California authorities the trial judge may properly consider the subject matter presently encompassed in the Commission's subparagraph (b) and (c).

Two members of the Committee believe that subparagraph (b) does not make it sufficiently clear that there must be a causal connection between the alleged violation of the State or Federal Constitutions and the obtaining of the confession.

Although the Committee believes that subparagraph (c) is contrary to the present California Law as stated in the case of People v. Freeland, 218 A.C.A. 215; Rogers v. Superior Court, 46 Cal.2d 3, the majority of the Committee is in favor of the Commission's recommendations.

RULE 63(7)

ADMISSIONS BY PARTIES

The Committee recommends that Rule 63(7) be rewritten as follows:

A statement by a person who is a party to a civil action or proceeding offered against him in either his individual or representative capacity regardless of whether such statement was made in his individual or representative capacity.

RULE 63(8)

AUTHORIZED AND ADOPTIVE ADMISSIONS

The Committee recommends that Rule 63(8) be rewritten to read as follows:

A statement offered against a party if:

(a) Made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; or

(b) The party against whom it is offered had knowledge of its content and has by words or conduct manifested his adoption or his belief in its truth.

RULE 63(9)

VICARIOUS ADMISSIONS

The Committee recommends that Rule 63(9) be rewritten as follows:

A statement which would be admissible if made by the declarant at the hearing if offered against a party and:

(a) The statement is that of an agent, partner or employee of

the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made during such relationship and (ii) the statement is offered after, or in the judge's discretion as to the order of proof, subject to proof by independent evidence of the existence of the relationship between the declarant and the party; or

(b) The statement is that of a co-conspirator of the party and (i) the statement was made during the existence of the conspiracy and in furtherance of the common object thereof, and (ii) the statement is offered after proof by evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, the liability, obligation or duty of the declarant is an issue between the party and the proponent of the evidence of the statement and the statement tends to establish that liability, obligation or duty.

We have eliminated the word "independent" from Rule 63(9b ii) to comply with the rules set forth in People v. Collier, 111 Cal. App. 215; and People v. Curtis, 106 Cal. App.2d 321, to the effect that the acts and declarations of conspirators are properly received in evidence in proof of the "fact" of the existence of a conspiracy.

RULE 63(10)

DECLARATIONS AGAINST INTEREST

The Committee recommends that Rule 63(10) be rewritten as follows:

A statement which the judge finds was at the time of the statement: (i)

so far contrary to the declarant's pecuniary proprietary interest or (ii) so far subjected him to the risk of civil or criminal liability, or (iii) so far tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, provided the declarant is not a party to the action or proceedings and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, except, however, that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.

Two members of the Committee disapproved said subdivision for the following reasons:

By reason of the decision by a District Court of Appeal in the case of People v. Spriggs, 220 A.C.A. 348, to the effect that the declaration of another person that he committed the crime is inadmissible hearsay, and since the Supreme Court granted a hearing in the Spriggs case, and in the absence of additional safeguards to assure the trustworthiness of the declarant, it is suggested that the Committee not recommend favorable action on this subdivision until our Supreme Court renders its decision.

RULE 63(12)

STATEMENTS OF PHYSICAL OR MENTAL CONDITION OF DECLARANT

The Committee recommends that Rule 63(12) be rewritten as follows:

A statement of a declarant unless the judge finds it was made in bad faith, relative to:

(a) His physical or mental condition when such is an issue or is relevant to prove or explain acts or conduct of the declarant, but, except as provided in paragraphs (b), (c) and (d) of this subdivision, not including memory or belief to prove the fact remembered or believed; or

(b) His state of mind, emotion or physical sensation at a time prior to the statement to prove such prior facts when such is an issue in the action or proceedings, but not to prove any other fact provided declarant is unavailable as a witness; or

(c) Whether he has or has not made a will or has or has not revoked his will or that identifies his will provided he is unavailable as a witness.

The majority of the Committee believe that the Commission's subparagraph (c) should be eliminated entirely and that the present law of California on that subject as it now exists should apply.

Two members of the Committeee believe that the subject matter of subparagraph (c) should be included in the subdivision in language substantially as follows:

(c) His previous symptoms, pain or physical sensation made to a physician relative to an issue of declarant's bodily condition.

RULE 63(15)

REPORTS OF PUBLIC OFFICERS AND EMPLOYEES

The Committee approves Rule 63(15) (a), (b) and (c) provided that whenever the author of such writing is called as a witness by the party against whom the writing is offered and concerning the subject matter of the writing, such witness may be examined as an adverse witness as on cross-examination.

The Committee suggests that the Commission give consideration to the admissibility of reports prepared by agencies of the government prior to the litigation dealing with natural or physical conditions, for example, reports that might be used in water, mining, oil subsidence cases, but which would not qualify for admission under subparagraph (b).

RULE 63(16)

REPORTS OF VITAL STATISTICS

The Committee recommends that the title of this subdivision be changed to "Records of Vital Statistics."

The Committee also recommends that the words "or reports" in the first line of the subdivision should be eliminated, and if so eliminated the Committee approves the subdivision as recommended by the Commission.

RULE 63(17)

CONTENT OF OFFICIAL RECORDS

The Committee recommends that Rule 63(17) be rewritten as follows:

(a) A writing purporting to be a copy of a writing recorded or filed pursuant to law in the office of a public officer, or

a writing in the custody of such an officer, and offered to prove the contents of such writing if the original would be admissible and a copy meets the requirements of authentication under Rule 68.

(b) A writing made by the public officer who is the official custodian of the records in his office and offered to prove the absence of a record in such office if such writing meets the requirements of authentication under Rule 69 and recites diligent search and failure to find such record.

One member of the Committee disapproves of the recommendation of the Commission and of this Committee with regard to subparagraph (a), and feels that the provisions of the Uniform Rules of Evidence should be followed.

RULE 63(20)

JUDGMENT OF PREVIOUS CONVICTION

The majority of the Committee approves the recommendation of the Commission in eliminating subdivision 20 of the Uniform Rules of Evidence. However, the Committee suggests that the Commission give consideration to the case of Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd., 58 Cal.2d 601. If said subdivision 20 is eliminated and the Teitelbaum case remains as the law of this state would not the final judgment of conviction be admissible in any other action in which it would be material?

One member of the Committee believes that subdivision 20 should be included as proposed in the Uniform Rules of Evidence so long as it is made clear that it is not intended to repeal by implication the new subdivision 3 of Section 1016 Penal Code dealing with a plea of nolo contendere.

RULE 63(21)

JUDGMENT AGAINST PERSONS ENTITLED TO INDEMNITY

The Committee recommends that Rule 63(21) be rewritten as follows:

Evidence of a final judgment if offered by the judgment debtor in any action of proceedings to prove any fact which was essential to the judgment and such action or proceedings is to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment; or

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

RULE 63(22)

JUDGMENT DETERMINING PUBLIC INTEREST IN LAND

The Committee recommends Rule 63(22) be rewritten as follows:

Evidence of a final judgment determining the interest or lack of interest of a public entity in land, and offer to prove any fact which was essential to the judgment if such judgment was entered in an action or proceedings to which the public entity whose interests or lack of interest was determined, was a party. As used in this subdivision "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or a state or territory of the United States.

RULE 63(23)

STATEMENT CONDERNING ONE'S OWN FAMILY HISTORY

The Committee recommends that Rule 63(23) be rewritten as follows:

A statement of a matter concerning a declarant's own family history, even though the declarant had no means of acquiring personal knowledge of the matter declared provided the judge finds the declarant is unavailable as a witness and that the statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth.

RULE 63(24)

STATEMENT CONCERNING FAMILY HISTORY OF ANOTHER

The Committee recommends that Rule 63(24) be rewritten as follows:

A statement concerning the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) The statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth; and

(b) The declarant was related to the other by blood or marriage; or

(c) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

RULE 63(26)

REPUTATION IN FAMILY CONCERNING FAMILY HISTORY

The Committee recommends that Rule 63(26) be rewritten as follows:

Evidence of reputation among members of a family if the reputation concerns the family history of a member of the family by blood or marriage and if offered to prove the truth of the matter reputed.

RULE 63(26.1)

ENTRIES CONCERNING FAMILY HISTORY

The Committee recommends that Rule 63(26.1) be rewritten as follows:

Entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones and the like if offered to prove the family history of a member of the family by blood or marriage.

RULE 63(27)

COMMUNITY REPUTATION CONCERNING BOUNDARIES, GENERAL HISTORY AND FAMILY HISTORY

The Committee recommends that Rule 63(27) be rewritten as follows:

Evidence of reputation in a community if offered to prove the truth of the matter reputed and the reputation concerns:

(a) Boundaries of or customs affecting land in the community and the judge finds that the reputation, if any, arose before the controversy.

(b) An event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community.

(c) The date of fact of birth, marriage, divorce or death of a person resident in the community at the time of the reputation.

RULE 63(27.1)

STATEMENT CONCERNING BOUNDARY

The Committee recommends that Rule 63(27.1) be rewritten as follows:

A statement concerning the boundary of land if the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject and that the statement was made under such circumstances that the declarant in making such statement had no apparent motive or reason to deviate from the truth.

RULE 63(28)

REPUTATION AS TO CHARACTER

The Committee recommends that Rule 63(28) be rewritten as follows:

Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated and if offered to prove the truth of the matter reputed.

RULE 63(29)

RECITALS IN DOCUMENTS AFFECTING PROPERTY

The Committee recommends that Rule 63(29) be rewritten as follows:

A statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property if the judge finds that:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

RULE 64

DISCRETION OF JUDGE

UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

One member of the Committee disagrees with the recommendation of the Commission as set forth on page 343 of its Report that section 1850 (res gestae) of the Code of Civil Procedure be repealed notwithstanding the suggestion of the Commission that Rule 62 and 63 make declarations that are themselves material and relevant, not subject to the hearsay rule.

Said member also believes that a portion of said section 1850 is not encompassed within the Rules as recommended by the Commission:

Dated: January 28, 1964.

Respectfully submitted,

Justice Mildred Lillie

Judge Mark Brandler

Judge Raymond J. Sherwin

Judge James C. Tootbaker

Judge Howard E. Crandall

Judge Leonard A. Diether, Chairman

Memo 64-13

EXHIBIT VI

Hollywood Bar Association

Law Offices

Meserve, Mumper & Hughes

Mr. John H. DeMoully
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This will acknowledge your letter of January 31, 1964, regarding the hearsay evidence article. We believe that the Commission has made an exhaustive study and their efforts are accurately reflected in the proposed recommendations. The Hollywood Bar Association is a relatively small organization, and the committee was not in a position to conduct extensive research. We have no recommendations to submit.

Yours very truly,

DOWNEY A. GROSENBAUGH

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EXHIBIT VII

Extract from Hearing of Joint Legislative Committee for the Revision of of the Penal Code, September 24 and 25, 1963 (Official Transcript, pages 12-15).

Attorney General Mosk:

No consideration of the advisability of setting up separate codes to deal with the main branches of criminal law would be complete without a careful study of the law of evidence as it pertains to criminal cases. The Penal Code specifically deals with many rules of evidence. Section 1102 provides that the rules of evidence in civil actions are applicable to criminal proceedings, except as provided in the Penal Code, but then the Code goes on to set forth numerous rules of evidence in criminal cases. There are many other specific evidentiary rules scattered throughout the Penal Code, such as Section 315, which relates to the admissibility of the reputation of a house of prositution; Section 1322, the scope of the marital privilege and objections thereto; 1323, the privilege of self-incrimination, and so forth.

This committee, in revising the Penal Code, must exercise its judgment and bring to bear its experience on the rules of evidence expressed specifically within the Penal Code and those applicable to criminal proceedings by virtue of other statutes or judicial decisions.

In this connection, this committee can draw on the studies and recommendations produced by the California Law Revision Commission in its study to determine whether the California Law of Evidence should be revised to conform to Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

Thus far the California Law Revision Commission has prepared a tentative recommendation on hearsay evidence and on privileges. My staff

has reviewed this work and we feel that the Commission has contributed a great deal by way of the research and study that has gone into this project.

However, candor compels me to note that this committee was specifically designed to represent a more balanced viewpoint than the California Law Revision Commission, and thus I hope you will only view the recommendations of the Law Revision Commission as only one source.

I take it as settled that this committee will not deem itself foreclosed from examining questions of criminal evidence solely because the California Law Revision Commission has already offered its recommendation.

To illustrate my concern in this regard, I have noted that the California Law Revision Commission recommendation in connection with the admissibility of confessions in criminal cases provides that an extra-judicial statement by a defendant is not admissible, regardless of its free and voluntary character, if it was made during a period while the defendant was illegally detained by a police officer or employee of the United States or a state or territory of the United States. It should be noted initially that neither the Uniform Rules of Evidence nor the consultant to the California Law Revision Commission recommended this rule.

This suggested rule is, of course, the so-called McNab-Mallory rule, which is effective in the federal courts. Our California Supreme Court, which yields, quite properly, to no court in its concern for rights of criminal defendants, has refused repeatedly to adopt the McNab rule. To my knowledge, no state has adopted it. The policy reasons advanced

by the California Law Revision Commission for adopting this rule consist of a few lines, the gist of which is that the suggested rule will implement the right of an accused person to be brought promptly before a magistrate.

Now, we all agree with the goal of prompt arraignment. Our state law at the present time requires in various code sections that an accused person be brought promptly before a magistrate. These are desirable provisions and they should be, and I believe they are, enforced by our public officials.

It does not follow, however, that a confession, or even an exculpatory statement, which might be taken after what a judge deems to be an unreasonable period of time in custody, should be inadmissible when there are no circumstances that point to an involuntary or untruthful statement.

Now, there are, undoubtedly, intelligent and sincere people who believe that the Mallory rule should be adopted in this state. There are many more who have disputed this. This issue can be, and should be, fully debated before this committee, thus resulting in a studied judgment.

There are other recommendations of the California Law Revision Commission which highlight the need for a complete examination by this committee of the rules of criminal evidence. Such an instance is the recommendation which would withdraw from the trial judge his traditional and proper discretion to determine the order of proof in conspiracy cases. The suggested rule would provide for a rigid requirement that a conspiracy must be first proved independently prior to the reception in evidence of the declarations of co-conspirators.

Many of these points I have made could be called surface criticisms, and I will concede that they are. But a deeper analysis, I am sure, will reveal deeper problems.

EXHIBIT VIII

OFFICE OF COUNTY COUNSEL - SAN BERNARDINO COUNTY

COMMENTS ON THE HEARSAY EVIDENCE ARTICLE OF THE UNIFORM RULES OF EVIDENCE

In commencing on Article V privileges, we suggested that it would be desirable for each article to contain a provision listing the types of proceedings to which the rules in that article would apply. Otherwise uncertainty would exist as to whether the rules applied just to courts, or also to some or all administrative proceedings. The privileges article was quite explicit in this respect. A proceeding was defined as "any action, hearing, investigation, inquest, or inquiry, whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body or any other person authorized by law to do so, in which testimony can be compelled to be given." RULE 22.5 SCOPE OF THE PRIVILEGES ARTICLE stated: "Except as otherwise provided by statute, the provisions of this article apply to all proceedings."

There is no such provision in the Article on Hearsay Evidence. This type of provision would be very desirable because at present the rules are scattered throughout the codes, and in many cases they are quite uncertain. For example, §11513 of the Government Code provides that a hearing conducted under the Administrative Procedure Act "need not be conducted according to technical rules relating to evidence and witnesses, any relevant evidence shall be admitted if it is the sort of evidence which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions..."

In court proceedings inadmissible hearsay is sufficient to support a judgment if it is in the record through failure of the opponent to object. Since there is no basis for objecting to hearsay evidence in a hearing conducted under the Administrative Procedure Act, the weight and effect of hearsay evidence is reduced until it is not sufficient, by itself, to support a finding.*

The courts apparently have adopted the same rule for local administrative proceedings not governed by the Administrative Procedure Act. In Walker vs. City of San Gabriel 20 C 2d 879 in a hearing before the city council, the court held that hearsay evidence alone was insufficient to support the revocation of a business license.

* QUERY: As to both court and administrative proceedings, should not a default by failure to answer or appear at the hearing be deemed an admission of every allegation in the complaint, petition, accusation or other pleading? Should not the defaulting party waive both his right to object to "inadmissible" hearsay and his right to require other proof?

Government Code section 11514 permits affidavits, under certain circumstances, to have the same effect as if the affiant had testified orally.

Section 5709 of the Laber Code states, regarding hearings before the Industrial Accident Commission, "...No order, decision, award or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure." The Labor Code apparently has very liberal rules of evidence, and there is no requirement that a finding be supported by non-hearsay evidence. In the case of State Compensation Insurance Fund v Industrial Accident Commission 195 C 174 the court held that even jurisdictional facts are provable by hearsay evidence, and such evidence alone may be sufficient to sustain an award. On the other hand, the case of Casualty Company vs. Accident Commission 195 C 533, the court stated: "While the terms of this section are broad and comprehensive, covering as they do the admission into the record and use as proof of any fact in dispute of any evidence objectionable under the common law and statutory rules, yet it was not intended thereby that it would be any the less the duty of the Commission to follow the prescribed procedure and rules of evidence. In other words, it still remains the duty of the Commission to conduct the proceedings so that there will be as little occasion as possible for the courts to resort to the said rule of decision." This is an odd statement. It implies that while reversible error will not occur from failure to apply formal rules of evidence, the Commission has a duty to exclude evidence which would not be admissible in a court of law. In the more recent case of Pacific Empire Insurance Company v Industrial Accident Commission 47 CA 2d 494, "unsubstantial" hearsay evidence was not sufficient to sustain an award.

From these conflicting rules and decisions, it appears desirable to state which rules shall apply in which hearings, and that could easily be done by having a provision, similar to the one in the privileges article, setting forth the scope of the hearsay rules.

Probably if the Uniform Rules of Evidence are adopted by this state, they will, for the most part, be adopted with the modifications recommended by the California Law Revision Commission. Comments will be directed primarily to the Uniform Rules as so modified or revised. To distinguish between them, the Uniform Rules of Evidence will be referred to as URE, and the rules as revised by the Commission will be referred to as RURE. Along with its tentative recommendations, the Commission has made comments of its own, which are brief and to the point. Consequently these comments will be confined primarily to major changes in the law or changes most likely to affect law enforcement or other county functions.

RULE 62: DEFINITIONS

As used in Rules 62 through 66;

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's senses.

(4) "Public officer or employee of a state or territory of the United States" includes an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

(6) Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" means that the declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant.

(b) Disqualified from testifying to the matter.

(c) Dead or unable to attend or to testify at the hearing because of age, sickness, infirmity or imprisonment.

(d) Absent beyond the jurisdiction of the court to compel appearance by its process.

(e) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by subpoena.

(7) For the purposes of subdivision (6) of this rule, declarant is not available as a witness:

(a) If the judge finds that the exemption, disqualification, death, inability or absence of the declarant is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying; or

(b) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

(8) "Former testimony" means:

(a) Testimony given under oath or affirmation as a witness in a former hearing or trial of the same action or proceeding;

(b) Testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies; and

(c) Testimony in a deposition taken in compliance with law in another action or proceeding.

Normally a definitions rule or section does not, in itself, change the substantive law. However this rule makes two major changes. "Statement" is defined so as to exclude conduct not intended as a substitute for words. According to present law, flight from the scene of a crime is considered hearsay conduct. The inference to be drawn is that flight was motivated by an awareness of guilt and a fear of apprehension. Running away is equivalent to saying, "I am guilty." If the statement, "I am guilty," could be received in evidence through some exception to the hearsay rule, evidence of flight could also be received; otherwise not. (It might be mentioned here that a statement, "I am guilty" or "I committed the crime," would be admissible under the new rules, even when made by someone other than a party to the action. Such a statement would fall under the hearsay exception for declarations against interest). Courts have seldom carried the "hearsay conduct" exception to extremes, but in theory one should not be able to testify that everyone was wearing a raincoat to prove that it was raining. The fact that others were wearing a raincoat merely indicates that they thought it was raining, or is equivalent to their saying, "It is raining."

The justification for not treating non-assertive conduct as hearsay is that the person did not intend his conduct as a statement; therefore his veracity is not in issue.

The second major change is the definition of unavailability of a witness. Present law is inconsistent. In some cases a witness must be dead in order to be considered unavailable (so as to admit his out-of-court statements in evidence). Insanity or residence more than 150 miles from the court are frequent grounds of unavailability. Paragraph 6 of Rule 62 eliminates arbitrary distinctions by stating a general, broad rule of unavailability which will be used for all purposes.

These two changes in Rule 62 will allow more hearsay testimony to be admitted than formerly; in fact most of the changes throughout the RURE will have that effect. Whether this change will be beneficial or detrimental, as a whole, to counties and law enforcement is difficult to determine.

RULE 63: HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS

OPENING PARAGRAPH: GENERAL RULE EXCLUDING HEARSAY EVIDENCE

Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

Note that only a "statement" is inadmissible, and statement has been defined so as to exclude conduct other than nodding, sign language, etc., intended as a substitute for words. Following are 32 exceptions to the general hearsay rule.

SUBDIVISION (1): (Previous Statement of Trial Witness)

(1) A statement made by a person who is a witness at the hearing, but not made at the hearing, if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with rule 22*; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is contained in a writing which (i) was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory, (ii) was made by the witness himself or under his direction or by some other person for the purpose of recording the witness's statement at the time it was made, (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and (iv) is offered after the writing is authenticated as an accurate record of the statement.

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* Rule 22 will be the subject of a later study and recommendation by the Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:

"As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

The URE would have permitted any out-of-court statement by a witness to be admitted on the theory that the witness could be fully cross-examined regarding the statement. The RURE rule rejected this approach on the theory that it would be undesirable to permit a party to present his case through written statements carefully prepared in his attorney's office. The prohibition against leading questions on direct examination would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost.

Paragraph (a) restates the present law respecting prior inconsistent statements. Rule 22, referred to in this paragraph, will be the subject of later study, but it will deal primarily with the problem of what foundation must be laid before impeaching a witness - like under what circumstances his written statement must be shown to him or his oral statement pinned down as to time, place and persons present before asking whether he made such a statement.

Paragraph (b) restates the present law except that prior inconsistent statements are admitted as substantive evidence, not just to impeach or cancel out the witness's statement on the stand. This seems a desirable change since it is not realistic to expect a jury to understand and apply the distinction made by present law.

Paragraph (c) makes a minor change in "past recollection recorded" by not requiring the statement to which the witness refers to have been prepared by him or under his direction.

SUBDIVISION 3: FORMER TESTIMONY OFFERED AGAINST A PARTY TO THE FORMER ACTION OR PROCEEDING

(3) Except as otherwise provided in this subdivision, former testimony if the judge finds that the declarant is unavailable as a witness and that:

(a) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action or proceeding and testimony given in a preliminary examination in another criminal action or proceeding is not admissible under this paragraph against the defendant in a criminal action or proceeding unless it was received in evidence at the trial of such other action or proceeding.

Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former

testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

SUBDIVISION 3.1: FORMER TESTIMONY OFFERED AGAINST A PERSON NOT A PARTY TO THE FORMER ACTION OR PROCEEDING

3.1 Except as otherwise provided in this subdivision, former testimony if the judge finds that:

(a) The declarant is unavailable as a witness;

(b) The former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding; and

(c) The issue is such that a party to the action or proceeding in which the former testimony was given had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

The URE provision was much broader than the combined RURE subdivisions 3 and 3.1. The URE would allow depositions to be used in the trial of the action in which they were taken without proof that the witness was unavailable. The justification was that the proponent would usually call the witness, when available, in order to make a more favorable impression upon the judge or jury. If the opponent had observed at the deposition hearing that the witness would not make a favorable impression, or if he wished to cross-examine him further, then he, the opponent, could subpoena the witness, if he were available. When the witness was actually unavailable and it was necessary to use his deposition, the URE rule would eliminate the necessity and difficulty of proving that he was unavailable. Nevertheless the Law Revision Commission chose to restate the present law in this regard, apparently because it was not convinced that self-interest would usually force the proponent to call the witness at the trial. Since it was desirable to have the witness at the trial, when possible, it was logical to place the burden of locating and subpoenaing him upon the proponent.

There is, according to present law, a rule of mutuality or reciprocity which prevents the use of very reliable former testimony. In the action A vs. B, W is called as a witness. In the later action A vs. C, C would like to use a transcript of W's testimony. A had a previous opportunity to examine or cross-examine W, so why shouldn't C be able to use this testimony? The supposed justification for excluding it is that A could not use this testimony against C; therefore it would be unfair to allow C to use it against A. The present rule excluding W's testimony is not stated in terms of mutuality, but that is the real policy reason for its exclusion. (The requirement of admissibility is substantial identity of parties and issues). The proposed change will eliminate the principle of mutuality. RURE subdivision 3 makes testimony admissible against a person who called the witness himself or who was a party and had an opportunity to cross-examine. This principle has two exceptions: It will not apply in criminal actions against the defendant or in other cases where the interest and motive of

the person against whom the evidence was admitted was different from his interest and motive in the new proceeding. The reason for these exceptions is that the party may have failed to cross-examine fully-especially at a deposition for the primary purpose of discovery or at a preliminary hearing - because of not wanting to tip off the weakness of the witness's testimony, or because the witness's testimony, while it could have been refuted, was not harmful in the previous case.

Subdivision 3.1 contains a more controversial change. When the declarant is unavailable, his testimony can be used (except against a criminal defendant) even when the party opposing its admission has not had the previous opportunity to cross-examine! The fact that another party, with a similar motive, had the opportunity to cross-examine is supposed to provide an adequate safeguard. One's natural reaction is to oppose any such radical reduction of the right to cross-examine. However such testimony should be more reliable than many other types of hearsay which are admitted.

SUBDIVISION 4: Contemporaneous and Spontaneous Statements

(4) A statement:

(a) Which the judge finds was made while the declarant was perceiving the act, condition or event which the statement narrates, describes or explains; or

(b) Which the judge finds (i) purports to state what the declarant perceived relating to an act, condition or event which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Apparently this is just a restatement of present law.

SUBDIVISION 5: Dying Declarations

(5) A statement by a person since deceased if the judge finds that it would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith and in the belief that there was no hope of his recovery.

This is a very substantial enlargement of the present dying declaration exception. The latter is limited to a statement by a dying man regarding the cause of death in a criminal homicide action. The clause "if the judge finds that it would be admissible if made by the declarant at the hearing..." is for the purpose of preventing opinion evidence or other unreliable evidence from being admissible merely because the declarant is dying.

SUBDIVISION 6: Confessions

(6) As against the defendant in a criminal action or proceeding, a previous statement by him relative to the offense charged, but only if the judge finds that the statement was made freely and voluntarily and was not made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State; or

(c) During a period while the defendant was illegally detained by a public officer or employee of the United States or a state or territory of the United States.

The major change made by this rule is to eliminate the arbitrary distinction between confessions and admissions. Undoubtedly it will make the securing of convictions in criminal cases more difficult.

SUBDIVISION 7: Admissions by Parties

(7) As against himself in either his individual or representative capacity, a statement by a person who is a party to a civil action or proceeding whether such statement was made in his individual or representative capacity.

This is a restatement of present law.

SUBDIVISION 8: Authorized and Adoptive Admissions

(8) As against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; or

(b) Of which the party, with knowledge of the content thereof, has, by words or other conduct manifested his adoption or his belief in its truth.

This is supposed to be a restatement of present law. Perhaps it is a restatement of case law, but the wording of C.C.P. 1870 seems to allow evidence which would be excluded by the new rule. Section 1870 provides: "Evidence may be given upon a trial of the following facts....3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." This writer has unsuccessfully objected to hearsay statements made in the presence of his party when the statements were not adopted, but were vigorously denied. An example is when A accuses B of doing various things which B denies -- and in the case of B vs C, B would like to prevent the accusations from going into the record. The only rationale for admitting such statements is that the party, by his conduct or silence, has admitted their truth, and if he does not do so, the statements should not be admissible. However a literal reading of C.C.P. 1870 seems to allow such statements to be admitted. In this respect, the new rule, while more restrictive, seems preferable to the old.

SUBDIVISION 9: Vicarious Admissions

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement is that of an agent, partner or employee of the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made beford the termination of such relationship, and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party; or

(b) The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, the liability, obligation or duty of the declarant is in issue between the party and the proponent of the evidence of the statement, and the statement tends to establish that liability, obligation or duty.

This provision makes a substantial change in law. Formerly statements that an agent was not authorized to make were not admissible against the principal. Thus an employee usually was not authorized to admit liability, and statements such as, "It was my fault," or "We knew of the defect for several days but never got around to fixing it," were excluded on the theory that the employee had exceeded the scope of his employment in making such statements. According to this subdivision, statements will be admissible if they concern matters within the scope of the agency or employment, even though the statements themselves were outside of the scope of the agency or employment.

SUBDIVISION 10: Declarations Against Interest

(10) If the declarant is not a party to the action or proceeding and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to the risk of civil or criminal liability or so far tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.

This is another very substantial enlargement of the present hearsay exception. It seems as though the new rule will be more logical. Formerly a declaration against interest had to be against pecuniary interest and even that exception was rather narrowly defined. A person would be even less likely to make a statement which would subject him to the risk of criminal liability than to make a statement which could cost him, perhaps, a nominal sum of money. How broadly the courts will interpret the

exception to cover hatred, ridicule, or social disgrace remains to be seen. In the privileges article an example was given where X confessed to P, a psychotherapist, that X had murdered Y. D, charged with the murder of Y could compel P to testify regarding X's confession. The problem dealt with in that section was that the communication to P was not privileged in these circumstances. It was assumed that X's confession, if not privileged, would be admissible as a declaration against penal interest. It seems illogical that X's confession would be considered a declaration against interest since it was a privileged communication, and could never be used against him. It is suggested that subdivision 10 be amended by adding the following sentence: "A confidential communication (as defined in rules ____, ____, ____) shall not be deemed a declaration against interest."

SUBDIVISION 12: Statement of Physical or Mental Condition of Declarant

(12) Unless the judge finds it was made in bad faith, a statement of:

(a) The declarant's then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but except as provided in paragraphs (b), (c) and (d) of this subdivision not including memory or belief to prove the fact remembered or believed when such mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant.

(b) A declarant who is unavailable as a witness as to his state of mind, emotion or physical sensation at a time prior to the statement to prove such prior state of mind, emotion or physical sensation when it is itself an issue in the action or proceeding but not to prove any fact other than such state of mind, emotion or physical sensation.

(c) The declarant's previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition.

(d) A declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will.

Only paragraph C is intended to be a change from present law. It does not appear to be an important one.

SUBDIVISION 13: Business Records
SUBDIVISION 14: Absence of Entry in Business Records
SUBDIVISION 15: Reports of Public Officers and Employees
SUBDIVISION 16: Reports of Vital Statistics
SUBDIVISION 17: Content of Official Record
SUBDIVISION 18: Certificate of Marriage
SUBDIVISION 19: Records of Documents Affecting an interest in Property

SUBDIVISIONS 13 to 19 are primarily restatements of present law.

SUBDIVISION 21: Judgment Against Persons Entitled to Indemnity

(21) To prove any fact which was essential to the judgment, evidence of a final judgment if offered by the judgment debtor in an action or proceeding to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

SUBDIVISION 21.1: Judgment Determining Liability, Obligation or Duty

(21.1) When the liability, obligation or duty of a third person is in issue in a civil action or proceeding, evidence of a final judgment against that person to prove such liability, obligation or duty.

These provisions restate the present law.

SUBDIVISION 22: Judgment Determining Public Interest in Land

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of a public entity in land, if the judgment was entered in an action or proceeding to which the public entity whose interest or lack of interest was determined was a party. As used in this subdivision, "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or a state or territory of the United States.

This is a new exception for California. It is unlikely to affect public bodies.

SUBDIVISION 23: Statement Concerning One's Own Family History

(23) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness.

SUBDIVISION 24: Statement Concerning Family History of Another

(24) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth, a statement concerning the birth,

marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) The declarant was related to the other by blood or marriage; or

(b) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

SUBDIVISIONS 23 and 24 are a restatement of present law except that present law requires the declarant to be dead, while the new rules merely require him to be unavailable.

SUBDIVISION 26: Reputation in Family Concerning Family History

(26) To prove the truth of the matter reputed, evidence of reputation among members of a family if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

This makes a minor change in present law. C.C.P. 1870 (11) requires the family reputation in question to have existed "previous to the controversy." This qualification was deemed unnecessary because reputation of a matter of pedigree would be unlikely to be influenced by the controversy.

SUBDIVISION 26.1: Entries Concerning Family History

(26.1) To prove the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage, entires in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones, and the like.

This restates present law.

SUBDIVISION 27: Community Reputation Concerning Boundaries, General History and Family History

(27) To prove the truth of the matter reputed, evidence of reputation in a community if the reputation concerns.

(a) Boundaries of, or customs affecting, land in the community and the judge finds that the reputation, if any, arose before controversy.

(b) An event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community.

(c) The date or fact of birth, marriage, divorce or death of a person

resident in the community at the time of the reputation.

Paragraph (a) restates present law. Paragraph (b) is less restrictive than C.C.P. 1870 (11) since it does not require that the reputation exist for more than 30 years. Paragraph (c) broadens present law to include reputation in the community, not just family reputation.

SUBDIVISION 27.1: Statement Concerning Boundary

(27.1) If the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement concerning the boundary of land unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

This subdivision restates the substance of existing, but uncodified, California law found in cases such as Morton v Folger 15 C 275 and Morcom v Baiersky 16 CA 480.

SUBDIVISION 28: Reputation as to Character

(28) To prove the truth of the matter reputed, evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated.

SUBDIVISION 29: Recitals in Documents Affecting Property

(29) A statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in property, if the judge finds that:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

SUBDIVISIONS 28 and 29 restate the present law.

SUBDIVISION 29.1: Recitals in Ancient Documents

(29.1) A statement contained in a writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter.

This subdivision clarifies existing law relating to recitals in ancient documents. The Supreme Court in dictum indicated that documents over 30 years old, acted upon as genuine, would be presumed genuine and admissible, but the genuineness of the documents imports no verity to the recitals contained therein. Recent cases decided by the district courts of appeal, however, have held that recitals in such documents are admissible to prove the truth of the facts recited.

SUBDIVISION 30: Commercial Lists and the Like

(30) A statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation if the judge finds that the compilation is generally used and relied upon by persons engaged in an occupation as accurate.

This subdivision has no counterpart in the California statutes although there is some indication that it has been recognized as case law. In any event, the provision seems desirable.

SUBDIVISION 31: Learned Treatises

(31) Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties to prove facts of general notoriety and interest.

This is C.C.P. 1936 modified only to conform to the general format of the hearsay statute. The courts have held that "books of science or art" do not include medical books since medicine is not an exact science. Consequently a doctor can be cross-examined as to his knowledge regarding various medical books, but the books themselves cannot be used as substantive evidence. The commission considered the possibility of broadening this exception by stating specifically that medical books are included. There is no indication why the commission decided against this desirable change.

SUBDIVISION 32: Evidence Admissible Under Other Laws

(32) Hearsay evidence declared to be admissible by any other law of this State.

This will cover all sorts of miscellaneous provisions such as the use of affidavits in uncontested probate proceedings, certain medical reports in hearings before the Industrial Accident Commission, etc. The purpose in this subdivision is to prevent such miscellaneous provisions from being deemed repealed by implication.

RULE 65: CREDIBILITY OF DECLARANT

Rule 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

This rule deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it

makes clear that the rule applying to impeachment of a witness---that a witness may be impeached by a prior inconsistent statement only if a proper foundation is laid by calling his attention to the statement and permitting him first to explain it---does not apply to a hearsay declarant.

Thus, Rule 65 would permit the introduction of evidence to impeach a hearsay declarant in one situation where such impeaching evidence would now be excluded. Our decisions indicate that when testimony given by a witness at a former trial is read into evidence at a subsequent trial because the witness is not then available, his testimony cannot be impeached by evidence of an inconsistent statement unless the would-be impeacher laid the necessary foundation for impeachment at the first trial or can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that the trier-of-fact at the second trial should be allowed to consider the impeaching evidence in all cases.

No California case has been found which deals with the problem of whether a foundation is required when the hearsay declarant is available as a witness at the trial. The Commission believes that no foundation for impeachment should be required in this case. The party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies that tend to impeach him.

Rule 63 (1) (a) provides that evidence of prior inconsistent statements made by a witness at the trial may be admitted to prove the truth of the matters stated. In contrast to Rule 63 (1) (a), the evidence admissible under Rule 65 may not be admitted to prove the truth of the matter stated. Inconsistent statements that are admissible under Rule 65 may be admitted only to impeach the hearsay declarant. Unless the declarant is a witness and subject to cross-examination upon the subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

RULE 66: MULTIPLE HEARSAY

Rule 66. A statement within the scope of an exception to Rule 63 is not inadmissible on the ground that the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Rule 63.

Apparently there are no California cases discussing the admissibility of multiple hearsay has been analyzed and discussed although there are cases where it has been admitted. The rule seems logical.

RULE 66.1: SAVINGS CLAUSE

Nothing in Rules 62 to 66, inclusive shall be construed to repeal by implication any other provision of law relating to hearsay evidence.

It seems that there is a duplication in this rule and rule 63-32. However, it is difficult to see how this duplication can do any harm. A few sections of the URE were not adopted as part of the RURE. These sections, and the reasons for not adopting them, are as follows:

SUBDIVISION 2: AFFIDAVITS

The URE provided: "Affidavits to the extent admissible by the statutes of this state." The RURE omitted this subdivision because it is unnecessary, particularly in view of Rule 66.1, added by the commission. Rule 66.1 provides: "Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence."

SUBDIVISION 11: VOTER'S STATEMENTS

A statement by a voter concerning his qualifications to vote or the fact or content of his vote:

This subdivision was not made part of the RURE on the theory that the exception was unnecessary, that there was no sufficient guarantee of trustworthiness and it would change present law.

SUBDIVISION 20: JUDGMENT OF PREVIOUS CONVICTION

Evidence of a final judgment adjudging a person guilty of a felony; to prove any fact essential to sustain the judgment;

Subdivision 20 was not made part of the RURE because there was no pressing necessity for it. If the witnesses in the criminal trial are no longer available, their testimony would normally be admissible under subdivision 3; if they are available they can be called again. A guilty plea is admissible in a subsequent civil action as an admission by a party (Subdivision 7).

SUBDIVISION 25: STATEMENT CONCERNING FAMILY HISTORY BASED ON STATEMENT OF ANOTHER DECLARANT

Subdivision 25 of the URE provided as follows: "A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;"

This subdivision was not made a part of the RURE because such a statement, with two chances for error, would be very unreliable.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

Rule 64 of the URE provided as follows: "Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy."

The Commission did not make this rule a part of the RURE because it believed that modern discovery procedures are adequate to enable the parties to protect themselves from surprise.

Many present code sections, primarily in the Code of Civil Procedure, are to be repealed or amended to avoid conflict with the Uniform Rules of Evidence. In most cases they are being repealed since the same subject matter is covered in the Uniform Rules. In a few cases, they are being modified so as to be consistent with the Uniform Rules. For example, C.C.P. 2016 will state that a deposition can be used if the witness is unavailable within the meaning of Rule 62 of the Uniform Rules of Evidence rather than dead, more than 150 miles from place of trial, unable to attend because of age, sickness, infirmity or imprisonment, etc. C.C.P. 2047 will be changed rather substantially by permitting a witness to refer to a document not prepared by him, and by permitting the opposing attorney to inspect a document used to refresh the witness's memory, even when the witness does not take it with him to the witness stand. Probably the court would hold that this does not require disclosure of a document containing privileged information. The witness might be deemed to have waived his privilege (like the lawyer-client privilege) by referring to the document to refresh his memory, but this should not compel him to hand over a document (like part of an adoption file) when the privilege belongs to another party or when disclosure is forbidden by statute. It would be a good idea to say so, if this is the law.

Witnesses will have to be careful what they use to refresh their memory prior to trial if they don't want the opposing attorney to see their files.

Penal Code Section 686 will be amended to state that a defendant's right to confront witnesses against him is limited to the extent that hearsay evidence may be produced. This will be a restatement of present law since section 686 does not accurately state the law. P. C. 1345 and 1362 will specify when depositions can be used in criminal trials.

#34(L) 2/18/64

First Supplement to Memorandum 64-13

Rule 63(16), (18). Under existing law, a certificate of birth, fetal death, death or marriage, filed within the state is self-authenticating. Health and Safety Code Section 10577 provides:

> Any birth, fetal death, death, or marriage record which was registered within a period of one year from the date of the event under the provisions of this division or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

Subdivision (16) provides a hearsay exception for vital statistics reports from other jurisdictions. However, the judge must find (1) that the maker was required by statute to file the report in a designated public office and (2) that the writing was made and filed as required by the statute. This seems to require some evidence of the identity of the maker so that the judge can determine that he was in fact required to file the writing and that he made and filed the writing in accordance with the statute.

So far as documents executed by public officials are concerned, we made the documents self-authenticating by creating a Thayer presumption as to the validity of official seals and signatures. This is Rule 67.7. We believe that a birth, death, or marriage record filed in a public office is as likely to be authentic as a document signed by a purported notary public and, hence, we recommend that a subdivision be added to Rule 67.7 providing a presumption of authority and the authenticity of the signature of the maker of a birth, death, or marriage record. See Exhibit I (yellow page) for suggested language.

The certificate of marriage referred to in subdivision (18) is not the official record of the marriage referred to in subdivision (16). The certificate referred to in (18) is the kind of certificate that is given to the parties to the marriage. Hence, there is not the same aura of authenticity that there is in regard to official birth, death, and marriage records. Subdivision (18) does not provide that the marriage certificate is self-authenticating. The Commission might wish to make a Thayer presumption of authenticity in regard to this kind of document, too. However, the staff does not recommend such action. We mention it here, however, for your consideration.

Rule 63(20). The Commission disapproved subdivision (20)--which would provide that a final judgment adjudging a person guilty of a felony is admissible to prove any fact essential to sustain the judgment--before the decision of the California Supreme Court in Teitelbaum Furs, Inc. v. Dominion Insur. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962). The Teitelbaum case held that the doctrine of collateral estoppel conclusively bars a person convicted of a crime from contesting the matters determined in the criminal action in a later civil action. In the Teitelbaum case, Teitelbaum had previously been convicted of conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim because a purported robbery was a hoax. The corporation of which Teitelbaum was the president then sued the insurance company to recover on its policy protecting it against robbery. The Supreme Court held that the criminal conviction was not merely evidence that there was no robbery, the criminal conviction conclusively established that there was no robbery insofar as Teitelbaum was concerned. The court

distinguished a plea of guilty which is a mere admission and not conclusive. The corporation, then, was barred because it was merely Teitelbaum's alter ego.

In light of the conclusive effect of a criminal judgment against the defendant himself in later litigation, perhaps a conviction of a felony should be given at least an evidentiary effect in later litigation when the doctrine of collateral estoppel does not apply.

The Conference of California Judges Committee (see Exhibit V to Memorandum 64-9) suggests that the Teitelbaum case makes the judgment of conviction admissible in any other action in which it would be material despite the omission of subdivision (20). We do not think this is so, however, for the facts determined by the judgment may be relevant in litigation between other parties. In such a case the doctrine of collateral estoppel would not apply and the Teitelbaum case would have no application.

One member of the judicial committee recommends the retention of subdivision (20) so long as it is made clear that it is not intended to repeal by implication Penal Code Section 1016, subdivision 3, relating to the plea of nolo contendere. Penal Code Section 1016 provides that the plea of nolo contendere may not be used against the defendant as an admission. We cannot tell whether it is intended by this language to overcome the rule of the Teitelbaum case or not. The Teitelbaum case did not use Teitelbaum's plea at all, and distinguished cases using a plea as an admission. And, strictly speaking, the Teitelbaum case did not use the judgment (as distinguished from the plea) as an admission. Teitelbaum was not concerned with the admissibility and effect of a judgment as

evidence, as it would have been if it had treated the judgment as an admission, it was concerned with the effect of a judgment as substantive law. Under our recommendations, the court would obtain knowledge of the judgment by judicial notice, and no evidentiary problem would arise.

We suspect, however, that Section 1016 will have to be construed to mean that a judgment based on a plea of nolo contendere may not be given conclusive effect against the defendant. If this construction is not given, the qualification in Section 1016 does not mean anything. If this is the construction given to Section 1016, it would be desirable, if subdivision (20) is retained, to revise it to indicate that the judgment may not be used as evidence of the underlying facts in any later litigation if the judgment is based on a plea of nolo contendere; for if the judgment cannot be used against the defendant, it would seem inappropriate to make it available against anyone else.

If the Commission believes that subdivision (20) should be restored, we recommend the following language:

> (20) Unless the judgment was based on a plea of nolo contendere, evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment.

Rule 63(22), (27). Both of these exceptions to the hearsay rule permit evidence concerning land to be introduced. Subdivision (22) permits a judgment determining the interest of a public entity in land to be used as evidence of the interest or lack of interest of the public entity, and subdivision (27) permits common reputation in a community to be used to prove boundaries of, or customs affecting, land in the community.

The rules are somewhat related from this standpoint: the English cases tended to regard the hearsay rule at times as merely a rule requiring the

court to use the best evidence that was available on the particular issue. The English courts regarded a judgment between adverse parties as a superior form of evidence--that is, a more reliable form of evidence--than common reputation. Hence, because they accepted reputation evidence on the interest of the public in land, they would permit evidence of a judgment determining the interest of the public in land to be used to prove that interest.

First, considering subdivision (27), we have discovered that it does not permit introduction of all of the hearsay on the subject that is now admissible. In Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524 (1920), the court pointed out that there is a common law exception to the hearsay rule permitting common reputation evidence to be used to show the interest or lack of interest of the public in property; but the reputation must be ancient, that is, of a fact more than 30 years old.

Nothing in Rule 63(27) permits evidence of reputation concerning the interest or lack of interest of the public in property to be shown. We think that the proposed rules of evidence should not let in less hearsay than is now admissible. We believe, therefore, that subdivision (27) should be revised to make reputation evidence as to the public interest in property admissible. We do not believe that the revision should include the 30 year limitation that is in the existing law. The Commission has previously rejected the 30 year limitation so far as events of general history are concerned. The reason for the deletion is given in the comment to subdivision (27). We think the comment is equally applicable to the 30 year requirement in regard to reputation as to interest in property.

Subdivision (22) also needs revision. The proposed revision of subdivision (27) would make reputation evidence admissible to prove the interest

or lack of interest of the public at large in property, even though no particular public entity were interested in the property. Correspondingly, we think subdivision (22) should permit a judgment determining the interest or lack of interest of the public at large in property to be used as evidence of such interest or lack of interest whether or not any particular public entity was a party to the lawsuit.

It seems to us that where no public entity's interest is involved, the exception in subdivision (22) is most needed. The interest of a particular entity can usually be traced to appropriate documents. Judgments affecting the interest are probably constitutive documents affecting the public interest rather than evidence of what the public interest may be. Moreover, where an entity is concerned, there are officials and records that can be looked to for information. But, when no entity is involved, these alternative sources of proof do not exist. Thus, if the rationale for Rule 63(22) is sound (and we think it is), and a judgment determining the public interest should be received when reputation concerning that interest would be received because it is a superior and more reliable form of evidence, subdivision (22) should be revised to permit evidence of a judgment to be introduced as hearsay evidence when the judgment determines the interest or lack of interest of the public at large in property whether or not the interest of a public entity was decided in the judgment and whether or not a public entity was a party to the lawsuit.

Is the reference in subdivisions (22) and (27) to "land" broad enough? Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524 (1920) and Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237 (1895) held that common reputation evidence is admissible to prove the public interest or lack of public interest in

water. Should the reference be changed to "property" or should an additional reference to "water" be added?

We recommend that the subdivisions be revised as follows:

(22) To prove any fact which was essential to the judgment[~~,~~] :

(a) Evidence of a final judgment determining the interest or lack of interest of the public in property.

(b) Evidence of a final judgment determining the interest or lack of interest of a public entity in [~~land~~] property, if the judgment was entered in an action or proceeding to which the public entity whose interest or lack of interest was determined was a party. As used in this [~~subdivision~~] paragraph, "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or of a state or territory of the United States.

(27) To prove the truth of the matter reputed, evidence of reputation in a community if the reputation concerns:

* * * * *

(d) The interest or lack of interest of the public or of a public entity in property in the community and the judge finds that the reputation, if any, arose before controversy.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

First Supplement
to Memo 64-13

EXHIBIT I

Either of the following subdivisions should be added to Rule 67.7:

A writing purporting to be a record or report of a birth, fetal death, death, or marriage is presumed to be genuine if:

(a) A statute required writings made as a record or report of a birth, fetal death, death, or marriage to be filed in a designated public office; and

(b) The writing was filed in that office.

A signature is presumed to be genuine and authorized if it is affixed to a writing purporting to be a record or report of a birth, fetal death, death, or marriage and:

(a) A statute required writings made as a record or report of a birth, fetal death, death, or marriage to be filed in a designated public office; and

(b) The writing was filed in that office.

#34(L) 2/24/64

Second Supplement to Memorandum 64-13

Subject: Study No.34(L) - Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

It is suggested that a new subdivision be added to Revised Rule 63, to read as follows:

> (15.1) An official written finding, report, or record, that a person is missing, missing in action, interned in a neutral country, or beleaguered, beseiged, or captured by an enemy, or is dead, or is presumed dead, or is alive, made by a public employee of the United States authorized by any law of the United States to make such finding, report, or record is admissible to prove that such person is missing, missing in action, interned in a neutral country, or beleaguered, beseiged, or captured by an enemy, or is dead, or is alive, as the case may be, and the date, circumstances, and place thereof.

This subdivision is based on C.C.P. Sections 1928.1 and 1928.2, which read:

> § 1928.1. Finding of Presumed Death. A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as it read on May 3, 1945, or is thereafter amended, or a duly certified copy of such finding, shall be received in any court, office, or other place in this State as evidence of the death of the person therein found to be dead, and the date, circumstances, and place of his disappearance. Leg. H. 1953 ch. 52.
>
> § 1928.2. Official Report of Death, Internment, Missing in Action, etc. An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, beseiged, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by any law of the United States to make such report or record, shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, beseiged, or captured by an enemy, or is dead, or is alive, as the case may be. Leg. H. 1953 ch. 52.

If the new subdivision (15.1) is added to Rule 63, we suggest that a new rule be added to Article IX (Authentication and Content of Writings) to read:

RULE 67.8. PRESUMPTION CONCERNING REPORTS OF PERSONS MISSING IN ACTION AND THE LIKE.

(1) Any finding, report, or record that a person is missing, missing in action, interned in a neutal country, or beleaguered, beseiged, or captured by an enemy, or is dead, or is presumed dead, or is alive, purporting to have been signed by a public employee of the United States who purports to be authorized by any law of the United States to make such finding, report, or record, is presumed to have been signed and issued by such a public employee pursuant to law, and the person signing such finding, report, or record is presumed to have acted within the scope of his authority.

(2) The presumptions established by this section require the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumptions established by this section.

Subdivision (2) of the proposed rule is based on subdivision (4) of Revised Rule 67.7. Subdivision (1) is based on C.C.P. Section 1928.3 which reads:

§ 1928.3. Presumption of Execution and Authority. For the purposes of this article any finding, report, or record, or duly certified copy thereof, purporting to have been signed by an officer or employee of the United States described in this article shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing such report or record shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify it, such certified copy shall be prima facie evidence of his authority so to certify. Leg. H. 1953 ch. 52.

Consideration should be given to whether Rule 67.8 is necessary in view of Rule 67.7(2).

Respectfully submitted,

John H. DeMoully
Executive Secretary

#34(L) 4/8/64

Memorandum 64-23

Subject: Study No. 34(L) - Uniform Rules of Evidence (Organization of Proposed Comprehensive Evidence Statute and Disposition of Sections in Part IV of Code of Civil Procedure)

The staff believes that the time has come to consider the organization of the proposed comprehensive evidence statute and the disposition of the sections in Part IV of the Code of Civil Procedure. We should approve the tentative recommendation on General Provisions for printing at the April meeting. Hopefully, we will also complete work on the last of the articles of the URE--Article III on Presumptions--and send a tentative recommendation on that subject to the State Bar Committee. Moreover, our contract with Professor Degnan called for the completed research study on the existing provisions of Part IV of the Code of Civil Procedure by April 1, 1964, and we have extended this deadline until May 1, 1964.

We believe, therefore, that it is essential that the Commission adopt some general organizational scheme for the new statute so that we can begin to draft portions of the new statute in a form that will permit us to fit them into a comprehensive statute. We need to integrate many provisions of existing statutes into the various Revised URE Articles and need to designate additional portions (parts, chapters, or articles) of the new statute as the places where particular portions of existing statutes not embraced in the URE will be compiled.

We present four matters for your consideration:

FIRST: The first matter presented for Commission consideration is: Should the new statute be a new code or should it be compiled in Part IV of the Code of Civil Procedure. It is noted that Part IV of the Code of Civil Procedure now requires three volumes of the West's Annotated

California Codes. Although there are a number of sections in Part IV that do not relate to evidence and should be compiled in the Code of Civil Procedure or some other code, there are many new sections that will result from the compilation of the Revised URE provisions. (Compare, for example, the many proposed sections on hearsay evidence and many provisions relating to privileges with the existing skimpy statutory provisions dealing with these matters. The numbers that could be assigned to sections in a new code would be more manageable than the numbers that would be assigned to the sections if they are compiled in the Code of Civil Procedure. (Note that in Memorandum 64-24 we use section numbers running from 10,000 up.) The most significant single consideration, however, is that the rules of evidence that we have drafted apply both to civil and criminal proceedings, and the privilege provisions apply in all proceedings where testimony can be compelled. Logically, these rules do not belong in a Code of Civil Procedure. Accordingly, the staff recommends that the new evidence statute be drafted in the form of an Evidence Code.

SECOND: The second matter to be considered is the general organization of the new statute, or new code, as the case may be. Attached as Exhibit I (pink pages) is a suggested outline of the content of the new statute. (Disregard the section numbers in the suggested outline if it is determined that there should be an Evidence Code.) We have attempted in this outline to integrate the great majority of the existing code sections with the pertinent revised URE rules. We have not been able to do this for the portion of the statute relating to "General Provisions" or the portion relating to "Burden of Proof; Presumptions; Weight of Evidence." Until we have prepared a tentative recommendation on "Burden of Proof; Presumptions; Weight of Evidence," we cannot determine where the substance of a number of existing statutes should be compiled. In addition, there

are a few sections that are not classified in the suggested outline because we have not, as yet, determined whether they should be in the evidence statute or in some other code.

We suggest that you read the proposed outline carefully so that we can discuss it at the meeting. We are not interested in discussing the details, such as the order of sections or the section titles. We are, however, interested in the general organization and in the content of the various titles of the suggested outline. We plan to revise the outline as further study indicates desirable changes, and we would appreciate receiving any changes you care to suggest.

The sections of the existing statute on depositions and discovery in civil cases present a policy problem. We believe that these sections relate to evidence and are properly included in the evidence statute. We hope that at some future time the problem of discovery in criminal proceedings will be considered and an appropriate title on that subject drafted for inclusion in the evidence statute. If we include the provisions relating to discovery in civil cases in the new statute, we can break up the long complex sections that now exist into shorter sections without destroying the unity of subject matter that now exists. (We can thereby eliminate the need for references, such as "subparagraph (iv) of paragraph (3) of subdivision (d) of Section 2016.") In addition, we can accomplish a modest improvement in the organization of the statute as indicated in the suggested outline. If the Commission wishes, however, the existing statute could be retained--without any change in section numbers--in Part IV of the Code of Civil Procedure, and the title to Part IV could be changed to "Depositions and Discovery." On balance, we are persuaded that it would be better to include these provisions in the new evidence statute.

THIRD: A third matter presented for your consideration is: What disposition should be made of the various sections in Part IV that do not relate directly to evidence or that merely duplicate provisions in other codes? For example, although we have included these provisions in the suggested outline, the Statute of Frauds in the Code of Civil Procedure is substantially duplicated by a section of the Civil Code and the various provisions of the Code of Civil Procedure on interpretation of statutes and writings duplicate and overlap to some extent with somewhat comparable provisions in the Civil and Probate Codes. Other provisions, such as those relating to tender or those abolishing the effect of seals, do not relate to evidence.

As time permits, we plan to prepare memoranda presenting our suggested dispositions of these sections. We anticipate that Professor Degnan's study will be of considerable assistance in preparing these memoranda. Although we have not yet received the pertinent portions of the research study, we hope to be able to prepare several memoranda of this type for the April meeting. We suggest that no decision be made on a particular section until we have prepared a memorandum indicating our suggested disposition of the section.

Does the course of action outlined above meet the approval of the Commission?

FOURTH: A fourth matter that should be discussed at this time is the form in which the proposed legislation will be presented, i.e., whether in the form of one bill or a series of bills. The staff has concluded that a series of bills will be necessary. This will avoid any constitutional problems that might result if more than "one subject" were included in a

single bill. We suggest, therefore, that the new evidence statute be a separate bill and that sections of Part IV of the Code of Civil Procedure that are superseded by the new evidence statute be repealed in that bill. We suggest also that a series of bills be drafted to repeal obsolete, duplicating, and unnecessary provisions of Part IV that do not directly relate to evidence. And we suggest that a series of bills be prepared to compile in other codes or in other portions of the Code of Civil Procedure those sections of Part IV which do not relate directly to evidence but which should be retained in substance. We believe that as a general rule we would not have to include the so-called double jointing clauses in these companion bills, since they could become effective even though the new evidence statute is not enacted. (A "double jointing" clause provides that one bill does not become law unless another bill is enacted as law.) There may be a few exceptional cases where a double jointing clause would be needed.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

TENTATIVE OUTLINE

Section numbers allocated on assumption will be made a part of CCP

TITLE 1. DEFINITIONS [§§ 3000-3099]

TITLE 2. GENERAL PROVISIONS [§§ 3100-3499]

TITLE 3. JUDICIAL NOTICE [§§ 3500-3599]

TITLE 4. BURDEN OF PROOF; PRESUMPTIONS; WEIGHT OF EVIDENCE [§§ 3600-3999]

TITLE 5. Not Used

TITLE 6. WITNESSES [§§ 4000-4199]

TITLE 7. PRIVILEGES [§§ 4200-4599]

TITLE 8. Not Used

TITLE 9. EVIDENCE EXCLUDED OR AFFECTED BY EXTRINSIC POLICIES [§§ 4600-4749]

TITLE 10. EXPERT WITNESSES; OPINION AND SCIENTIFIC EVIDENCE [§§ 4750-4999]

TITLE 11. HEARSAY EVIDENCE [§§ 5000-5999]

TITLE 12. WRITINGS [§§ 6000-8499]

TITLE 13. EFFECT OF JUDICIAL RECORDS AND JUDGMENTS [§§ 8500-8599]

TITLE 14. AFFIDAVITS [§§ 8600-8649]

TITLE 15. DEPOSITIONS AND DISCOVERY IN CIVIL CASES [§§ 8650-9499]

TITLE 1. DEFINITIONS

[§§ 3000-3099]

We are unable to determine the content of this title at the present time. It will include RURE Rule 1 and any additional definitions.

TITLE 2. GENERAL PROVISIONS

[§§ 3100-3499]

We are unable to determine the content of this title at this time.

It will include Rules 2-8 and additional material from existing statutes.

TITLE 3. JUDICIAL NOTICE

3500. Judicial notice may be taken only as authorized by statute. [RURE 9(3)]

3501. Matters which must be judicially noticed. [RURE 9(1)]

3502. Matters which may be judicially noticed. [RURE 9(2)]

3503. Compulsory judicial notice on request. [RURE 9.5]

3504. Reasonable opportunity to present information to judge. [RURE 10(1)]

3505. Sources of information that may be used by judge. [RURE 10(2)]

3506. Procedure where judge unable to determine what foreign law is. [RURE 10.5]

3507. Noting for record matter judicially noticed. [RURE 11(1)]

3508. Instructing jury on matters judicially noticed. [RURE 11(2)]

3509. Judicial notice in proceedings subsequent to trial. [RURE 12]

TITLE 4. BURDEN OF PROOF; PRESUMPTIONS; WEIGHT OF EVIDENCE

[§§ 3600-3999]

This title will be set out in the tentative recommendation on URE Article III.

TITLE 6. WITNESSES

CHAPTER 1. COMPETENCY

4000. General rule as to competency. [RURE 7(a), (b), (c)]

4001. Disqualification of witness. [RURE 17(1)]

4002. Personal knowledge. [RURE 19]

CHAPTER 2. OATH AND CONFRONTATION

4010. Oath or affirmation required. [RURE 18]

4011. Confrontation. [CCP 1846]

CHAPTER 3. METHOD AND SCOPE OF EXAMINATION IN COURT

4050. Definitions. [CCP 2045 and 2046 (part)]

4051. Control by court of mode of interrogation. [CCP 2044 (part) and 2066 (part)]

4052. Exclusion of witnesses. [CCP 2043]

4053. Compelling answers. [CCP 2991 and 2065]

4054. Power of court to call witnesses [new]

4055. Cumulative evidence. [CCP 2044 (last sentence)]

4056. Order of examination. [CCP 2045 (last sentence)]

4057. Leading questions. [CCP 2046 (part)]

4058. Refreshing memory from writing. [CCP 2047]

4059. Cross-examination. [CCP 2048]

4060. Re-examination. [CCP 2050 (first sentence)]

4061. Recall of witness previously examined. [CCP 2050 (last two sentences)]

4062. Examination by opposing party of writings shown to witness. [CCP 2054]

4063. Cross-examination of adverse party or witness. [CCP 2055]

4064. Motion to strike nonresponsive answer. [CCP 2056]

CHAPTER 4. TESTING CREDIBILITY

4100. "Attacking credibility" and "impairing credibility" defined. [new]

4105. Who may attack or impair credibility. [RURE 20(1)]

4110. General rule as to admissibility of evidence relating to credibility. [new]

4115. Demeanor. [CCP 1847 (part)]

4120. Contradiction as to facts. [CCP 1847 (part)]

4125. Organic incapacity. [new]

4130. Opportunity to perceive. [new]

4135. Bias and the like. [CCP 1847 (part)]

4140. Corrupt attitude toward case. [new]

4145. Occupation and the like. [new]

4150. Prior inconsistent statement. [RURE 22(1), (2)]

4155. Character evidence. [RURE 22(3), (4)]

4160. Conviction for a crime. [RURE 21(1), (2), (3)]

4165. Religious belief or lack thereof. [RURE 22(5)]

4170. Evidence to support credibility. [RURE 20(2)]

4175. Evidence of good character of witness. [RURE 20(3)]

CHAPTER 5. INTERPRETERS

4180. Rules relating to witnesses apply to interpreters. [RURE 17(2)]

4181. Interpreters for foreign witnesses. [CCP 1884.]

4182. Interpreters for deaf in criminal and commitment cases. [CCP 1885.]

CHAPTER 6. JUDGE OR JUROR AS WITNESS

4190. Testimony by the judge. [RURE 42]

4191. Testimony by a juror. [RURE 43]

TITLE 7. PRIVILEGES

CHAPTER 1. DEFINITIONS

4200. Application of definitions. [new]

4205. Civil proceeding. [RURE 22.3(1)]

4210. Criminal proceeding. [RURE 22.3(2)]

4215. Disciplinary proceeding. [RURE 22.3(3)]

4220. Presiding officer. [RURE 22.3(4)]

4225. Proceeding. [RURE 22.3(5)]

CHAPTER 2. GENERAL PROVISIONS

4250. Scope of title. [RURE 22.5]
4251. General rule as to privileges. [RURE 7(b), (d), (e)]
4255. Waiver of privilege. [RURE 37]

4260. Reference to exercise of privilege. [RURE 39]

4265. Ruling upon a claim of privilege. [RURE 37.5]

4270. Ruling upon privileged communications in nonjudicial proceedings. [RURE 37.7]

4275. Claim of privilege by presiding officer. [RURE 36.5]

4280. Confidential communications; burden of proof. [RURE 28.5]

4285. Effect of error in overruling claim of privilege. [RURE 40]

4290. Admissibility of disclosure wrongfully compelled. [RURE 38]

4295. Savings clause. [RURE 40.5]

CHAPTER 3. PARTICULAR PRIVILEGES

Article 1. Privilege of Defendant in Criminal Action

4300. Privilege of defendant in criminal action. [RURE 23]

Article 2. Privilege Against Self-Incrimination

4310. Definition of incrimination. [RURE 24]

4315. Privilege against self-incrimination. [RURE 25 (opening paragraph)]

4321. Submitting to examination. [RURE 25(1)]

4322. Demonstrating identifying characteristics. [RURE 25(2)]

4323. Samples of body fluids or substances. [RURE 25(3)]

4324. Production of thing to which another has superior right. [RURE 25(4)]

4325. Required records. [RURE 25(5)]

4326. Cross-examination of defendant in criminal action. [RURE 25(6)]

4327. Waiver by persons other than criminal defendants. [RURE 25(7)]

Article 3. Lawyer-Client Privilege

4350. "Client" defined. [RURE 26(1)(a)]

4351. "Confidential communication between client and lawyer" defined. [RURE 26(1)(b)]

4352. "Holder of the privilege" defined. [RURE 26(1)(c)]

4353. "Lawyer" defined. [RURE 26(1)(d)]

4360. Lawyer-client privilege. [RURE 26(2)]

4365. When lawyer required to claim privilege. [RURE 26(3)]

4370. Crime or fraud exception. [RURE 26(4)(a)]

4371. Parties claiming through deceased client. [RURE 26(4)(b)]

4372. Breach of duty arising out of lawyer-client relationship. [RURE 26(4)(c)]

4373. Lawyer an attesting witness. [RURE 26(4)(d)]

4374. Intention of deceased client concerning writing affecting property interest. [RURE 26(4)(e)]

4375. Validity of writing affecting interest in property. [RURE 26(4)(f)]

4376. Communication to physician. [RURE 26(4)(g)]

4377. Communication to psychotherapist. [RURE 26(4)(h)]

4378. Joint clients. [RURE 25(5)]

Article 4. Privilege Not To Testify Against Spouse.

4390. Privilege not to testify against spouse. [RURE 27.5(1) (introductory clause)]

4391. Privilege not to be called as a witness against spouse. [RURE 27.5(2)]

4392. When privileges not applicable. [RURE 27.5(1)(a)-(d), (3), (4)]

Article 5. Marital Privilege for Confidential Communications.

4400. Privilege for confidential communications. [RURE 28(1)]

4401. Crime or fraud exception. [RURE 28(2)(a)]

4402. Commitment or similar proceeding. [RURE 28(2)(b)]

4403. Proceeding to establish competence. [RURE 28(2)(c)]

4404. Proceeding between spouses. [RURE 28(2)(d)]

4405. Certain criminal proceedings. [RURE 28(2)(e)]

4406. Juvenile court proceeding. [RURE 28(2)(f)]

4407. Communication offered by spouse who is criminal defendant. [RURE 28(2)(g)]

Article 6. Physician-Patient Privilege.

4420. "Confidential communication between patient and physician" defined. [RURE 27(1)(a)]

4421. "Holder of the privilege" defined. [RURE 27(1)(b)]

4422. "Patient" defined. [RURE 27(1)(c)]

4423. "Physician" defined. [RURE 27(1)(d)]

4430. Physician-patient privilege. [RURE 27(2)]

4435. When physician required to claim privilege. [RURE 27(3)]

4440. Crime or tort exception. [RURE 27(4)(a)]

4441. Criminal or disciplinary proceeding. [RURE 27(4)(h), (j)]

4442. Proceeding to recover damages for criminal conduct. [RURE 27(4)(i)]

4443. Parties claiming through deceased patient. [RURE 27(4)(b)]

4444. Breach of duty arising out of physician-patient relationship. [RURE 27(4)(c)]

4445. Intention of deceased client concerning writing affecting property interest. [RURE 27(4)(d)]

4446. Validity of writing affecting interest in property. [RURE 27(4)(e)]

4447. Commitment or similar proceeding. [RURE 27(4)(f)]

4448. Proceeding to establish competence. [RURE 27(4)(g)]

4449. Proceeding where condition of patient is tendered by patient or person claiming through him. [RURE 27(4)(k)]

4450. Required report. [RURE 27(4)(L)]

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4460. "Confidential communication between patient and psychotherapist" defined. [RURE 27.3(1)(a)]

4461. "Holder of the privilege" defined. [RURE 27.3(1)(b)]

4462. "Patient" defined. [RURE 27.3(1)(c)]

4463. "Psychotherapist" defined. [RURE 27.3(1)(d)]

4470. Psychotherapist-patient privilege. [RURE 27.3(2)]

4475. When psychotherapist required to claim privilege. [RURE 27.3(3)]

4480. Crime or tort exception. [RURE 27.3(4)(a)]

4481. Parties claiming through deceased patient. [RURE 27.3(4)(b)]

4482. Breach of duty arising out of psychotherapist-patient relationship. [RURE 27.3(4)(c)]

4483. Intention of deceased client concerning writing affecting property interest. [RURE 27.3(4)(d)]

4484. Validity of writing affecting interest in property. [RURE 27.3(4)(e)]

4485. Proceeding to establish competence. [RURE 27.3(4)(f)]

4486. Proceeding where condition of patient is tendered by patient or person claiming through him. [RURE 27.3(4)(g)]

4487. Court appointed psychotherapist. [RURE 27.3(4)(h)]

4488. Required report. [RURE 27.3(4)(i)]

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4501. "Penitential communication" defined. [RURE 29(1)(b)]

4502. "Priest" defined. [RURE 29(1)(c)]

4505. Privilege of penitent. [RURE 29(2)]

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4600. Discretion of judge to exclude admissible evidence. [RURE 45]

4605. Evidence to test a verdict. [RURE 41]

CHAPTER 2. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM OR USAGE

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4660. Character trait for care or skill. [RURE 48]

4665. Habit or custom to prove specific behavior. [RURE 49]

4670. Usage to explain act or writing. [CCP 1870(12)]

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4701. Subsequent remedial conduct. [RURE 51]

4702. Offer to compromise and the like. [RURE 52]

4703. Offer to plead guilty to crime. [RURE 52.5]

4704. Offer to discount a claim. [RURE 53]

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4750. Qualification as expert witness. [RURE 55.5]

4751. Matters as to which expert witness may testify. [RURE 55.7]

4752. Testimony in form of opinion. [RURE 56(1), (2)]

4753. Statement of basis of opinion. [RURE 57]

4754. Opinion based on improper matter. [RURE 56(3)]

4755. Opinion based on opinion or statement of another. [RURE 57.5]

4756. Opinion on ultimate issue. [RURE 56(4)]

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4760. Limit on number of expert witnesses. [CCP 1871 (last sentence)]

Article 2. Appointment of Expert Witness by Court

4770. Appointment of expert by court. [CCP 1871 (first paragraph)]

4771. Payment of expert appointed by court. [CCP 1871 (second paragraph)]

4772. Calling and examining expert appointed by court. [CCP 1871 (fourth paragraph)]

4773. Right to produce other expert evidence. [CCP 1871 (third paragraph)]

Article 3. Opinion Testimony in Eminent Domain Cases

4800. Opinion testimony in eminent domain cases. [CCP 1845.5]

[NOTE: The recommendation on opinion testimony in eminent domain and inverse condemnation cases would add a number of sections to this article in lieu of CCP 1845.5]

Article 4. Opinion Testimony on Particular Matters

4850. Opinion as to identity or handwriting. [CCP 1870(9) (part)]

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4900. Short title. [CCP 1980.1]

4901. Interpretation. [CCP 1980.2]

4902. Order for blood tests in civil actions involving paternity. [CCP 1980.3]

4903. Tests made by experts. [CCP 1980.4]

4904. Compensation of experts. [CCP 1980.5]

4905. Determination of paternity. [CCP 1980.6]

4906. Limitations on application to criminal matters. [CCP 1980.7]

TITLE 11. HEARSAY EVIDENCE

[§§ 5000-5999]

Note: This title has already been drafted in statutory form.

TITLE 12. WRITINGS

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6000. Authentication required. [RURE 67]

6005. Ancient writings. [RURE 67.5]

6010. Copies of writings in custody of public employee. [RURE 68]

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6020. Official seals and signatures. [RURE 67.7; see additional provision added--Minutes of February 1964 meeting, page 20]

6025. Explaining alteration in writing. [CCP 1982]

6030. Certificate to copy. [CCP 1923]

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6050. When secondary evidence of content of writing admissible. [RURE 70(1)]

6055. Type of secondary evidence admissible. [RURE 70(2)]

6060. Entries in regular course of business. [CCP 1947]

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6100. Parol evidence rule. [CCP 1856]

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6200. Recitals in statute as evidence. [CCP 1903]

6201. Writing construed as of place of execution. [CCP 1857]

6202. Interpolation forbidden. [CCP 1858]

6203. Intention of Legislature or parties. [CCP 1859 (part)]

6204. Inconsistent general and particular provisions. [CCP 1859 (part)]

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6300. Private writings. [CCP 1948]

6305. Instrument affecting real property. [CCP 1951]

6310. Witnessed writings. [RURE 71; CCP 1941, 1942]

6315. Proof of handwriting. [CCP 1943, 1944, 1945]

Article 2. Photographic Copies of Writings

6350. Photographic copies made in regular course of business. [RURE 72]

6355. Photographic copies where original destroyed or lost. [CCP 1920b]

Article 3. Church Records

6400. Church records as proof of contents. [CCP 1919a]

6405. Method of establishing. [CCP 1919b]

Article 4. Hospital Records

6450. Compliance with subpena duces tecum of hospital records. [CCP 1998]

6455. Affidavit accompanying records. [CCP 1998.1]

6460. Copy of records and affidavit admissible in evidence. [CCP 1998.2]

6465. Single witness or mileage fee. [CCP 1998.3]

6470. Personal attendance of custodian and production of original records. [CCP 1998.4]

6475. Service of more than one subpena duces tecum. [CCP 1998.5]

Article 5. Reports of Presumed Death, Missing in Action, and the Like

6480. Finding of presumed death by federal offical. [CCP 1928.1]

6481. Report or record that person is missing, captured, or the like. [CCP 1928.2]

6482. Presumption of execution and authority. [CCP 1928.3]

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Article 6. Particular Writings

6500. Authenticated Spanish title records. [CCP 1927.5]

6505. Patent for mineral lands. [CCP 1927]

6510. Deed by proper officer in pursuance of court process. [CCP 1928]

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Article 7. Judicial Records Destroyed in Fire or Calamity

6550. "Record" defined. [CCP 1953]

6551. Petition to restore by certified copy. [CCP 1953.01]

6552. Order substituting certified copy. [CCP 1953.02]

6553. Application where certified copy does not exist. [CCP 1953.03]

6554. Order restoring copy. [CCP 1953.04]

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6556. Records on appeal. [CCP 1953.06]

Article 8. Private Records Destroyed in Disaster or Calamity

6570. Action to establish existence of record. [CCP 1953.10]

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6572. Court order establishing existence. [CCP 1953.12]

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Article 9. Injured or Missing Writings

6580. Restoration of recorded maps. [CCP 1855b]

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CHAPTER 7. RECORDS OF MEDICAL STUDIES

6600. Records of medical study of in-hospital staff committee. [CCP 1936.1]

TITLE 13. EFFECT OF JUDICIAL RECORDS AND JUDGMENTS

8500. "Judicial records" defined. [CCP 1904]

8501. Conclusiveness and effect of judgment. [CCP 1908]

8502. Effect of orders other than judgments. [CCP 1909]

8503. Parties concluded by judgment. [CCP 1910]

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8505. Surety bound from time of notice. [CCP 1912]

8506. Conclusiveness and effect of judgment of sister state. [CCP 1913]

8507. Effect of foreign admiralty decree. [CCP 1914]

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TITLE 14. AFFIDAVITS

8600. Use of affidavit. [C.C.P. 2009]

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8610. Who may take. [C.C.P. 2012]

8615. Affidavits taken in sister states. [C.C.P. 2013]

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8650. Policy of state. [C.C.P. 2016(g)]

8651. "Action" defined. [C.C.P. 2035]

8652. Showing of good cause. [C.C.P. 2036]

8653. Privileged matters. [C.C.P. 2016(b)(last three sentences)]

8654. Fees and mileage. [C.C.P. 1986.5]

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8660. Purpose; time; attendance of witnesses; production of documents. [C.C.P. 2016(a)]

8661. Scope of examination. [first two sentences of C.C.P. 2016(b)]

8662. Examination and cross-examination. [C.C.P. 2016(c)]

8663. Use of deposition. [C.C.P. 2016(d)]

8664. Objections to admissibility. [C.C.P. 2016(e)]

8665. Deponent not witness for party taking deposition; exception; rebuttal of evidence. [C.C.P. 2016(f)]

Article 2. Depositions Before Action or Pending Appeal.

8670. Perpetuation of testimony before action; petition; form and contents [C.C.P. 2017(a)(1)]

8671. Notice and service. [C.C.P. 2017(a)(2)]

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8673. Use of deposition. [C.C.P. 2017(a)(4)]

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3682. Disqualification for interest. [C.C.P. 2018(c)]

Article 4. Depositions upon Oral Examination.

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8691. Stipulations. [C.C.P. 2019(a)(2)]

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8693. Necessity of service of subpena. [C.C.P. 2019(a)(4)]

8694. Orders for protection of parties and deponents. [C.C.P. 2019(b)(1)]

8695. Order to attend deposition more than 150 miles from residence of deponent. [C.C.P. 2019(b)(2)]

8696. Oath; record of examination; objections. [C.C.P. 2019(c)]

8697. Motion to terminate or limit examination. [C.C.P. 2019(d)]

8698. Submission to witness; changes; signing. [C.C.P. 2019(e)]

8699. Certification and filing by officer. [C.C.P. 2019(f)]

8700. Failure to attend or serve subpena; expenses. [C.C.P. 2019(g)]

Article 5. Depositions of Witnesses upon Written Interrogatories.

8710. Serving interrogatories; notice. [C.C.P. 2020(a)]

8711. Duty of officer before whom deposition taken. [C.C.P. 2020(b)]

8712. Notice of filing. [C.C.P. 2020(c)]

8713. Orders for protection of parties and deponents. [C.C.P. 2020(d)]

8714. Manner of service. [C.C.P. 2020(e)]

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8723. Taking of depositions. [C.C.P. 2021(c)]

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Article 7. Compelling Witness to Appear and Testify Upon Issuance of Commission out of Foreign Court of Record.

8730. Compelling witness to appear and testify upon issuance of commission out of foreign court of record. [C.C.P. 2023]

Article 8. Taking Deposition Out of State.

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8751. Scope; numbers; orders for protection of parties. [C.C.P. 2030(b)]

8752. Examination of business records. [C.C.P. 2030(c)]

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8803. Expenses on refusal to admit. [C.C.P. 2034(c)]

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